scheme relating to such an allowance takes account of objective differences in the situations of workers according to whether their residence at the time when they take up employment is within the territory of the State concerned or abroad.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 12 February 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 5 DECEMBER 1973 [1]

Mr President,
Members of the Court,

Introduction

Article 48 of the Treaty establishing the European Economic Community lays down the principle of freedom of movement for workers within the Common Market; as a consequence of this principle it goes on to state that all discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment is to be abolished.

However, an exception is made by paragraph (4) of this Article, the provisions of which 'shall not apply to employment in the public service'.

An examination of the preliminary questions put to you by the Bundesarbeitsgericht (Federal Labour Court), Kassel, in pursuance of Article 177 of the Treaty, will lead you — for the first time as far as I am aware — to define the scope of this exception by giving a ruling on the meaning of the term 'employment in the public service'.

The facts which gave rise to the action brought before the Bundesarbeitsgericht are simple.

An Italian national, Mr Sotgiu, has been employed as a skilled worker by the Deutsche Bundespost, Stuttgart, since 1955, although his family is still living in Italy.

In accordance with the collective wages agreement which applies to workers in the Federal Post Office, Mr Sotgiu's

1 — Translated from the French.

remuneration includes a separation allowance which was initially paid at a single rate of 7·50 DM per day.

By a circular of the Federal Ministry of the Interior the amount of the separation allowance was fixed with effect from 1 April 1965 at 10 DM per day for workers employed away from the family home, provided that this home is situated within the territory of the Federal Republic.

On the other hand, workers whose normal residence is situated abroad can only claim a daily allowance of 7·50 DM. This is the position of Mr Sotgiu who, seeing in this disparity of rates a discrimination contrary to Article 48 of the Treaty and to Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers, brought a law-suit against his employer. Having lost his action at first instance and then on appeal, the plaintiff in the main action brought a further appeal on a point of law before the Bundesarbeitsgericht, which is asking you primarily whether Article 48 (4) of the Treaty is to be interpreted as excluding the application of Article 7 (1) and (4) of the Regulation of the Council to migrant workers employed by the Federal Post Office on the basis of a contract of employment under private law.

I — The concept of employment in the public service according to Community law

As can be seen from the grounds of the Order making the reference, the German court, having found that the postal service forms part of the Federal administration subject to the law relating to the public service, the activities of which have sovereign legal character — in other words, which exercise the prerogatives of public authority — considers nevertheless that only those employees of this service who have the status of public officials (fonctionnaires publics) are in 'employment in the public service' within the meaning of Article 48 (4) of the Treaty.

On the other hand, Post Office workers whose situation is governed by a contract under private law rather than by legislation under public law are not affected by the exception contained in paragraph (4).

The criterion for the interpretation of this provision of the Treaty therefore rests neither upon the legal attributes of the employer as the public service nor upon the nature of the relationship existing between the employee and the employing administration. If it is a relationship under public law, then the exception applies, but on the other hand if it is a case of a contract under private law, then the provisions of paragraph (4) do not prevent a worker who is a national of another Member State from taking advantage of the rights provided for migrant workers by Regulation No 1612/68.

In fact it is necessary to approach the question from a higher level and to examine ways of interpreting the provision in question with regard to the spirit and the ultimate aims of the Treaty in the matter of freedom of movement for workers.

A first approach, adopted by the Government of the Federal Republic, is based upon the fact that the Community is not a state organization but is founded upon the state organizations of the Member States. The concept of the public service, referred to but not otherwise defined by Article 48 (4), can therefore only be interpreted further in terms of each of these national concepts. It is for each Member State on the one hand to establish as a public service such activity as it deems necessary for the satisfaction of needs of a public nature, that is to say, to organize the structure of its administration as it thinks fit; and on the other hand, should it deem it necessary, to require employment within this administration to be reserved for its nationals, regardless of the nature of the

activities carried on within the framework of such employment.

