OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 1 July 1997 *

I — Introduction

1. In this case, the Court of Justice is primarily asked to define the concept of worker, within the meaning of Community law, in relation to both freedom of movement and social security. The Court is also asked to decide whether the child-raising allowance provided for under German law constitutes a family benefit within the meaning of Regulation (EEC) No 1408/71 or a social advantage within the meaning of Regulation (EEC) No 1612/68. A further question concerns the compatibility with Community law of national legislation which makes the grant of German child-raising allowance subject to possession of a residence permit even though the person concerned is a national of another Member State authorised to reside in Germany.

II — The facts of the case

2. Mrs María Martínez Sala, a Spanish national and the plaintiff in the main proceedings, has been living in the Federal Republic of Germany (save for the period from June 1972 to August 1974) since she was 12 years old. From 1976 to 1986, albeit with various interruptions, and again from 12 September until 24 October 1989, Mrs Martínez Sala pursued an activity in Germany as an employed person. Since that time she has been in receipt of social assistance from the City of Nuremberg and the Landratsamt Nürnberger Land (Nuremberg Rural District Authority).

3. The plaintiff also received residence permits without substantial interruptions until 19 May 1984. Thereafter she was merely given certificates stating that extension of a residence permit had been applied for. On 19 April 1994, she was again issued by the competent German authorities with a residence permit valid for one year, which was subsequently extended for a further year.

4. On 9 January 1993, Mrs Martínez Sala gave birth to her second child, Jessica, and, during that same month, applied for a child-raising allowance in accordance with the relevant German legislation (Gesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub, BErzGG (Law on the Grant of Child-raising Allowance and Parental Leave)). On 21 January 1993, the competent office of the State of Bavaria rejected the plaintiff's application on the ground that she was neither a German national nor in possession of a residence permit or other form of residence authorisation granted for humanitarian or political reasons. The national court

* Original language: Italian.

points out in this connection that, under the European Convention on Social and Medical Assistance of 11 December 1953 (Articles 1 and 7), the plaintiff could not be deported from German territory.

5. Mrs Martínez Sala appealed against that decision, but her appeal was also rejected by the defendant on 23 June 1993. She then brought an action challenging that decision before the Sozialgericht (Social Court) Nuremberg. Her application was again rejected, once more on the ground that she was not in possession of the appropriate residence authorisation. According to the Sozialgericht, its finding was not affected by the Community legislation applicable to the case. Mrs Martínez Sala therefore lodged an appeal against the judgment of the Sozialgericht before the Landessozialgericht (Higher Social Court) Bavaria.

6. In the light of the issues of Community law raised by the dispute, the Landessozialgericht considered it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Was a Spanish national living in Germany who, with various interruptions, was employed until 1986 and, apart from a short period of employment in 1989, later received social assistance under the Bundessozialhilfegesetz (Federal Social Welfare Law (BSHG)) still, in 1993, a worker within the meaning of Article 7(2) of Regulation No 1612/68 or an employed person within the meaning of Article 2 in conjunction with Article 1 of Regulation (EEC) No 1408/71?

2. Is child-raising allowance granted under the Gesetz über die Gewährung von Erziehungsgeld und Erziehungsurlaub (Law on the Grant of Child-raising Allowance and Parental Leave (BErzGG)) a family benefit within the meaning of Article 4(1)(h) of Regulation (EEC) No 1408/71, to which Spanish nationals living in Germany are entitled in the same way as German nationals under Article 3(1) of Regulation (EEC) No 1408/71?

3. Is child-raising allowance payable under the BErzGG a social advantage within the meaning of Article 7(2) of Regulation (EEC) No 1612/68?

4. Is it compatible with the law of the European Union for the BErzGG to require possession of a formal residence permit for the grant of child-raising allowance to nationals of a Member State, even though they are permitted to reside in Germany?'

III — The applicable Community legislation

7. In accordance with Article 1(a)(i) of Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended by Council Regulation No 2001/83 of 2 June 1983, [1] the term 'worker' means, for the purpose of the regulation:

'any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons;'.

