OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 27 February 2003 [1]

I — Introduction

1. In this case the Verwaltungsgerichtshof wishes to ascertain from the Court whether an EU citizen may be regarded as a worker within the meaning of Article 39 EC on the basis of an employment relationship of limited duration in a Member State of which the person concerned is not a national, regard being also had to a number of specific activities carried on by the person concerned prior to commencement and following termination of the employment relationship.

2. If the answer is in the affirmative, the national court is then seeking clarification of the Court's case-law under which certain rights stemming from the status of a worker can also be enjoyed where the employment relationship is at an end. A migrant worker may, under certain circumstances, retain this status and thus entitlement to study finance under the same conditions as those which apply to national workers in the host Member State. The most important condition is that there is continuity between the occupational activity and the course of study or that the worker has involuntarily become unemployed and the conditions on the job market have obliged him to undertake occupational retraining in another field of activity.

3. The dispute in the main proceedings arose because in April 1996 the Austrian Bundesminister für Wissenschaft, Verkehr und Kunst (Federal Minister for Science, Transport and Art) refused to grant study finance to an Italian national, Mrs Ninni-Orasche. She married an Austrian in 1993 and since then has been legally resident in Austria. In March 1996 she began studying romance languages in that country after having worked for two and a half months as a waitress/cashier in the summer of 1995. In the view of the Federal Minister, the person concerned did not satisfy the conditions laid down by the Court to be accorded the same treatment as an Austrian national.

4. Therefore, the essential question is whether Community law confers on Mrs Ninni-Orasche a right to equal treatment as regards the grant of study finance. In the

1 — Original language: Dutch.

proceedings the Danish Government and the Commission examined, *inter alia* in the light of *Grzelczyk*,[2] whether or not Article 17 EC relating to citizenship of the European Union, read with the prohibition in Article 12 on discrimination on the ground of nationality, confers that right on Mrs Ninni-Orasche. Although the national court did not examine this matter, in my view the Court should consider the relevance to the substance of the dispute of the Treaty provisions concerning citizenship.

II — Legal framework

5. The questions referred for a preliminary ruling concern the freedom of movement for workers secured by Article 39 EC which entails the abolition of any discrimination on the ground of nationality as between workers of the Member States. Under 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,[3] a worker who is a national of a Member State and has availed himself of the freedom of movement for workers is to enjoy in the host Member State 'the same social... advantages as national workers'.

6. Article 17(1) EC establishes citizenship of the Union. Every person holding the nationality of a Member State is a citizen of the Union. This citizenship complements but does not replace national citizenship. Under Article 17(2) EC, citizens of the Union enjoy the rights conferred by the Treaty and are subject to the duties imposed thereby.

7. Under Article 18(1) EC, every citizen of the Union has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.

8. Article 12 EC prohibits any discrimination on the ground of nationality within the scope of application of the Treaty and without prejudice to any special provisions contained therein.

9. For the purposes of assessment Council Directive 93/96 of 29 October 1993 on the right of residence for students[4] is also of significance. The sixth recital in the preamble thereto provides that 'beneficiaries of the right of residence must not become an unreasonable burden on the public finances of the host Member State'. Under Article 1:

2 — Case C-184/99 [2001] ECR I-6193.

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

4 — OJ 1993 L 317, p. 59.

'In order to lay down conditions to facilitate the exercise of the right of residence and [with a view to guaranteeing access to vocational training in a non-discriminatory manner] for a national of a Member State who has been accepted to attend a vocational training course in another Member State, the Member States shall recognise the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law... where the student assures the relevant national authority... that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State...'

Article 3 of Directive 93/96 provides as follows:

'This Directive shall not establish any entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence.'

10. The national legal framework is constituted by the Austrian Studienförderungsgesetz 1992 (Law for the Promotion of Education), [5] which contains the conditions relating to acquisition of the right to study finance. It appears from the case-file that Paragraph 6 of this law sets out a number of objective criteria which must be satisfied by an intending beneficiary. The initial sentences of Paragraphs 2 and 3 provide that Austrian nationals may apply for financial assistance for studies. Under Paragraph 4(1), nationals of the Member States of the European Economic Area are to be treated as Austrian nationals in so far as such treatment follows from the Agreement on the European Economic Area. It is not disputed that, in so far as the scope *ratione personae* of the Studienförderungsgesetz is concerned, this provision refers to Community law.

III — Facts, order for reference and procedure

11. The national court described the facts and background in the main proceedings as follows:

12. The appellant in the main proceedings is an Italian national and has been married to an Austrian since 18 January 1993. She has been living in Austria since 25 November 1993 and on 10 March 1994 received a residence permit valid until 10 March 1999. With this permit she also acquired the right to take up and pursue activities as an employed person in the territory of Austria under the same conditions as an Austrian worker.

5 — BGBl. No 305, 1992.

13. From 6 July to 25 September 1995 Mrs Ninni-Orasche worked in Austria as a waitress/cashier under a fixed-term contract of employment. In that capacity she was also responsible for managing the stocks and purchasing and stocking goods offered for sale.

14. On 16 October 1995 she received in Italy her diploma in book-keeping and commerce (diploma di ragioniere e perito commerciale). She thereby fulfilled the requirements for admission to study at an Austrian university.

15. Between October 1995 and March 1996 Mrs Ninni-Orasche sought employment in Klagenfurt corresponding to her education and professional experience. However, her purely spur-of-the moment applications to hotels and a bank were unsuccessful.

16. In March 1996 she began studying romance languages at the University of Klagenfurt, specialising in Italian and French. On 16 April she submitted an application for study finance under the Studienförderungsgesetz which was rejected by the Federal Minster for Science, Transport and Art. In the view of the Federal Minister, the reference in Paragraph 4(1) of the Studienförderungsgesetz 1992 to the EEA Agreement relates to the principle of non-discrimination contained in Article 12 EC, freedom of movement for workers, and Regulation No 1612/68. Furthermore, the Federal Minister referred to the case-law of the Court, under which a worker has a right to study finance if he can demonstrate that he has pursued occupational activities for a considerable period in the country in which he takes up his studies and the occupational training relates to his previous occupational activities. The Federal Minister considered that Mrs Ninni-Orasche did not satisfy these two conditions.

