OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 11 JUNE 1974

My Lords,

On 15 October 1968 the Council, in exercise of the power conferred on it by Article 49 of the EEC Treaty to 'make regulations setting out the measures required to bring about, by progressive stages, freedom of movement for workers', adopted Regulation (EEC) No 1612/68 (OJ L 257 of 19. 10. 1968). The preamble to that Regulation recites among other things that 'freedom of movement constitutes a fundamental right of workers and their families' and that 'the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country'.

Provisions about workers' families are contained in Articles 10 to 12 of the Regulation and it is with Article 12 that the Court is particularly concerned in the present case. That Article is in the following terms:

'The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

It is not difficult to see that the requirement of the first paragraph of that Article that the children of a migrant worker are to be admitted to the host State's educational courses 'under the same conditions' as nationals of that State is intended to secure the 'integration' that the preamble envisages. Nor is it difficult to detect from the second paragraph of the Article a broad intention on the part of the authors of the Regulation that in the field of education (as in other fields covered by other Articles) everything possible should be done to facilitate that integration.

The present case, which comes to the Court by way of a reference for a preliminary ruling by the Verwaltungsgericht of Munich, is concerned with the compatibility with Article 12 of a Bavarian statute which contains an element of discrimination in the matter of educational grants. This statute, the Bayerische Ausbildungsförderungsgesetz (referred to for short as the BayAföG), is described in its title as 'supplementing the Federal statute on individual educational grants'. It provides for grants to be made in certain circumstances in which Federal grants are not available. In particular it provides for grants to be made to children in the 5th to 10th forms, whereas Federal grants are available only in higher forms. Article 1 of the BayAföG provides that grants are to be made thereunder to those whose means would otherwise be insufficient for their maintenance and education. Article 3, however, confines the benefit of the grants to German nationals, stateless persons and aliens who have been given political asylum. The Verwaltungsgericht, in its Order for Reference, makes no secret of its view that this element of

discrimination is incompatible with Article 12.

The Plaintiff in the proceedings before the Verwaltungsgericht is an Italian national, the son of Italian parents. He was born on 29 December 1953 and has lived since his birth in Munich, where his father, who died on 24 January 1971, was employed. For the school year 1971/72, until 30 April 1972, the Plaintiff attended school in Munich in the 10th form. He claimed a grant under the BayAföG for the period of his attendance. This was refused on the ground that he did not come within any of the categories of persons mentioned in Article 3 of that statute. It was stated on his behalf at the hearing that it was because of this refusal that he had to leave school.

The question formally put to this Court by the Verwaltungsgericht in its Order for Reference is simply whether Article 3 of the BayAföG is compatible with the first paragraph of Article 12.

My Lords, it is well established that this Court cannot answer directly a question formulated in that way, for it has no jurisdiction, under Article 177, to rule on the validity of a provision of national law. This does not mean that the reference is inadmissible, but that the Court must distil from the question and put the pure question of Community law to which it gives rise, rule on that, and then leave it to the national Court to apply that ruling to the specific case before it. Many authorities illustrate this. Some are referred to in the Observations of the Commission. I confine myself to citing Case 76/72 *Michel S. v Fonds National de Reclassement Social des Handicapés* [1973] ECR p. 457, an authority which bears on the present case in other ways too.

Fortunately it is not difficult in this case to ascertain what is the question of Community law that arises. It is apparent both from the reasons set forth in the Verwaltungsgericht's Order and from the submissions, written and oral, that have been made to this Court. The question is whether the first paragraph of Article 12 relates only to actual access of the children of migrant workers to schools and other education establishments in the host State or is to be interpreted more broadly as relating to all advantages afforded by the host State to its nationals in the educational field, including educational grants.

Logically, as the Commission has pointed out, the question also arises whether that paragraph, whatever its interpretation, has direct effect in the legal systems of Member States, so as to confer rights on the children of migrant workers themselves, which they can enforce in the national Courts. There can, however, in my opinion, be no doubt that the answer to that question is in the affirmative. So much indeed is implicit in the Judgment of the Court in the *Michel S.* case.

I think it right, in view of some of the submissions that have been made, to emphasize that, to my mind, the question for the Court in this case is one of interpretation of the first paragraph of Article 12. The second paragraph of that Article does not seem to me to be in point, except in so far as, in common with other provisions of Regulation No 1612/68, not least the preamble, it manifests the general intention of the authors of the Regulation that, as I have already expressed it, everything possible should be done to facilitate the integration of the families of migrant workers, and in particular of their children, into their host country. Specifically, the second paragraph seems to me to relate to the encouragement by Member States of efforts towards this made or to be made by others, such as individuals or charitable institutions, rather than to what is to be done by State organs themselves — and in this context I use the expression 'State organs' to denote all organs of government, whether national or local, for I do not overlook that the defendant in the present case is the City of Munich

or that the statute in question is a Bavarian one.

I turn then to the essential question in the case, the question as to the scope of the first paragraph of Article 12.

There can be no doubt of its importance.

Its importance from Bavaria's point of view was emphasized at the hearing by Counsel representing the Staatsanwaltschaft attached to the Verwaltungsgericht of Munich. Although the claim of the Plaintiff himself is for a relatively small sum, it seems that there are in Bavaria so many children of migrant workers in the same or in a similar position that a decision in his favour would entail for that State expenditure running into millions of DM. The Court was also told that, in the Federal Republic, the fields of educational and cultural policy are particularly reserved to the Länder — those fields were described to us as almost the last in which the Länder retained any independence — so that any encroachment on them by Community law was regarded with some sensitivity.