In accordance with Article 1(u)(i) of the regulation, the expression 'family benefits' means:

'all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h), excluding the special childbirth allowances mentioned in Annex II.'

Article 2 of the regulation applies to:

...

'employed or self-employed persons who are or have been subject to the legislation of one or more Member States'

...

Article 3(1) provides that:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

8. 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 [2] provides that a worker who is resident in a Member State is to enjoy, in the territory of other Member States, the same social and tax advantages as national workers.

1 — OJ 1983 L 230, p. 6.

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

IV — The relevant German legislation

9. German child-raising allowance is a non-contributory benefit forming part of a set of family-policy measures. It is granted pursuant to the Bundeserziehungsgeldgesetz of 6 December 1986 (Law on the Grant of Child-raising Allowance and Parental Leave; BGBl I, p. 2154, hereinafter 'the BErzGG').

Paragraph 1(1) of the BErzGG, in the version dated 25 July 1989 (BGBl I, p. 1550), as amended by the Law of 17 December 1990 (BGBl I, p. 2823), provides that the following are entitled to child-raising allowance: any person who (1) is permanently or ordinarily resident in the territory to which the Law applies, (2) has a dependent child in his household, (3) looks after and brings up that child, and (4) has no, or no full-time, employment.

Paragraph 1(a) provides:

'A non-national wishing to receive the allowance must be in possession of a residence entitlement or residence permit.'

The Bundessozialgericht has consistently held that a person is 'in possession' of a residence entitlement or residence permit only if at the start of the benefit period formal determination of his right of residence or other form of residence authorisation granted for humanitarian or political reasons by the authority dealing with foreigners has already occurred. Mere confirmation that an application for a residence permit has been made and the person concerned is therefore 'entitled' to stay is not sufficient to meet that requirement.

V — Analysis of the dispute

10. By its first question, the national court seeks to ascertain whether during the period at issue Mrs Martínez Sala could be classified as a 'worker' within the meaning of Community law. More specifically, the question involves establishing whether the rules to be applied to this case are those laid down by Regulation No 1612/68 or those laid down by Regulation No 1408/71, given that the plaintiff has in the past — albeit with some interruptions — been an employed person and then been in receipt of benefits accorded under the national social security legislation (Bundessozialhilfegesetz).

11. I shall begin by considering the meaning of the term 'worker' in Community law with regard to the possible application in this case of the rules on the free movement of workers, in particular Article 48 of the Treaty and

the relevant implementing provisions, laid down by Regulation No 1612/68. The concept of worker is defined in the case-law. According to the Court, a worker is a person who 'for a certain period of time ... performs services for and under the direction of another person in return for which he receives remuneration'. [3]

It is therefore clear from the Treaty and from secondary legislation that a person's status of Community 'worker' is not perceived as being permanent. In theory, an individual loses the status of worker once the conditions required for its acquisition cease to be fulfilled. Community law provides otherwise only in specific circumstances and only with regard to certain effects. The Court has in fact had to consider a range of such cases, some of them quite representative. [4] In the instant case, however, there does not appear to be any actual link, or at any rate any link relevant for the purposes of this case, between Mrs Martínez Sala's previous occupational activity — which was not, in fact, very recent — and her situation during the period for which she has applied for the benefit at issue. Furthermore, the order for reference provides no facts or evidence on the basis of which Mrs Martínez Sala could be accorded the status of Community worker under Regulation No 1612/68. In particular, the fact that she has in the past been granted a social benefit is not a sufficient argument in this respect. It is, of course, for the national court to ascertain whether there are *other* factual grounds that may justify taking the opposite view here. That assessment must, in any event, be made with reference to the relevant criteria laid down by the Court. [5] I shall mention only one of the relevant criteria: there must continue to be an *actual link* between the earlier activity and subsequent situation of the worker concerned. If, in this case, the national court were able to consider the plaintiff to be a worker within the meaning of Regulation No 1612/68, the *practical result* would indeed be clear. This would entitle her to rely on the principle that there should be no discrimination on grounds of nationality with regard to the conditions laid down for entitlement to the family benefit she has applied for. I shall consider later (at point 22 below), in relation to another aspect of the case, whether those conditions laid down by the national legislation constitute unjustified unequal treatment.