17. Thereupon Mrs Ninni-Orasche lodged an appeal with the Verfassungsgerichtshof (Constitutional Court) on grounds of infringement of her right to equal treatment before the law and infringement of Community law. The Verfassungsgerichtshof declined jurisdiction and referred the case to the Verwaltungsgerichtshof (Administrative Court).

18. Having regard to the case-law of the Court of Justice on Article 39 EC and Articles 7(2) of Regulation No 1612/68 of the Council on freedom of movement for workers, and the relevance of these articles to higher education, the Verwaltungsgerichtshof considers that two questions of European law are important, that is to say whether the appellant is a (migrant) worker within the meaning of Article 39 EC and, if so, whether she gave up her job voluntarily or involuntarily.

19. Therefore, by order of 13 September 2001 the Verwaltungsgerichtshof requested that the Court give a preliminary ruling on the following questions:

'1. 1 Does the fact that an EU citizen works for a short period (two and a half months) that is fixed from the outset in a Member State of which she is not a national confer on her the status of a worker under Article 48 of the EC Treaty (now Article 39 EC)?

1. 2 When determining whether she is a worker in the above sense in such a case, are any of the following circumstances significant:

1.2.1 the fact that she took up the job only some years after her entry into the host State;

1.2.2 the fact that shortly after the end of her short, fixed-term employment relationship she became eligible for entry to university in the host country by virtue of having completed her schooling in her country of origin;

1.2.3 the fact that she attempted to find a new job in the period between the end of the short, fixed-term employment relationship and the time when she took up her studies?

2. If she is a (migrant) worker under Question 1:

2. 1 Does the termination, by expiry of time, of an employment relationship which is limited from the outset to a fixed term constitute a voluntary termination?

2. 2 If so, in such a case, when assessing whether or not the termination of the employment relationship was voluntary or involuntary, are any of the following circumstances significant, either in themselves or in conjunction with the other factors referred to herein:

2.2.1 the fact that shortly after the employment relationship ended she became eligible for entry to university in the host country by virtue of having completed her schooling in her country of origin and/or

2.2.2 immediately following termination of that employment relationship until beginning her studies, she was looking for another job?

Is it relevant to the answer to this question that the other job sought by the person in question constitutes a sort of continuation at a similar (low) level of the job which she was doing for a fixed period but which has come to an end, or a job which corresponds to the higher level of education achieved in the meantime?'

20. In the proceedings before the Court written observations were submitted by the Governments of Austria, Germany, the United Kingdom and Denmark and by the Commission. There was no hearing.

IV — Assessment

A — *Introduction*

21. As is evident from the description of the facts and the explanation which the Verwaltungsgerichtshof provided in the reference for a preliminary ruling, the substance of the dispute concerns the question whether Mrs Ninni-Orasche is able, in the circumstances of the case, to derive from Community law a right to equal treatment as regards the grant of study finance for a university education.

22. In this respect certain preliminary remarks are appropriate. To begin with, it is evident from the order for reference that Mrs Ninni-Orasche is not the child of migrant workers. Therefore, she cannot invoke the rights to study finance which the family members of such workers derive from Regulation No 1612/68. [6]

23. Furthermore, I consider that the Court cannot merely give a limited answer to the questions referred by the national court. The issues arising in the main proceedings concern not only whether Mrs Ninni-Orasche is a migrant worker and whether the termination, by expiry of time, of a temporary employment relationship constitutes a voluntary termination. On the question of whether Community law confers on Mrs Ninni-Orasche a right of access to the system of study finance, in my view, the Court will, in giving its answer, inevitably also have to take account of factors of Community law which, strictly speaking, lie outside the scope of the

6 — See, amongst other authorities, Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 25, in which it was held that study finance granted by a Member State to the children of workers constitutes for a migrant worker a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 where the worker continues to support the child.

questions referred. In addition to the doctrine of the abuse of Community law and the application of Article 7(2) of Regulation No 1612/68 (Sections B and C), this will include, in particular, the provisions relating to citizenship of the Union (Section D).

24. Furthermore, the governments of the Member States which submitted observations and the Commission concur as regards the task of the national court. It is in fact the Verwaltungsgerichtshof that must give a final judgment and, on the basis of the facts and circumstances, decide whether Mrs Ninni-Orasche has the status of a worker within the meaning of the Treaty and whether she has retained this status for the purpose of the right to equal treatment as regards the grant of study finance. [7] However, the Court can, in proceedings for a preliminary ruling, provide it with the necessary interpretative criteria to enable the judgment to be given in the main proceedings also to have regard to Community law.

B — *The first question concerning the concept of 'worker'*

25. There is detailed case-law in which a number of objective criteria have been developed for determining whether or not a person is a 'worker' within the meaning of the Treaty. As is well known, the concept has a Community meaning and must be interpreted broadly since it defines the scope of one of the fundamental freedoms guaranteed by the Treaty. [8]

26. 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. However, in that respect it is a condition that only a person who pursues an activity which is effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is to be treated as a worker. [9] The nature of the legal relationship between worker and employer is not decisive as regards the applicability of Article 39 EC. [10]

27. The scope of the additional requirement that the activity be 'effective and genuine' is central to the first question. The Verwaltungsgerichtshof asks the Court to provide clarification of the relevance of the duration of the employment relationship and the conduct of the person concerned prior to commencement and following termination thereof.

7 — In accordance with settled case-law such as, for example, *Bernini*, cited in footnote 6, paragraph 19.

8 — See, for example, Case 139/85 *Kempf* [1986] ECR 1741, paragraph 13, and Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16.

9 — See, *inter alia*, *Lawrie-Blum* cited in footnote 8, paragraph 17; *Bernini*, cited in footnote 6, paragraph 14; and Case C-357/89 *Raulin* [1992] ECR I-1027, paragraph 10.

10 — See, primarily, Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 5. In that case the Court held that what is now Article 39 EC draws no distinction between terms of employment under public law and those under private law.

28. In the first part of this question the national court seeks to ascertain whether the fact that a person works for a short period (two and a half months) that is fixed from the outset precludes him from having the status of a worker.

29. The case-law in regard to the duration of the employment relationship varies according to the nature of the case. The Court has already ruled, *inter alia*, on the possible worker status of young persons seeking their first job, part-time workers, trainees and on-call workers. It is clear from this case-law that the duration of the activity pursued by the person concerned is a factor which the national court may take into account in assessing whether or not the activity is effective and genuine in nature.