But the impact of Your Lordships' decision in this case will not be limited to Bavaria. The first paragraph of Article 12 requires the children of migrant workers to be assimilated to the nationals of the host State 'if such children are residing in its territory'. The Court was told, on behalf of the Commission, that, whilst such assimilation already obtains, in the matter of educational grants, in some Member States, e.g. Italy, this is far from being the position in others. Thus, in Germany, Federal grants are only payable for an alien child if he has resided in the Federal Republic for a qualifying period of five years or if one of his parents has resided there for at least three years. In Belgium there is a similar qualifying period of five years and, in addition, a requirement of reciprocity: the law of the child's own country must accord the same benefits to Belgian children. In France, so it appears, there is no discrimination at the level of primary and secondary education, but there is discrimination at the level of University and other higher education. Although the Commission does not claim yet to have made an exhaustive survey covering every Member State, it makes no secret of the fact that it it is awaiting Your Lordships' decision in this case with deep interest: if that decision is in favour of the wider interpretation of the first paragraph of Article 12, it proposes to initiate steps to secure compliance with it by all Member States.

What then is the proper interpretation of that paragraph? The City of Munich and the Staatsanwaltschaft contend for the narrower interpretation; the Plaintiff, the Italian Republic and the Commission for the wider one.

For my part, my Lords, I would adopt the wider one.

The main argument put forward on behalf of the Staatsanwaltschaft and of the City of Munich consists in saying that educational and cultural matters are not as such within the scope of the EEC Treaty, which is essentially concerned with economic matters, and that the power of the Council under Article 49 of the Treaty cannot therefore extend to legislating about educational grants.

But, my Lords, no one suggets that the power of the Council under Article 49 is a power to legislate about educational matters as such. It is a power to legislate for the freedom of movement of workers, which includes power to legislate about the education of their children. Indeed the Staatsanwaltschaft and the City of Munich recognized this, for they did not contend that Article 12 was invalid. There was moreover, I think, an inconsistency in the argument as they put it forward because they coupled with it a submission that educational grants were among the matters falling within the second paragraph of Article 12 (which, they submitted, did not have direct effect).

It was also argued on behalf of the Staatsanwaltschaft and of the City of Munich that the words themselves of the first paragraph were not apt to cover more than free access to educational establishments.

My Lords, in my view, those words point, on the contrary, to the first paragraph having a wide scope. They require the children of migrant workers to be admitted to the host State's educational courses 'under the same conditons' as nationals of that State. What can this mean unless it be that those children are to be accorded all the same rights in relation to such courses as children who are nationals of the host State? The very idea of admission under the same conditions must include, it seems to me, admission on the same financial terms, whether these involve the payment of fees or the receipt of grants.

It seems to me also that to adopt the narrower interpretation would be inconsistent with the spirit of Regulation No 1612/68 in general and of Article 12 in particular. As I have, I think, shown, their purpose, so far as material, is the integration of the family of a migrant worker into the host country. This involves among other things equality of treatment, non-discrimination between the children of that worker and the children of his fellow workers who are nationals of that country. As was said by Mr Avocate-General Mayras in the *Michel S.* case, [1973] ECR p. 471, it involves equality of opportunity as between those children. There can be no such equality of opportunity if one child is enabled or encouraged to stay at school or at university by means of a grant whilst the other is not.

Lastly, it seems to me that to adopt that narrow interpretation would be inconsistent with the decision of the Court in the *Michel S.* case; first because that decision was manifestly based on the view that the first paragraph of Article 12 was to be interpreted broadly, and secondly because the decision involved the rejection of any distinction in that paragraph between benefits in kind and benefits in money — consider the facts of the case as set out by Mr Advocate-General Mayras [1973] ECR p. 466.

Another argument was put forward on behalf of the Staatsanwaltschaft at the hearing, which had not been foreshadowed in its written observations. This argument was based on the fact that the BayAföG applies only in Bavaria. Residents of other Länder cannot claim the benefit of it and, in some at least of those Länder, a person in the position of the Plaintiff could claim no grant even were he a German national. So, the argument ran, as I understood it, the benefits flowing from the BayAföG are not benefits conferred by a Member State and are, for that reason alone, outside the scope of the first paragraph of Article 12. My Lords, acceptance of this argument could have strange consequences. In some countries, England for instance, educational grants are in the main awarded by local authorities under provisions that are either wholly discretionary or partly mandatory and partly discretionary. Would a child of a migrant worker, so far as Community law was concerned, accordingly be entitled in such a country to no grant at all, or only to such grant as was mandatory, or to such grant as would be awarded to him by the least generous of that country's local authorities? Nor do the difficulties end there. Thus, the legislation governing education, and in particular that governing educational grants, is different in England and in Scotland. The argument could thus entail that the child of a migrant worker could claim no rights under Community law anywhere in the United Kingdom because there is no relevant legislation applicable throughout that Member State.

My Lords, the rights of children of migrant workers under Community law cannot depend upon the extent to which, or the manner in which, within a

Member State, responsbility for education is divided between the central Government and local authorities. No more can they depend upon whether that Member State has a federal or a unitary Constitution or something in between. In my opinion, the first paragraph of Article 12 must be interpreted as meaning that, whatever the internal structure of a Member State, the children of a migrant worker residing anywhere in its territory are entitled to the same advantages as are afforded to nationals of that State in that part of its territory.

I am therefore of the opinion that the question referred to the Court by the Verwaltungsgericht of Munich should be answered as follows:

'The first paragraph of Article 12 of Regulation (EEC) No 1612/68 of the Council extends to the children of a national of a Member States who is or has been employed in the territory of another Member State the right, if such children are residing in any part of the territory of the latter State, to all the same educational advantages, including grants, as are afforded to nationals of that State in that part of its territory.'