12. Similar problems arise with regard to the question whether Mrs Martínez Sala may be accorded the status of worker under the other Community regulation, No 1408/71, which is referred to in the order for reference, though, here again, the order provides little useful background. The national court does not tell us whether Mrs Martínez Sala is actually insured under a social security scheme. Nor are we even told whether she is able to claim some link with her family of origin, which is also resident in German territory, for, if such a link existed, she would be included among the family members and dependants of an insured worker and covered by the regulation in question. That said,

3 — Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 17.

4 — Case 66/85, cited above in footnote 3, and Case 344/87 *Bettray* v *Staatssecretaris van Justitie* [1989] ECR 1621.

5 — Case 39/86 *Lair* [1988] ECR 3161, Case 344/87 *Bettray* cited above in footnote 4, and Case 66/85 *Lawrie-Blum* cited above in footnote 3.

the fact remains that, although she was not employed during the period at issue, the plaintiff was in receipt of social assistance benefits. The Commission does not exclude the possibility that the plaintiff and her children may have been insured by operation of the law against the risk of sickness. That is a possibility relevant to the determination of the case and one which ought, therefore, to be taken into consideration. If and in so far as she is insured in Germany against even just one contingency — here the risk of sickness — the plaintiff would, so it is submitted, have the status of worker within the meaning of the regulation in question (Article 1(a)(i)).

Here again, it is for the national court to determine whether the national legislation provides that kind of insurance as a result of the drawing of social assistance benefits. The German legal system could in fact have made such provision, and this point must be clarified in any event, even if account is taken of the Court's recent judgment in the *Stöber and Piosa-Pereira* case. [6] The limitation contained in Annex I, point I, C (Germany), to Regulation No 1408/71, which the Court had to consider in those cases, concerns the derogations provided for by the Community legislature in regard to the family benefits that may be applied for by employed and self-employed persons in Germany. The Court found those limitations to be completely legitimate. It ruled that Regulation No 1408/71 merely coordinates national social security schemes, so that the legislature in each Member State is at liberty to determine the conditions to be met before the persons concerned can be entitled to social welfare benefits. In the field reserved for the German legislature, there would then be just one point relevant here, concerning the position of Mrs Martínez Sala, which would be whether the social assistance benefits accorded to her entailed, under national legislation, that she was automatically insured against the risk of sickness. Were that the case, the treatment would be *comparable*, so to speak, to that accorded to workers who are out-of-work and for that reason in receipt of benefits from the competent social security institution. Under the Community rules, which deliberately focus on the social objectives of and reasons for the insurance scheme, an unemployed person is akin to a person unable to provide for the most basic needs of survival, including health care. A worker is insured against the risk of sickness. Any person who is automatically insured under national legislation against that risk, because he is in a state of dire need, of whatever nature, is also deemed to be a worker, even if he is not in gainful employment. This is the rationale of the system: anyone who is protected in the same way as a worker would be under the relevant insurance rules is deemed to be a worker. If, in this case, German law recognised the principle that insurance becomes available by operation of the law, the derogation contained in Annex I would not therefore apply to Mrs Martínez Sala. She would have to be considered to be a worker for the purposes of Community law, pursuant to the combined provisions of Article 2 and Article 1(a)(i) of Regulation No 1408/71. The ensuing advantage for Mrs Martínez Sala is the same as that I explained earlier in relation to the other regulation. Her status of worker would mean that she would be entitled to rely on the principle prohibiting discrimination on grounds of nationality and consequently be entitled to claim German child-raising allowance without having to be in possession of the requisite residence permit.