30. Young persons seeking their first job have not yet entered the labour market and thus have naturally not pursued any occupational activity which is effective and genuine. [11] On the other hand, the Court has ruled that the pursuit of a part-time activity as an employed person, [12] whereby normally no more than even 10 hours a week are worked, [13] does not as such preclude classification as a worker.

31. In *Lawrie Blum* and *Bernini* the Court acknowledged that a person engaged in preparatory training in the course of occupational training must be regarded as a worker if the training period is completed under the conditions of genuine and effective activity as an employed person. [14] In the Court's view, this conclusion cannot be invalidated by the fact that the trainee's productivity is low, that he works only a small number of hours per week or that he receives limited remuneration. In developing his occupational aptitude it is necessary for the person concerned to have completed a sufficient number of hours in order to familiarise himself with the work. In *Bernini* the national court had to examine, on the basis of these interpretative criteria, whether activity as an employed person which a trainee pursued for 10 weeks in preparatory training was sufficient to confer on him the status of a worker.

32. Raulin concerned, *inter alia*, the question whether a worker on an on-call contract for eight months who worked as a waitress five hours a day for only twelve days must be regarded as having exercised an activity which is purely marginal and ancillary. The Court held that the fact that the person concerned worked only a very limited number of hours in a labour relationship may be an indication that the activities exercised are purely marginal and

11 — See recent judgment in Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 18. Therefore, Community law on freedom of movement for workers is, in relation to national rules concerning unemployment insurance, by definition not applicable to them.

12 — Case 53/81 *Levin* [1982] ECR 1035, paragraph 17.

13 — Case 171/88 *Rinner-Kühn* [1989] ECR 2743, paragraph 16. The case concerned the interpretation of Article 119 of the EC Treaty (now Article 141 EC).

14 — *Lawrie Blum*, cited in footnote 8, paragraphs 19 to 21; *Bernini*, cited in footnote 6, paragraph 15.

ancillary. The national court may also take account, if appropriate, of the fact that the person must, under the on-call contract, remain available to work if called upon to do so by the employer. [15]

33. Therefore, the broad interpretation of the concept of 'worker' means that the Court does not exclude the possibility that a trainee pursuing an activity as an employed person for 10 weeks, or an on-call worker who has ultimately worked for only 60 hours may acquire the status of a worker. [16] The duration of the activities is not in itself decisive. Ultimately, the question whether or not the work undertaken was purely marginal and ancillary also turns on other factors, in particular the nature of the activities concerned (a training period is serious only where a sufficient number of hours are completed in order to allow for familiarity with the work) [17] and the nature of the employment relationship (the irregular nature of the services actually performed under a contract for occasional employment).

34. The foregoing is confirmed by *Lair*. In that case the Court had to consider the lawfulness of the additional requirement for the award of a grant to nationals of other Member States, namely that they must have worked in the host Member State for at least five years before the start of the course concerned. It was established that the host Member State cannot make the right to the same social advantages provided for in Article 7(2) of Regulation No 1612/68 conditional upon *a minimum period* of prior occupational activity within the territory of that State. [18]

35. It follows from the foregoing that an EU citizen who has undertaken actual work as an employed person for two and a half months can in principle be a worker within the meaning of Article 39 EC. The case-file shows that during this period Mrs Ninni-Orasche pursued activities as a waitress/cashier and as the person responsible for managing the stocks and for purchasing and stocking the goods on sale. Neither the nature of these activities nor the nature of the employment relationship give grounds for assuming that the activities exercised during the period of employment were purely marginal and ancillary. However,

15 — *Raulin*, cited in footnote 9, paragraph 14.

16 — See also Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraphs 25 and 26. In that case the Court concluded that the employment relationship which dockers on fixed-term contracts of employment, which *as a rule are for short periods* and for the purpose of performing clearly defined tasks, have with the undertakings for which they perform dock work is characterised by the fact that they perform the work in question for and under the direction of each of those undertakings, so that they must be regarded as 'workers' within the meaning of Article 39 EC.

17 — See, in this connection, also Case 344/87 *Bettray* [1989] ECR 1621, paragraph 17, according to which work for the purposes of social employment cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned and the purpose of the adapted employment is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life.

18 — Case 39/86 *Lair* [1988] ECR 3161, paragraph 44. Emphasis added. See also Case 197/86 *Brown* [1988] ECR 3205, paragraph 22, and Case 157/84 *Frascogna* [1985] ECR 1739.

it is for the national court to ascertain whether or not the status of worker was actually acquired in this particular case, regard being had to all the circumstances thereof. [19]

36. The second limb of the first question relates to the conduct of the person concerned prior to commencement and following termination of the employment relationship. The national court refers to the fact that the appellant in the main proceedings took up the job only some years after her entry into the host State, that she had completed her schooling, and that she attempted to find a new job after the temporary employment relationship had come to an end.

37. In my view, these facts are irrelevant in determining the status of a worker within the meaning of Article 39 EC. They are unconnected with the abovementioned objective criteria which under the case-law are to be used in determining whether a person has the status of a worker. According to settled case-law, Community law does not impose any additional conditions for a person to be classifiable as a worker other than the objective criteria referred to above. [20] Furthermore, the three factors are unconnected with the possible ancillary nature of the work undertaken. None of them gives any insight into the substance of the activities pursued and the nature of the employment relationship.

38. I am not persuaded by the Danish Government's argument that in assessing the effective and genuine nature of the occupational activities account must also be taken of the fact that the person concerned worked for only two and a half months in the host State during a period of residence of approximately two and half years. The argument that the activities pursued remained limited to such a short period, and therefore appear to be marginal and ancillary over the entire period of residence, disregards the fact that, in determining the effective nature of the employment relationship, the reasons why the person concerned did not enter the labour market in the preceding period or thereafter make a renewed attempt to find employment are immaterial.