This concept, based on the utmost respect for the sovereignty of the State, does not encounter any special objection in the classical relationships between states in international law. Thus, according to Article 13 of the European Convention on Establishment of 13 December 1955:

'Any Contracting Party may reserve for its own nationals the exercise of public functions or of occupations connected with national security or defence, or make the exercise of such occupations by aliens subject to special conditions.'

According to the terms of Section I of the Protocol annexed to the Convention, an evaluation of this authority, and consequently a definition of what is to be understood by 'public functions', are to be arrived at 'by national criteria'.

But apart from the fact that Article 48 (4) does not refer to such national criteria for a definition of the concept of public service, there are serious reasons for doubting whether in view of the objectives and spirit of the European Economic Community such an interpretation, based on the pre-eminence of the sovereignty of states, can be upheld.

We must not disregard the fact that each of the Member States remains, in principle, free to regulate its public service or its decentralized organizations. Nevertheless it should be noted that where powers of their own have been conferred on Community institutions, the primacy, the direct effect and the necessity for a uniform application of the rules laid down by these bodies cannot admit of criteria of interpretation which would permit each Member State to fashion to its own taste, that is, to extend or limit the scope of, such Community rules.

In this matter you have asserted these principles too often and too constantly for it to be worth while for me to expatiate further upon them.

This is what substantially distinguishes the Treaty of Rome, which is an instrument for economic and social integration, from the conventions of classical international law.

On the one hand the implementation of the principle of freedom of movement for workers undoubtedly comes within the sphere of Community powers, as is shown moreover by the powers conferred upon the Council by Article 49 to issue directives or make regulations setting out the measures required to bring about the effective application of this principle.

On the other hand since freedom of movement must be regarded as one of the fundamental liberties guaranteed to workers of the Member States by the Treaty, the exception contained in Article 48 (4) seems to me to require an interpretation which is both strict and uniform in each of these States, thus excluding the possibility of referring for this purpose to national criteria.

What in fact would freedom of movement amount to if it depended upon one state or another to set in operation, as it were automatically, the exception contained in paragraph (4) by entrusting to a public service, within the meaning of domestic law, responsibility for some activity or other which appeared to it to constitute a task of general importance?

Every state certainly has the power to define the field of action of its administration, to assume responsibility either directly or through the intermediary of decentralized organizations under public law for activities which elsewhere are left to private initiative. In doing this it asserts its own concept of state intervention in national life. But it cannot rest with the state as a member of the Community to limit by this means the actual extent of freedom of movement for workers.

I therefore share the opinion of the Commission, according to which the concept of employment in the public service must be given an independent

definition, unaffected by variable national criteria which depend upon the conception which each state has of its tasks and upon the structure of the bodies responsible for carrying them out.

It is for this Court to provide such a definition if possible.

As the wording itself gives little help, we must first look for the '*ratio*' in the intentions of the authors of the Treaty. There is no doubt that they meant by the exception in paragraph (4) to allow states to reserve for their own nationals such of the public appointments as put those who hold them in a position to participate directly in the exercise of official authority, or to put it in more general terms, to avail themselves of the prerogatives of public authority with regard to individuals. It is in this sense that it can be said that the expression 'the public service' implies a power exercised directly by the state. Mere participation in a public service would not be sufficient to exclude a given employment from the field of application of Article 48 (Mégret, *Le droit de la Communauté européene*, Vol. 3, p. 6). This restrictive interpretation is also adopted by the majority of commentators on the Treaty.

Certainly in a resolution adopted on 17 January 1972 the European Parliament states first of all that: 'Article 48 (4) may be applied to any employment considered by a Member State as coming within its public service, regardless of the nature of the activities carried on within the framework of such employment.' By itself this statement would appear to put forward an interpretation based on the wishes of the States.

But the Parliament adds that: 'the presumed aim of paragraph (4) is essentially to allow states to reserve to their own nationals the effective exercise of public authority . . .' and expresses the hope that the application of this exception will be limited to those posts alone which involve the exercise of such authority. In short, this purely consultative opinion supports the thesis put forward by the majority of legal theorists.