6 — Joined Cases C-4/95 and C-5/95 *Stöber and Piosa-Pereira* v *Bundesanstalt für Arbeit* [1997] ECR I-511.

As I mentioned earlier, I shall, in point 22 below, explain whether the principle of non-discrimination is applicable in this case.

13. By its second and third questions, the national court asks in effect whether or not German child-raising allowance is to be considered a family benefit within the meaning of Regulation No 1408/71 or a social advantage within the meaning of Regulation No 1612/68.

After this reference for a preliminary ruling had been submitted, the Court, in its judgment in *Hoever and Zachow*, [7] answered in the affirmative the second question submitted by the national court and specifically ruled that German child-raising allowance is a family benefit within the meaning of Regulation No 1408/71. As far as the third question is concerned, I consider it very unlikely that Mrs Martínez Sala has the status of worker under Regulation No 1612/68. Were the national court to conclude differently, it is, however, my view, and here I concur with Advocate General Jacobs [8] in his Opinion in the abovementioned *Hoever and Zachow* case and with the observations submitted by the Commission in that same case, that the benefit in question also constitutes a social advantage within the meaning of Regulation No 1612/68. Indeed, the term social advantage, as construed by the Court, is broad in scope and may, therefore, certainly encompass benefits such as the benefit in issue, regardless of whether German child-raising allowance also constitutes a family benefit for the purposes of Regulation No 1408/71.

14. Should it prove that Mrs Martínez Sala is not a worker under either of the two Community regulations, it will be necessary to consider what reply should be given to the fourth question submitted to the Court. The problem, as it has been framed, concerns specifically and directly the provision of German law that makes the grant of child-raising allowance to nationals of other Member States subject to the issue of a *permit*, that is to say a special residence authorisation, which even *persons otherwise authorised* to reside in Germany have to possess. That provision derogates from the general rule under that same legislation whereby the benefit in question may be awarded to *any person* who is permanently or ordinarily resident in the Federal Republic (and also fulfils other conditions, on which the Court does not have to rule here, namely that they must have a dependent child and must not be in employment). The German legislation thus provides for different treatment depending on the nationality of the possible recipients of the benefit in question. The national court is asking whether these rules are compatible with Community law. In its analysis the Court can therefore only refer to the principle of non-discrimination laid down in the Treaty. Assuming that the plaintiff is not

7 — Joined Cases C-245/94 and C-312/94 *Ingrid Hoever and Iris Zachow* v *Land Nordrhein-Westfalen* [1996] ECR I-4895.

8 — Opinion of 2 May 1996 in Joined Cases C-245/94 and C-312/94, cited above in footnote 7, points 87 to 90.

a worker, the question *remains*: what *other* status is afforded by the legal order of the Union for preventing a Community citizen resident in Germany from being discriminated against in relation to German nationals in the circumstances and for the purposes of this case?