39. In concluding the assessment of the first question, the issue of abuse must be addressed. In its statement of grounds the Verwaltungsgerichtshof pointed to the risk of abuse and the United Kingdom Government in particular examined this matter in its written observations. The abuse, it claimed, is constituted by the fact that Mrs Ninni-Orasche intentionally worked for only a few months in order subsequently to be able to have recourse, as a worker within the meaning of the Treaty, to the social advantages which are associated with study finance and which are granted solely to persons who previously enjoyed the status of a worker. Essentially, she is a student who is artificially and incorrectly trying to pass herself off as a worker. The United Kingdom Government points to a number of objective circumstances which, in its view, might indicate that the person concerned did not pursue,

19 — The case-file does not show, *inter alia*, how many hours she worked in the two and a half months or whether, for example, she was available on the basis of an on-call contract.

20 — See, for example, *Brown*, cited in footnote 18, paragraph 22.

and did not endeavour to pursue, employment of an effective and genuine nature. [21]

40. It is settled case-law that the beneficiaries of the rights granted under the EC Treaty may not abuse such rights in order to evade the application of national law in an unacceptable manner. Whatever else is established in this case-law, [22] I, like the Commission, consider that the doctrine of the abuse of Community law is not material to the answer to be given to the first question. It is directed at the criteria relating to status as a worker. The possible abuse by the person concerned of the rights conferred on a worker by Community law must not be confused with the question whether or not a national is a worker within the meaning of Article 39 EC. There can be abuse of a right only after it has been established that the person concerned is *ratione personae* a beneficiary under Community law. [23] Therefore, this concept has more of a connection with the second question which concerns the possible grant to an EU national of a entitlement under Community law.

41. Therefore, in my view, status as a worker within the meaning of Article 39 EC is not precluded by the fact that an activity was pursued for a period of only two and a half months on a temporary contract if it is established that an effective and genuine activity was pursued. In that respect it is irrelevant that the person concerned took up the job only some years after his entry into the host State, that shortly after the end of her short, fixed-term employment relationship she obtained a diploma in the Member State of origin making her eligible for entry to university in the host Member State, or that she attempted to find a new job after her employment had come to an end.

C — *The second question concerning the right to study finance once a worker is no longer employed*

42. Once the employment relationship has ended, the person concerned as a rule loses the status of a worker and thus also the right to the same social advantages within the meaning of Article 7(2) of Regulation No 1612/68. However, migrant workers are guaranteed certain rights linked to the status of a worker even when they are no longer in an employment relationship. [24] If the first question is answered in the affirmative, the Verwaltungsgerichtshof is essentially asking in the second question whether

21 — In particular the short duration of the contract of employment, the fact that the person concerned did not come to Austria to work but only took up employment of short duration some years after entry into the State and the fact that shortly after the end of her working activities she satisfied the conditions for entry into university and also made use thereof.

22 — See my Opinion of today's date in Case C-109/01 *Akrich* [2003] ECR I-9607, I-9610, paragraph 96 et seq.

23 — See *Lair*, cited in footnote 18, according to which a national of a Member State may claim the rights conferred by Community law only in his capacity as a worker within the meaning of Article 39 EC and Regulation No 1612/68 (paragraph 41).

24 — Case C-85/96 *Martínez Sala* [1998] I-2691, paragraph 32.

the person concerned in this case can benefit from this case-law.

43. Under Article 7(2) of Regulation No 1612/68, a worker who is a national of a Member State and avails himself of freedom of movement for workers is to enjoy the same social advantages in the host Member State as national workers. [25] It is not disputed that a grant awarded for maintenance and training with a view to the pursuit of university studies constitutes a social advantage within the meaning of this provision. [26]

44. The referring court, the Commission and the governments which have submitted observations analysed the specific conditions laid down by the Court concerning the right to equal treatment enjoyed by such migrant workers as regards access to the maintenance grant system. The relevant case-law consists in particular of the judgments in *Lair*, *Brown*, *Raulin* and *Bernini* and may be summarised as follows.

45. First, a worker retains the status of a worker where there is continuity between the occupational activity previously pursued and the university course of study embarked on, in other words where there is a link between the previous occupational activity and the nature of the studies. Secondly, migrant workers do not lose certain rights stemming from the status of a worker where they have involuntarily become unemployed and are obliged by conditions on the job market to undertake occupational retraining in another field of activity. In that case continuity is not required. The Court substantiated this view by stating that continuous occupational activities are less common than was formerly the case. They are frequently interrupted by periods of training or retraining. [27]

46. Furthermore, the Court has laid down a number of safeguards against abuse. A worker does not gain access to the social advantages where he enters into an employment relationship for a particular period with a view subsequently to undertaking university studies and where he would not have been employed by his employer if he had not already been accepted for admission to university. In such circumstances, the employment relationship, which is the only basis for the rights deriving from Regulation No 1612/68, is merely ancillary to the studies to be financed by the grant. [28] Moreover, the Court has held that where it may be established on the basis of objective

25 — In *Martínez Sala*, cited in footnote 24, paragraph 25, the Court describes the settled case-law on the content of the concept of 'social advantage' referred to in Article 7(2) of Regulation No 1612/68 as follows: 'all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community...'.

26 — *Lair*, cited in footnote 18, paragraph 28.

27 — See, for example, *Lair*, cited in footnote 18, paragraphs 37 and 38.

28 — *Brown*, cited in footnote 18, paragraphs 27 and 28.

evidence that a worker has entered another Member State for the sole purpose of enjoying, after a very short period of occupational activity, the benefit of the student assistance system in that State, such abuse is not covered by Article 39 EC and Regulation No 1612/68. [29]

47. Finally, in this connection as well it is for the national court to investigate the facts. It is for it to assess whether the occupational activities pursued previously in the host country, whether or not interrupted, disclose a relationship with the subject-matter of the studies. In that connection it is for that court to take into account the various factors material to that assessment, such as the nature and the diversity of the activities pursued and the duration of the period between the end of those activities and the commencement of the studies. [30]

48. In the present case the national court mentions a number of specific circumstances and seeks to ascertain what effect they may have for the purposes of the legal determination. The first part of the second question concerns the termination of a fixed-term employment relationship. Is this circumstance in itself sufficient to support a finding of voluntary unemployment (2.1)? The answer is important since a migrant worker may derive certain rights from conditions on the job market only in the event of involuntary unemployment.

49. The parties which submitted observations take different views in this respect. The Austrian, German and United Kingdom Governments argue that a worker who enters, of his own volition, into a fixed-term contract, fully accepts that the employment relationship is at an end once that term expires. In their view that is not a case of involuntary unemployment.