Moreover, in a field similar to the one with which we are concerned, that of the right of establishment, which includes the right to take up and pursue activities as self-employed persons, Article 55 expressly excepts independent or professional activities which in 'any given Member States . . . are connected, even occasionally, with the exercise of official authority'.

Without going so far as to liken this provision to that of Article 48 (4) which refers only to employment in the public service, it remains true that the two exception clauses proceed from similar reasoning.

I should therefore be inclined to suggest to you, to begin with, an interpretation based on the idea of participation in official authority.

However, if we wished to confine within narrow bounds the meaning of the concept of public service by linking it exclusively to that of state authority, we should fail to appreciate the fact that in any modern state a considerable number of functions which do not entail the direct use of prerogative powers lying outside the general law must nevertheless be reserved for nationals on grounds of internal security or defence, for example.

This shows the difficulties which arise when one tries to formulate a precise and restrictive definition of the concept. One must be content to approach the problem step by step and, I believe, to avoid laying down once and for all too rigid an interpretation.

Do we not notice moreover how much the methods of exercising official authority differ from one state to another, according to whether or not the public service is subject to public law deviating from the general law, and equally according to the degree and the forms of state intervention?

It is necessary therefore both to avoid the divergences and contradictions which

an interpretation based on criteria taken from domestic law would conceal and at the same time attempt to avoid giving the concept too rigid and too narrow a definition which would prove to be difficult to apply to very varied situations.

One could certainly make reference to the classical idea of administration inherent in the state — public authority — maintaining that in any state organization the task of the judiciary, the police, defence and also that of assessing and recovering taxes, for example, essentially fall within the concept of public administration, as opposed to the public industrial and commercial services whose task is to perform services for the public, more often than not administered under conditions similar to those of private law, and which would thus not be within the definition.

But who can be unaware that between these two extremes there exist numerous intermediate situations?

The postal service presents just such an example. Although in most countries it is carried on by a state administration, subject to the rules of public management, and although its guiding principle is that of secrecy of the mail, it nonetheless conceals within itself certain aspects of a commerical service and in general it enjoys financial autonomy, as is the case in the Federal Republic.

The fact that its staff is composed for the most part of officials (fonctionnaires) in the strict sense of the word does not prevent it from employing, at the level of technical or purely operational tasks, manual workers (ouvriers) and office statt (employés), whose duties make them indistinguishable from their counterparts in private enterprise. In fact they occupy posts which, whilst forming part of a public service, do not involve national interests with a view to which the exception contained in Article 48 (4) was formulated.

The legal conditions under which the service in question is managed are not, then, in themselves determining factors. As for the nature of the legal relationship between the employee and the employing administration, it seems to me that this can in no way supply the basis for a decisive criterion for the application of Community law.

In states like the Federal Republic of Germany and France there is an independent administrative law which is characterized in particular by the power of the administration to take enforceable decisions and to avail itself of prerogatives of public authority. The distinction between on the one hand officials subject to legislative provisions whose position as regards the administration is governed by statutes and regulations and on the other hand employees of public service of an industrial or commercial nature whose relationship with their employer is subject to contracts of employment under private law is of significance inasmuch as the legal nature of the employment relationship determines the type of court with jurisdiction to take cognizance of law-suits concerning them and moreover involves important consequences in substantive law.

On the other hand this distinction seems to me to have little genuine relevance to Article 48 of the Treaty of Rome. In fact although it is possible to assume that the exception provided for by paragraph (4) of this Article should in principle apply to officials (fonctionnaires) because they are normally entrusted with tasks which involve more or less directly the national interest, it does happen that employees recruited on the basis of a contract under private law (agents recrutés sous contrat de droit privé) find themselves entrusted with duties closely related to the actual exercise of official authority. Thus it has been stated that the Federal German delegate to the Coal Industry is a contractual employee (agent contractuel) under private law, even though he exercises powers of decision which plainly derive from state authority.