15. The Commission suggests that, in reaching its judgment in this case, the Court should apply the criterion afforded by Article 8a, which was introduced into the Treaty following the Maastricht agreements and which is worded as follows: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. Article 8a(2) adds that the Council may, in accordance with the procedures laid down therein, adopt provisions with a view to facilitating the exercise of the rights referred to in Article 8a(1). In the Commission's view, the right to move and reside freely throughout the Union flows *directly* from the Treaty. The limitations and conditions provided for in Article 8a therefore relate solely to the *exercise* of that right, established by primary law as a freedom of the citizen. What, then, is the consequence for the outcome of the present case? By moving to and residing in Germany, Mrs Martínez Sala has exercised a freedom guaranteed to her by the Treaty. If and so long as the host State does not exercise the right to apply to her the limitations which, under Article 8a, circumscribe the actual exercise of that right, her right of residence remains intact, which means, in the present case, that she is entitled to claim child-raising allowance on the same conditions as German nationals. In answer to the Commission's argument, the German Government contends that Article 8a recognises the right to freedom of movement and residence expressly *within the limits* deriving from the Treaty and from secondary legislation: the case of Mrs Martínez Sala is covered by the provisions of Directive 90/364/EEC (OJ 1990 L 180, p. 26); she does not meet the conditions laid down there (full sickness insurance and sufficient resources to avoid becoming a burden on the social assistance system of the host State) and may not therefore claim any right of residence under Community law. According to the national court, the plaintiff is authorised to remain in Germany only on the basis of national provisions adopted in application of an international agreement which prohibits Germany from repatriating her. The German Government concludes that in this case the situation of a resident who is a national of another Member State is not regulated by Community law, and that the contention that the residence permit requirement infringes a principle established by the Treaty, namely the prohibition of discrimination based on nationality, is therefore unfounded. At the hearing, the representatives of the British and French Governments reiterated the defence arguments put forward by Germany in relation to the interpretation of Article 8a of the Treaty. In their view, that provision simply reiterates the rights of free movement and residence already accorded to the various individual categories of persons concerned and welds them together in a single provision of primary law — like the fragments of a mosaic, as the French Government put it at the hearing — but leaves untouched the limitations to which those rights are subject, depending on the circumstances, under either the Treaty or secondary legislation. In other words, Article 8a does not give freedom of movement any new broader substance than earlier legislation did.

16. The nub of the question argued at the hearing was therefore: whether and how the situation of a national of another Member State who resides in Germany in the circumstances of this case is regulated by Community law. According to the Commission, this case falls within the scope of Article 8a of the Treaty. That view is not shared by the German Government. We should, however, remember that the Court is being asked not to determine whether Mrs Martínez Sala is entitled in Community law to reside in Germany but, more specifically, whether *while residing* in that country she is entitled to German child-raising allowance on the same conditions as German nationals. I therefore consider that the case is to be analysed with reference to Article 8a specifically in the light of the answer to be given to the latter question.

17. The facts of the case have been described above. We do not know why the special residence permit, required under German law for the grant of child-raising allowance, is now being denied to the plaintiff by the host State: she was issued with a permit for certain periods during her long stay in Germany. Nor do we know whether this special residence permit — which, after all, is the only one relevant in this case — may be, and is in fact, issued to Community citizens, who according to the Erziehungsgeldgesetz are included in the category of foreigners, even if the requirements laid down in Directive 90/364 regarding the 'residence permit' and the related right of residence are not fulfilled. The national court itself informs us that the plaintiff is a Community national authorised to reside in Germany. The German Government, however, points out that this is solely by virtue of national legislation: Mrs Martínez Sala does not fulfil the conditions conferring a right of residence under the directive.

18. That said, the situation of the Community national residing in Germany in this case must now be determined. One preliminary point must be made here: now that Article 8a of the Treaty has entered into force, the right of residence can no longer be considered to have been created by the directive; it is, so to speak, 'granted' by the Member States to the nationals concerned of the other Member States in accordance with the provisions laid down there. That legislation was adopted by the Council to cover situations in which citizens did not enjoy a right of residence under other provisions of Community law. Now, however, we have Article 8a of the Treaty. The right to move and reside freely throughout the whole of the Union is enshrined in an act of primary law and does not exist or cease to exist depending on whether or not it has been made subject to limitations under other provisions of Community law, including secondary legislation. The limitations provided for in Article 8a itself concern the actual exercise but not the existence of the right. Directive 90/364 continues to regulate, if at all, the conditions governing enjoyment of the freedom of movement laid down in the Treaty. That point has been argued by the Commission on the — in my view — incontrovertible basis of the system of freedom of movement already established by the Treaty. Let us examine the context in which the right enshrined in Article 8a was framed by the Maastricht agreements. The novelty of the provision does not lie in its having embodied free movement of persons directly in the Treaty. That liberty was recognised, together with free movement of goods, services and capital, in another primary source, the Single