50. Conversely, the Commission takes the view that the 'voluntary nature' of the unemployment does not necessarily depend on the personal volition of the worker. With reference to *Tetik* it states that the concept of involuntary unemployment means that the inactivity cannot be attributed to the worker. [31] In the Commission's view the end of a temporary contract of employment does not give rise to 'voluntary unemployment' unless, upon termination of the temporary employment relationship, the worker specifically expressed a desire not to be considered for extension of the contract.

51. The Danish Government considers that the national court itself must give judgment on the basis of the circumstances of the case. In doing so it may take account of the

29 — *Lair*, cited in footnote 18, paragraph 43.

30 — *Bernini*, cited in footnote 6, paragraph 19.

31 — Case C-171/95 *Tetik* [1997] ECR I-329, paragraphs 38 and 39. This case concerned the interpretation of the concept of 'involuntary unemployment' within the meaning of Article 6(2) of Decision No 1/80 of the Council of Association of 19 September 1980 on the development of the Association between the European Economic Community and Turkey.

practices in the field of activity concerned, the duration of the contract, the chances of finding a job which is not temporary, and the personal interest of the appellant in the main proceedings in entering into an employment relationship for only a fixed term. Furthermore the national court must examine whether, after the termination of the previous temporary employment relationship, the person concerned made sufficient efforts to find a new occupational activity corresponding to her qualifications.

52. I agree with the thrust of the argument put forward by the Danish Government. An employment relationship which is limited from the outset to a fixed term and the expiry of the period of employment laid down in a temporary contract of employment cannot be decisive as to whether a worker's unemployment is voluntary or involuntary. [32] Incidental circumstances must be taken into account to establish whether such unemployment is attributable to the worker and they must be examined by the national court. These circumstances are connected, on the one hand, with the working environment in which the worker finds himself and, on the other, with his personal conduct.

53. In my view, the national court must take particular account of the characteristics of the job market which is relevant to the worker. In certain occupations temporary contracts of employment are much used; there can be various reasons for this. For example, it is conceivable that employers who operate in markets sensitive to economic fluctuations or employers dependent on seasonal labour will prefer to offer workers only temporary contracts of employment. The inflexibility of national labour law can also be a reason for an employer to opt for fixed-term contracts of employment. In such cases the termination of a temporary employment contract does not necessarily mean that the worker concerned is voluntarily unemployed. When entering into an employment relationship the worker often has no real influence over the choice of the type of contract. For economic and social reasons he himself would as a rule prefer a contract of unlimited duration.

54. On the other hand, situations are conceivable in which a worker intentionally opts for a temporary employment relationship. A worker may wish to gain experience with various employers, for example, by performing agency work. Conceivably he may also accept a temporary job in order to save up to finance a subsequent course of study or may not wish to enter into a longer-term contract because he is waiting for a job better suited to his level of education and ambitions. If, on the basis of the facts, it is established that the worker does not wish — either beforehand or subsequently — to be considered for an extension of the temporary contract of employment for a definite or indefinite term, this is an indication of voluntary

32 — *Tetik*, cited in footnote 31, to which the Commission and the Austrian Government refer, cannot, in my view, be applied completely to the present case because the context is not entirely comparable. *Tetik* concerned the calculation of periods of involuntary unemployment treated as periods of legal employment in connection with the residence permit of a Turkish national in Germany. In the present case the involuntary unemployment of the migrant worker must be examined in the light of the possible benefit of rights to study finance on the part of migrant workers who are no longer employed. In that respect it is particularly relevant that a worker who has involuntarily become unemployed may be obliged by the conditions on the job market to undertake occupational retraining in another field of activity.

unemployment. In such a case the person concerned loses his status of worker because there is no reason for it to be extended, that is to say that the conditions on the job market do not oblige him to undertake occupational retraining.

55. In the light of the foregoing, it is now necessary to examine the other circumstances outlined by the national court in the second part of the second question.

56. In that regard it must be determined whether it is material to the issue whether the end of the employment relationship was voluntary that, shortly after the employment ended, eligibility was obtained for entry to university in the host country (2.2.1). The national court further seeks to ascertain the significance of the (unsuccessful) attempts by the person concerned to find other employment in the host Member State. In this connection the question also arises as to the relevance of the fact that the new employment sought by the person in question substantively constitutes a kind of continuation at a similar (low) level of the previous short-term employment which has come to an end, or that it is employment in keeping with the higher level of education achieved in the meantime (2.2.2).

57. The views of the intervening Member States and the Commission coincide in this regard or form part of the answer to the first limb of the second question. The Austrian Government takes the view that the obtaining of a diploma conferring eligibility in the period between the end of the employment relationship and the commencement of the course of study proves that the unemployment was not involuntary. The German Government and the Commission have pointed out that the abovementioned circumstances are irrelevant in assessing whether or not the end of an employment relationship is voluntary. However, the Commission considers that the factors may be relevant in determining whether or not the appellant in the main proceedings can assert a right to support for a university education. The United Kingdom Government considers that these factors are relevant in determining whether or not the appellant in the main proceedings artificially created a situation in which she was unemployed in order to obtain a maintenance grant in which case there is, in its view, abuse.

58. In order to clarify the answer to the final part of the second question, I will first examine the relevance of the abovementioned factors in determining whether the unemployment is voluntary or involuntary.

59. In common with most of the governments referred to above and the Commission, I take the view that the abovementioned circumstances in principle have no bearing on the voluntary nature of the unemployment. Neither the obtaining, in another Member State, of a diploma offering access to university in the host Member

State, nor the attempt to find other employment, nor the level of employment sought, have any connection with the employment relationship from which the worker derived his status. In both cases higher levels of education can be attained and other employment sought irrespective of whether a person has become unemployed voluntarily or involuntarily. At most the fact that an unsuccessful attempt was made to find new employment provides support for the view that the unemployment might not have been entirely involuntary.

60. However, the Court must go further than this in order to give a satisfactory answer to the national court. As the various governments and the Commission have noted, the abovementioned circumstances may ultimately be relevant as to whether the appellant in the main proceedings may have recourse to social advantages within the meaning of Article 7(2) of Regulation No 1612/68. I will examine this matter in greater depth below.