Are we to say, conversely, that a maintenance employee or a driver who occupies an established post as an official in a central administration is carrying out duties which involve the interests of the state or the prerogatives of public authority by virtue of the mere fact that he is governed by a legislative provision?

It is clear then that for the interpretation of Article 48 (4) the concept of employment in the public service cannot be defined in terms of the legal status of the holder of the post.

A Community interpretation which would allow a uniform application of the exception provided for by this provision requires us therefore to have resort to factual criteria based upon the duties which the post held within the administration entails and the activities actually performed by the holder of this post.

The exception will only be applicable if this person possesses a power of discretion with regard to individuals or if his activity involves national interests — in particular those which are concerned with the internal or external security of the state.

Consequently however it is for the national court to apply these criteria to the actual cases which come before it. Moreover, in the present case we do not know what is the exact nature of the duties carried out by the plaintiff in the main action.

II — Nature of the separation allowance

The second question put by the Bundesarbeitsgericht refers to the interpretation of Article 7 of Regulation No 1612/68. The German court asks you whether the separation allowance granted in addition to wages forms part of the conditions of employment and work referred to in this Article — in particular in the first paragraph.

The purpose of this provision is, as you know, to ensure equality of treatment between Community workers and national workers with regard both to eligibility for available employment and to conditions of employment and work, in particular as regards remuneration but also more generally the totality of factors involved in the situation of the worker in the social sphere.

I should have scarcely any hesitation in admitting that the separation allowance provided for by the collective agreement of 6 January 1955 applicable to workers in the Federal Post Office, and referred to in the written employment contract made between the plaintiff in the main action and the Post Office, constitutes a flat-rate supplement to remuneration intended as compensation for expenses of whatever nature incurred as a result of the existence of two homes — one for the family and one necessitated by the employment.

However, would it not be encroaching on the jurisdiction of the national court to lay down thus a legal definition of this allowance instituted by the Federal Law of 8 April 1964 relating to removal expenses, which was adapted by the collective agreement to the situation of workers in the Post Office?

But in any event the effect of case law as it emerges from your judgments of 15 October 1969 (Case 15/69, *Ugliola,* Rec. 1969, p. 369) and of 13 December 1972 (Case 44/72, *Marsman,* Rec. 1972, p. 1248) makes it possible to conclude quite definitely that the payment of a separation allowance forms part of the 'conditions of work and employment' in the broadest sense of that expression.

The answer to the second question must therefore be in the affirmative.

III — Discrimination on the ground of residence

Both Article 48 (2) of the Treaty and Article 7 of Regulation No 1612/68 of the Council forbid, in matters relating to conditions of work and employment, any discrimination based on nationality.

These provisions are readily applicable when the disparity in treatment arises specifically and directly from a condition with regard to nationality.

But discrimination may be hidden or disguised. This is the case in particular when a national law or national rules, without referring to nationality, make the grant of payments or advantages linked to employment dependent upon criteria pertaining for example to descent, place of birth or normal residence on the national territory in such a way that enjoyment of these advantages is in fact reserved for nationals and cannot, with certain exceptions, apply to workers who are nationals of other Member States.

Must we not, in such cases, going beyond appearances, condemn a violation of equality of treatment which may be compared with a true misuse of powers within the meaning of Community law?

This is what Article 3 of Regulation No 1612/68 prescribes, in respect of taking up and pursuing employment, by declaring that national provisions or administrative practices shall not apply where, 'though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered'; whilst Article 7 (4) declares null and void any clause of a collective or individual agreement 'in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of other Member States'.

Such is the scope of the third and last question put to you by the Bundesarbeitsgericht, which asks you whether Article 7 (1) and (4) of Regulation No 1612/68 is to be interpreted as containing a prohibition not only against treating a worker differently because he is a national of another Member State, but also against treating him differently because he is resident within the territory of another Member State.

In the abstract, an affirmative answer would be appropriate, provided that an actual consequence of the differential criterion upon which the grant of the advantage in question depends is that it discriminaties against Community workers by comparison with national workers.