European Act, through the definition of the internal market as an area without frontiers. Article 8a extracted the *kernel* from the other freedoms of movement — the freedom which we now find characterised as the right, not only to move, but also to *reside* in every Member State: a primary right, in the sense that it appears as the first of the rights ascribed to citizenship of the Union. That is how freedom of residence is conceived and systematised in the Treaty. It is not simply a derived right, but a right *inseparable* from citizenship of the Union in the same way as the other rights expressly crafted as necessary corollaries of such *status* (see Article 8b, c and d) — a new right, common to all citizens of the Member States without distinction. Citizenship of the Union comes through the *fiat* of the primary norm, being conferred directly on the individual, who is henceforth formally recognised as a subject of law who acquires and loses it together with citizenship of the national state to which he belongs and in no other way. Let us say that it is the *fundamental* legal status guaranteed to the citizen of every Member State by the legal order of the Community and now of the Union. This results from the unequivocal terms of the two paragraphs of Article 8 of the Treaty.

19. Let us now consider more closely how the foregoing considerations can help to resolve the problem presented by this case. Directive 90/364 seeks to accord the right of residence to persons who have ceased to be in gainful employment, subject to the proviso that they should not place an excessive burden on the public finances of the host State. The Member States can derogate from the provisions of the directive only if enjoyment of the right of residence has to be restricted on grounds of public policy, public security or public health (in which case, Directive 64/221/EEC [9] will apply). Of course, no Member State may extend or tighten the limits within which Community citizens are allowed to exercise that right, but Member States are free to *enlarge* the scope of freedom of residence: and this, I would venture to say, is particularly so now, in view of common Union citizenship and the freedom of residence which under the Treaty is associated with it. Moreover, under the second paragraph of Article 8a, the Council may adopt measures to *facilitate* the exercise of freedom of movement and residence. Similar provisions may be adopted by an individual Member State, if it unilaterally so decides, such provisions being restricted, of course, to its own territory. We are told by the national court and the German Government that this is precisely the situation in Germany as far as this case is concerned: Mrs Martínez Sala is *authorised* to reside in Germany, outside the ambit of the conditions laid down by the directive. That does not, however, mean, as the host State argues, that the plaintiff's individual situation, on which she relies in order to claim the same treatment as German nationals, rests on national law and cannot therefore have any foundation in Community law. The subjective situation relevant for the purposes of this analysis is *based* on freedom of residence, which the plaintiff may exercise in

9 — Council Directive 64/221/EEC of 25 February 1964 on the co-ordination 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 1963-1964, p. 117).

Germany. As I pointed out above, it is precisely this fundamental legal status, that of citizen of the Union, which must be kept in mind in determining whether in this case the Community resident may rely on the right not to be discriminated against in relation to German nationals. In my view, the claimant may be accorded that right, for the reasons I shall explain below.

20. The prohibition of discrimination on grounds of nationality is laid down in the Treaty and interpreted by the Court as a general principle. It is a principle which, potentially, applies throughout the area of application of the Treaty, although it applies 'without prejudice to' and therefore through particular provisions laid down for putting it into effect in one or other sector of the Community legal order: for example, the free movement of workers and the freedom to provide services or the right of establishment. The creation of Union citizenship unquestionably affects the scope of the Treaty, and it does so in two ways. First of all, a new *status* has been conferred on the individual, a new *individual legal standing* in addition to that already provided for, so that nationality as a discriminatory factor ceases to be relevant or, more accurately, is prohibited. Secondly, Article 8a of the Treaty attaches to the legal status of Union citizen the right to move to and reside in any Member State. If we were to follow the reasoning adopted by the Governments represented at the hearing, then despite its explicit wording, Article 8a would not afford Union citizens any new right of movement or residence. In the present case, however, it is not necessary to examine the foundation of that view. If — as in this case — a Community citizen is *in any event* granted the right to reside in a Member State other than his Member State of origin, his right not to be discriminated against in relation to nationals of the host State continues to exist for as long as he is resident there: even if the person concerned is unable to rely on the directive on the right of residence, that right derives directly and autonomously from the primary rule of Article 8, which in the application of the Treaty is relevant in conferring on the person concerned the *status* of Union citizen. That individual status will *always* and *in any circumstances* be retained by the nationals of any Member State: consequently, in this case, it does not matter whether leave to reside in the host State was derived from the directive or from the domestic law of the Member State concerned. [10]