61. Firstly Mrs Ninni-Orasche is eligible for the right to equal access to study finance if there is continuity between the subject studied, namely romance languages, and the previous occupational activity as a waitress/cashier involving a number of additional administrative tasks. I deduce from the case-file that there is plainly no real connection between the two activities. Not only are there profound differences in substantive terms, but also the two activities are on two entirely different levels. I do not regard as relevant the fact that the diploma in accounting and commerce attained by Mrs Ninni-Orasche, which makes her eligible for entry to university, may indicate some connection with the earlier administrative activities on account of the commercial content thereof. What is important is the continuity between employment and study and not the nature of the diploma granting admission to a university course of study.

62. If the national court concludes that the unemployment is involuntary, it may be considered, secondly, whether the worker is obliged by the conditions on the job market to undertake occupational retraining in another field of activity. In the case-file there are few indications that the appellant in the main proceedings satisfies this condition. Also relevant in this connection are the objective factors which may indicate that the applicant carried on the occupational activity for only a very short period for the sole purpose of enjoying the benefit of the student assistance system.[33] The fixed term of the contract of employment, coupled with the fact that the person concerned did not come to Austria to work but only took up that short term employment some years after entry into the State are, in my view, indications that Mrs Ninni-Orasche did not make intensive efforts on the Austrian job market. The

33 — *Lair*, cited in footnote 18, paragraph 43.

argument that it is necessary, on account of conditions on the job market, to study romance languages in conjunction with a function in another field of activity is *a fortiori* rather implausible.

63. Nevertheless, it is for the national court actually to determine, on the basis of all objective and relevant circumstances, whether or not the appellant in the main proceedings is able to have recourse to social advantages within the meaning of Article 7(2) of Regulation No 1612/68.

64. I therefore propose the following answer to the second question:

'A national of another Member State who commences university studies in the host Member State, having carried on an occupational activity there, may rely on Article 7(2) of Regulation No 1612/68 only where

— there is a substantive relationship between his previous occupational activity in the host Member State and the subsequent course of study, or

— following involuntary unemployment, the conditions on the employment market in the host Member State oblige him to undertaking occupational retraining in another field of activity.

Whether there is a substantive relationship between the previous occupational activities and the subsequent course of study, or whether there is involuntary unemployment, and whether the conditions on the job market indicate that retraining is necessary to carry on another occupational activity, are matters to be determined on the basis of the objective circumstances of the case.'

D — *The right to study finance by virtue of citizenship of the Union*

65. The national court requested the Court merely to rule on the interpretation of Article 39 EC and Regulation No 1612/68. As stated above, the Commission and the Danish Government have also raised the question as to whether Mrs Ninni-Orasche might be able to derive a right to study finance from the provisions of the Treaty concerning citizenship of the Union in conjunction with the prohibition on discrimination on the basis of nationality. Both the Danish Government and the Commission conclude that reliance on Articles 12 and 17 EC in order to obtain study finance cannot be successful in the

circumstances of the case and in that connection they rely, in particular, on the wording of Regulation No 93/96 and the *Grzelczyk* judgment of 20 September 2001.

66. In that regard the question that first arises is whether, in the present case, the Court should rule at all on the interpretation of the abovementioned provisions of the Treaty. The reference from the national court does not seek interpretation of those provisions and the appellant in the main proceedings has also not requested such interpretation.

67. The Commission takes the view that such a ruling is appropriate and in that connection refers to the settled case-law of the Court and the principle of procedural economy. The Danish Government does not consider it necessary for the facts to be assessed in the light of those provisions of Community law but has submitted observations thereon should the Court take a different view.

68. In order to provide a satisfactory answer to the referring court, the Court may deem it necessary to consider provisions of Community law to which the national court has not referred in its question. [34] In my view, there can be no objection to a judgment of the Court on the possible effects of Articles 12, 17 and 18 EC in relation to the legal matters at issue in the main proceedings.

69. In the present case this is evident for a number of reasons. Firstly, the national court made the order for reference shortly before the Court gave its judgment in *Grzelczyk*. Furthermore, the case-law concerning citizenship is still being developed. The Court has recently given a number of other relevant judgments. [35] Secondly, I consider that the matters indicated in the order for reference are sufficient to provide the Verwaltungsgerichtshof with a satisfactory answer regarding Articles 12, 17 and 18 EC. It is beyond dispute that Mrs Ninni-Orasche seeks to derive the right to study finance from Community law. Thirdly, the relevant national legislation at issue does not, as regards the right of nationals of other Member States to study finance, refer only to the Treaty provisions relating to workers. According to the order for reference, Mrs Ninni-Orasche appealed against the decision of the Federal Minister also on grounds of 'infringement of Community law' and the Treaty provisions relating to citizenship which form part thereof. Fourthly, as the Commission has correctly noted, an examination at this stage of the Treaty provisions on citizenship will avoid a situation in which the national court is obliged to refer to the Court for a preliminary ruling questions on that matter at second instance.

34 — See the recent judgment in Joined Cases C-228/01 and C-289/01 *Bourrasse and Perchicot* [2002] ECR I-10213, paragraph 33.

35 — In particular Case C-413/99 *Baumbast and R* [2002] ECR I-7091 and *D'Hoop*, cited in footnote 11.

70. As regards the substance, the Commission considers that Mrs Ninni-Orasche has lost her status as a worker, but by commencing university studies has acquired the status of a student within the meaning of the directive on the right of residence for students. She is therefore bound by the limitations that this directive imposes on the entitlements that EU nationals may derive therefrom. In particular she is covered by the restriction relating to the award of study finance. Article 3 of Directive 93/96 expressly provides that it does not confer entitlement on students benefiting from the right of residence to the payment of maintenance grants by the host Member State. In the Commission's view, that is not altered by the fact that Mrs Ninni-Orasche has already lived in Austria for a considerable time and has also commenced her university studies there.

71. The Danish Government adds a number of critical observations to *Grzelczyk* which it regards as inconsistent with the clear wording of Article 3 of Directive 93/96. It reiterates its view, which has already been put forward in the proceedings in *Grzelczyk*, that citizenship of the Union may not be taken to mean that such citizens have obtained rights that are more extensive than those already stemming from the EC Treaty and secondary legislation.