In this respect the condition requiring residence within the territory of the host country may be a factor of discrimination, as you ruled in your judgment of 13 December 1972 (Case 44/72, *Marsman,* cited above) with regard to the grant of special redundancy conditions provided for by German law, of which a handicapped Dutch worker was unable to take advantage because, although he worked in the Federal Republic, he did not live there.

But in that case the condition of residence was applicable only to foreigners.

The question we are considering today arises in different circumstances.

In the words of the circular of the Ministry of the Interior of 31 March 1965:

Paragraph I:

'Officials appointed in a place other than their usual place of residence in their own country — that is, in the Federal Republic of Germany — will receive a separation allowance indentical, as regards its rate and the conditions upon which it is granted, to that received by officials transferred by reason of the exigencies of the service';

Paragraph II:

'An official whose usual residence is situated abroad may, in certain circumstances and with the consent of higher authority, be granted a separation allowance in accordance with Paragraph I when the grant of such allowance is in the interests of the service.'

On the same date the Minister fixed the rate of the separation allowance, in the first case at 10 DM per day; in the

second case the amount of daily allowance paid to a worker whose home was abroad remained fixed at 7·50 DM.

The collective agreement for workers in the Federal Post Office, to which the contract of employment agreed between the plaintiff in the main action and the administration of the Post Office refers, was in line with these provisions.

It is clear, moreover, from the grounds of the Order of the Bundesarbeitsgericht that the rules governing the separation allowance for workers whose usual residence at the time of their recruitment is situated abroad and who have retained this residence apply equally to German nationals and foreign nationals.

Finally, workers posted at the time of their appointment to a place other than their normal place of residence in Germany are obliged, like workers transferred in the interests of the service, to find a new home near to the place of work; consequently they cease to receive the separation allowance once they have satisfied the obligation to remove or at the latest after two years from the date of recruitment.

On the other hand, those who were recruited whilst their normal residence was situated abroad are not bound by this obligation to remove and may continue to receive the separation allowance throughout the entire period of their employment.

As you can see, there are two distinct schemes corresponding to different situations. Different treatment of non-comparable situations does not lead automatically to the conclusion that there is discrimination (Judgment of 17 July 1963, Case 13/63, *Italian Government v Commission,* Rec. 1963, p. 360).

As Mr Advocate-General Lagrange said with reference to that case: 'This concept or relativity which permeates the principle of non-discrimination . . . has a very general character, and is found for example in the social . . . sphere . . .' (Cf. also the judgment of 13 June 1972, Joined Cases 9 and 11/71, *Cie. d'Approvisionnement v Commission,* Rec. 1972, p. 392).

Although, in most cases, the system of allowances based on the existence of a usual residence abroad in fact applies only to foreign nationals, this circumstance is not sufficient to prove the existence of discrimination forbidden by Community law.

In so far as this scheme guarantees to certain migrants the payment of this allowance on a quasi-permanent basis, without any obligation to transfer their family home to the place of work, it does on the other hand confer a certain advantage on them in comparison with German workers or foreigners whose home, at the time of their recruitment, was situated within German territory.

I should therefore almost think that this system, which provides a fair solution for the situation of migrant workers who, for family reasons, have not transferred their usual residence to Germany, does not conceal any discrimination in fact or in law.

However it will not be necessary for you to come to a decision on this point.

It will be sufficient for you to reply to the question put to you that although a violation of the equality of treatment envisaged by Article 48 (2) of the Treaty and Article 7 (1) of Regulation No 1612/68 may result from national rules which make a distinction, as far as concerns conditions of work and employment, based not on nationality but on the place of residence of the worker at the time of his appointment, provided that such rules do in fact result in unfavourable discrimination against workers who are nationals of other Member States by comparison with national workers, it is, nonetheless, for the national court to decide whether the rules in question bring about such discrimination or whether, on the contrary, the difference in treatment is objectively justified by considerations of a non-discriminatory nature.

I am therefore of the opinion that your reply to the questions put to you should be as I have indicated.