21. As Community law now stands, the status of citizen of the Union therefore derives once and for all from the Treaty. It is, of course, for the Court of Justice, which has the task of interpreting the Treaty and guaranteeing its proper application, to determine in each individual case how the status of citizen of the Union may be relied upon by persons complaining of unequal treatment in

10 — Community law, as interpreted by the Court, recognises the relevance — in the field of social security, for example — of international agreements which confer on citizens of a Member State more extensive rights than those deriving from Community provisions, such as those contained, for example, in Regulation (EEC) No 1408/71. The individual concerned may not be denied the rights provided for by the more favourable provisions of such international agreements (see Case C-227/89 *Ludwig Rönfeldt* v *Bundesanstalt für Angestellte* [1991] ECR I-323 and Case C-475/93 *Jean-Louis Thévenon and Stadt Speyer-Sozialamt* v *Landesversicherungsanstalt Rheinland-Pfalz* [1995] ECR I-3813). The same applies in this case to the European Convention on Social and Medical Assistance, signed in Paris on 11 December 1953, of which Germany is a signatory. The right not to be expelled, as laid down therein, of necessity entails the right to reside in the host State. That therefore constitutes a legal ground justifying the presence of the plaintiff in Germany, *even for Community law purposes.*

relation to citizens of other Member States. Citizenship of the Union falls within the scope of application of the Treaty and is covered by the general prohibition of all discriminatory treatment on grounds of nationality, *but* only where it does *not* assume undue precedence over the *status* of national citizen. A claim by a resident who is a national of another Member State in relation to nationals of the host State will therefore be unfounded if it relates to rights which are to be understood as being reserved for the latter precisely on the ground that they are nationals of that State. That is an indisputable general limitation which derives from the provisions defining the scope of application of the Treaty. Indeed, the special provisions on the prohibition of discrimination which the Treaty has laid down in relation to the right of Union citizens to vote and stand for election in elections to the European Parliament and municipal elections explicitly derogate from provisions which are clearly a matter for the legal systems and, presumably, the Constitutions of the individual Member States.

22. Let us now go on to consider the present case. The plaintiff resides in Germany and is a citizen of the Union. Under German legislation, child-raising allowance is for persons who settle in the country by taking up residence there. That is the general rule. What is discriminatory is the other provision which derogates from that rule by laying down the *additional* requirement of a residence permit solely for residents who are citizens of another Member State. That different rule is unlawful: the treatment of Community citizens, whatever the capacity in which they are residing in Germany, is subject to more rigorous conditions than in the case of German nationals, without there being any rational and objective justification for this discriminatory criterion in domestic law. The less restrictive conditions which the German legislature requires its own nationals to fulfil before they receive the benefit in question could in fact be properly extended to Community citizens and would still protect the Member State from possible abuse. Indeed, the Court has stated in its judgment in *Royer* [11] that the issue of a residence permit is to be regarded 'not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of Community law'. It is an endorsement which, as the Commission has made clear, is declaratory only and not constitutive of rights. Entitlement to the allowance therefore arises from the Member State's authorising or allowing a Community citizen to stay or reside in its own territory and not from the issue of the residence permit required under the German legislation for its grant; there is no justification for making the enjoyment of that right, as governed by domestic law, subject in this case to a requirement, and thus to a limitation, not provided for in relation to the host State's own nationals. The conclusion is self-evident: the host State cannot discriminate between a Union citizen who is one of its own nationals and a Union citizen who is a national of another Member State whom it allows to reside in its own territory.

23. The conclusion I reach is essentially the same as that advanced by the Commission, but I come to it from a different direction.