72. I consider the Commission's assessment is correct but too limited. I do not share the Danish Government's view that the provisions on citizenship of the Union have no added value for EU nationals.

73. As the Court has since repeatedly held, Union citizenship within the meaning of Article 17 EC is destined to be the fundamental status of nationals of the Member States. As a national of a Member State lawfully residing in the territory of another Member State, [the appellant] in the main proceedings, Mrs Ninni-Orasche, comes within the scope *ratione personae* of the provisions of the Treaty concerning citizenship of the Union. [36]

74. In principle Union citizenship enables nationals of Member States in the same situation to enjoy the same treatment in law irrespective of their nationality. EU nationals may invoke Article 17 EC, read in conjunction with Article 12 EC, which prohibits discrimination on grounds of nationality, as from the entry into force of the provisions on Union citizenship. [37]

36 — See *Martínez Sala*, cited in footnote 24, paragraph 61.

37 — See, for example, *D'Hoop*, cited in footnote 11, paragraphs 25, 27 and 28.

75. However, the abovementioned provisions apply only in situations which fall within the scope *ratione materiae* of Community law. [38]

76. These situations include those involving the exercise of the fundamental right guaranteed by Article 18(1) EC to move and reside freely in another Member State. In *Baumbast* the Court held that Article 18(1) EC has direct effect and this finding is relevant in particular as regards citizens who carry on no economic activity within the meaning of Articles 39 EC, 43 EC and 49 EC. [39] The direct effect of Article 18(1) EC is also relevant on account of the interpretation of the limitations and conditions which under that provision may be placed on the exercise of the right of residence. They are now subject to review by the national court. [40]

77. In *Grzelczyk* the Court ruled that a Union citizen who pursues university studies in a Member State other than the State of which he is a national has the right to rely on the prohibition laid down in Article 12, read in conjunction with the right guaranteed by Article 18 EC to move and reside freely in another Member State. The Court substantiates this view by pointing to the fact that the Treaty has evolved as a result of the inclusion of provisions on citizenship and on education and vocational training and by referring to the directive on the right of residence for students. [41] In the main proceedings a French national who was taking a four-year university course in Belgium and, in his final year, was no longer able to meet his living costs himself, risked losing his right of residence if he did not have this minimum level of income. The Court concluded that Articles 12 and 17 EC preclude national legislation which make entitlement to the minimum subsistence allowance subject to the condition, in the case of nationals of Member States other than the host State, that they come within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host State. [42]

78. This broad interpretation of the Treaty provisions on citizenship results in particular from the Court's broad view taken of the concept of 'resources' within the meaning of Directive 93/96. This directive contains the 'limitations and conditions' imposed on the rights conferred on Union citizens by Article 18(1) EC. Under Article 1 of this directive, Member States may require migrant students to show that they have 'sufficient resources' to avoid becoming a burden on the social assistance system of the host Member State during their period of residence. Under Article 3 of the directive, no right is to be established to payment of maintenance grants by the host Member State for students who benefit from the right of residence. However, the

38 — See, for example, *Grzelczyk*, cited in footnote 2, paragraph 32.

39 — See *Baumbast*, cited in footnote 35, paragraphs 81 to 84.

40 — *Baumbast*, cited in footnote 35, paragraph 86.

41 — Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59).

42 — *Grzelczyk*, cited in footnote 2, paragraphs 34 to 37 and 46.

Court consequently infers that 'there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits'. Furthermore, it is clear from the sixth recital in the preamble that beneficiaries of the right of residence 'must not become an "unreasonable" burden on the public finances of the host Member State'. The Court therefore concludes that Directive 93/96, like Directives 90/364 and 90/365,[43] accepts 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'.[44]

79. In assessing whether or not Mrs Ninni-Orasche can successfully rely on the above-mentioned provisions to claim the right to study finance under the same conditions as Austrian nationals,[45] it is necessary first to establish that she has no right to study finance on the basis of her nationality. This is evident from the scheme of the Studienförderungsgesetz and the scope of the question referred.

80. Moreover, it must be assumed that the appellant in the main proceedings does not have the status of a worker and exercises no other fundamental economic freedom within the meaning of the Treaty. Nor does the case-file show that her Austrian spouse avails himself of one of the fundamental economic freedoms granted by the Treaty.[46] Therefore, she may not invoke the rights which economically active citizens and their family members enjoy.

81. Accordingly, consideration must be given to the basis of her right of residence in Austria. Mrs Ninni Orasche does not owe her leave to reside to reliance on the right guaranteed to Union citizens by the Article 18 EC to move and reside freely in another Member State. She was given a residence permit valid until 1999 by virtue of her marriage to an Austrian citizen in 1993 and this right of residence therefore has its origin in national law. However, as a result of Austria's accession to the European Union in 1995 and the commencement of her university studies in 1996 Mrs Ninni-Orasche's right of residence has assumed a Community dimension. At the time of the facts in the main proceedings the residence permit in principle had, in addition to a basis in national law, a basis in European law which stems in particular from Article 18 EC and Directive 93/96.

43 — Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26) and Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28).

44 — *Grzelczyk*, cited in footnote 2, paragraphs 38, 39 and 44.

45 — The objective requirements for eligibility for a maintenance grant are set out in Paragraph 6 of the Studienförderungsgesetz.

46 — See, in this connection — in respect of migration rights of spouses of services providers under the Treaty — Case C-60/00 *Carpenter* [2002] ECR I-6279, in particular paragraphs 36 to 39.

82. However, it is realistic to assume that the directive on the right of residence for students is not directly relevant to Mrs Ninni-Orasche. For Directive 93/96 is intended to lay down conditions 'to facilitate the exercise of the right of residence and with a view to guaranteeing access to vocational training for a national of a Member State who has been accepted to attend a vocational training course in another Member State' (Article 1). There are grounds for believing that Mrs Ninni-Orasche does not fall within the scope thereof because she derived her right of residence from national law in 1996 and had no need at all of a right of residence under the directive.

83. However, even on the supposition that the residence permit has a basis purely in national law, there is nothing to prevent Mrs Ninni-Orasche from relying on her status as a Union citizen. Moreover, I consider that, where statuses vary or overlap under Community law and national law, she may rely on the most favourable set of rules. [47]

84. Therefore, I will consider below two possible situations, that is to say that in which Mrs Ninni-Orasche derives the classification as a student under Community law from Directive 93/96 and the alternative situation in which Directive 93/96 has no relevance to her.