11 — Case 48/75 *Royer* [1976] ECR 497, paragraphs 31 to 33.

What justifies application of the general prohibition of discrimination in this case is not, as the Commission argues, the fact that the plaintiff has a right of residence which derives from the Treaty and which remains fully intact until the host State avails itself of the possibility of limiting the exercise of that right under the directive: justification for equality of treatment lies rather, as I have explained, in the legal status of a citizen of the Union, in the guarantee afforded by the status of the individual, as it is now governed by Article 8 of the Treaty, which is enjoyed by a national *of any* Member State and *in any* Member State. In other words, the Union, as conceived in the Maastricht Treaty, requires that the principle of prohibiting discrimination should embrace the domain of the new legal status of common citizenship. This case is therefore a test case for a range of problems which could be referred to the Court in future. I would, however, point out that the solution I propose represents a logical development of the case-law, which has already interpreted the prohibition of discrimination broadly and progressively. In the *Cowan* [12] case, the right of any person, present in another Member State as a mere recipient (and not as a provider) of services, not to be discriminated against in relation to nationals resident in that State was recognised as a *corollary* of the freedom of movement guaranteed to natural persons as regards protection against the risks of assault and, should such an assault take place, as regards the award of the compensation provided for under national law. The Court of Justice held to be discriminatory the French legislation which restricted the award of compensation in such cases to holders of a residence permit for the national territory. The judgment in *Cowan* therefore accords tourists, or any other recipients of services, whatever the length of their stay in the host State, the protection of the principle of non-discrimination. The present case may be viewed in the light of the earlier case-law that I have just referred to. The discriminatory requirement here is the residence permit which is not required of residents who are German nationals but is required of a Community citizen who has moved to Germany (and stayed there for a long time), so that from various viewpoints such a citizen must in that country be in the position of a recipient of services, as it is termed in the case-law. The *Cowan* case concerned compensation for physical assault, which is to be accorded without discrimination to any person, whether resident in the Member State or not. Here, the payment in issue is, admittedly, of a different kind, but the different requirements imposed on nationals and on resident Community citizens applying for it still constitute discriminatory treatment prohibited under Community law. The *ratio decidendi* in *Cowan* therefore squarely applies to this case, too. I wonder, however, whether once the right of a recipient of services — of the *abstract indiscriminate range* of services which may be provided to him in any host State — not to suffer discrimination has been recognised, the Court ought not, in the interests of consistency, to take the further step which, I believe, the solution of the present problem requires and rule that this potential recipient of every kind of service may now *also* rely on his or her status of citizen of the Union in order to assert the principle of non-discrimination, throughout the entire area in which the case-law applies.

12 — Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195.

VI — Conclusion

I therefore propose that the Court should give the following answers to the national court's questions:

(1) A Spanish citizen residing in Germany who is in the same situation as the plaintiff in the main proceedings may be considered to be a worker, within the meaning of Regulation (EEC) No 1612/68, if there is a direct link between her previous employment and her situation during the period in issue. That same plaintiff may be considered to be a worker, within the meaning of Regulation (EEC) No 1408/71, if the social assistance which that person is accorded by the competent authorities includes compulsory insurance against the risk of sickness or if she is insured, through her family of origin or on a comparable basis, under Regulation No 1408/71.

It is for the national court to ascertain whether the requirements enabling the plaintiff to be classified as a worker are fulfilled.

(2) Child-raising allowance constitutes a family benefit within the meaning of Regulation (EEC) No 1408/71 payable to Community citizens on the same conditions as it is payable to German nationals.

(3) German child-raising allowance also constitutes a social advantage within the meaning of Regulation (EEC) No 1612/68.

(4) A Community citizen authorised or allowed to reside or stay in the territory of another Member State, in this instance Germany, is entitled to child-raising allowance, as provided for by the Bundeserziehungsgeldgesetz, regardless of whether that citizen is in possession of a valid residence permit, on the same conditions as those applicable to nationals of that State.