47 — Also see, to this effect, the Opinion of Advocate General Alber in *Grzelczyk*, cited in footnote 2, paragraph 92.

85. Firstly, let us take the case in which Mrs Ninni-Orasche could avail herself of the entitlements conferred on migrant students by Directive 93/96. In this case *Grzelczyk* is relevant but in my view this judgment is of no assistance to the appellant in the main proceedings.

86. Thus, the factual situation in the two cases differs. *Grzelczyk* concerned an EU national who for a number of years had had sufficient resources as a student and had only one year left to complete his studies. Without assistance he risked losing his residence permit in the Member State in which he was studying and thus being unable to complete his studies. The Court took account of these specific circumstances of the case in its judgment.

87. At the time at which Mrs Ninni-Orasche submitted her application for study finance she was at the beginning of her studies of romance languages. Her right to reside in Austria and her capacity actually to avail herself of that right were not at issue in any way. Therefore, she was able to continue to enjoy the most fundamental right that she derived from her EU citizenship, that is to say the right to move and reside freely in the host Member State. Moreover, in strictly legal terms her case differs from the situation underlying *Grzelczyk*. That case related to a tempor-

ary benefit necessary to enable residence for the purpose of completing a course of study. This case relates to study finance which has no bearing either on the right or the capacity to reside in the host Member State.

88. I infer from the grounds in *Grzelczyk*, in particular the reference to 'a certain degree of financial solidarity' in connection with the particular situation in which the student concerned found himself, that this judgment specifically did not seek to override the basic conditions laid down by the three directives on residence, that is to say that EU nationals who move to another Member State to become established there must show that they have the necessary resources so as not to be reliant on social security benefits in the host Member State. Within the framework of the directive on the right of residence for students, this means that a national of a Member State who begins a course of study in another Member State may not have recourse to maintenance grants in the host State. This restriction on the rights of migrant students is expressed unequivocally in Article 3, that is to say in the operative part of the directive.

89. However, the foregoing arguments apply only if Mrs Ninni-Orasche is classified as a student within the meaning of Directive 93/96 and intends to derive entitlements from this directive. If she does not require these entitlements, Article 17 EC, read in conjunction with Article 12 EC, remains as a Community law basis for granting the right to study finance under the same conditions as those which apply to nationals of the host Member State who are in the same situation.

90. Although *Grzelczyk* concerned a different case, the tenor of that judgment must nevertheless be applied in a situation in which an EU national falls victim to unacceptable discrimination. In my view, the principle of a minimum degree of financial solidarity can, in specific, objectively verifiable circumstances, create a right to equal treatment.

91. This is so where an EU national has already resided legally for a considerable time in another Member State in a capacity which is not connected primarily with the exercise of the fundamental economic freedoms granted by the Treaty and where the residence permit is also not dependent on university studies which the person concerned has commenced in the host State. I consider that such a situation must, for a number of reasons, be placed within the scope of the Treaty, with the result that the EU national acquires the right to equal treatment in law.

92. Firstly, the restriction contained in Article 18 EC whereby the right to residence is to apply only subject to the

limitations and conditions laid down in the Treaty and secondary legislation is not relevant in such a case. Article 17, read in conjunction with Article 12, can, in specific circumstances, confer a right to equal treatment even where social advantages which are not granted under the directives on residence are concerned.

93. Secondly, the importance of education, and in particular university education, has now been broadly recognised within the context of the objectives of the EC Treaty. In *Grzelczyk* and *D'Hoop* the Court linked the Treaty provisions on education and vocational training with the applicability of Articles 12 and 17 EC. It is clear from *Grzelczyk* that the judgment in *Brown* in 1988, according to which at that stage in the development of Community law, assistance given to students for maintenance and training fell in principle outside the scope of the Treaty, became obsolete following the introduction into the Treaty of the provisions on citizenship and on education and vocational training.[48] In *D'Hoop* the Court ruled that national legislation was precluded which placed Belgian nationals who had had all their secondary education in Belgium at an advantage over those who, having availed themselves of their freedom to move, had obtained their diploma of completion of secondary education in another Member State.[49] This case-law shows that students who take up courses of study in a Member State of which they are not nationals not only fall within the scope of Community law but also actually enjoy a special status under the Treaty.

94. Thirdly, there are, in the abovementioned circumstances, no grounds for not treating an EU national in the same way as other beneficiaries under Community law such as, in particular, workers and their family members. As I stated previously in my opinion in *Baumbast*, the provisions on citizenship of the Union have added value for the group of economically non-active citizens[50] to whom the right to equal treatment is important.

95. In the present case there are certain further reasons for granting these additional rights to Mrs Ninni-Orasche. At the time at which she commenced her studies (March 1996) she had already been resident in Austria for over two years and her residence permit was valid for a further three years. In view of her marriage to an Austrian national even after 1999 she plainly retained a right of residence in respect of the remainder of her period of study. In addition, she obtained the Italian diploma granting her the right to enter a university in Austria immediately prior to commencing her studies. There is clearly no abuse in the sense of Mrs Ninni-Orasche

48 — *Grzelczyk*, cited in footnote 2, paragraphs 34 and 35.
49 — *D'Hoop*, cited in footnote 11, paragraphs 32 to 35.
50 — See, in particular, paragraph 114 et seq. of the opinion in *Baumbast*, cited in footnote 35.

deliberately choosing to acquire Austrian residence in order thus to be able to have recourse to study finance. Furthermore, whereas the basic principle in the directive on the right of residence for students is that a national of one Member State moves temporarily to another Member State to take up a course of study, Mrs Ninni-Orasche's residence in Austria is structural in nature.

96. Although, as Community law now stands, social security benefits, and in particular rights to study finance, are not harmonised, this fact cannot be used as an argument against EU nationals who are in a specific situation and have already resided legally for a considerable period in another Member State before claiming social benefits. In that case there is a need for a minimum degree of financial solidarity towards those residents who are students having the nationality of another Member State. I consider that precisely a resident in the situation of Mrs Ninni-Orasche, who has a demonstrable and structural link to Austrian society, cannot be treated in the host State as any other national of a third country.

97. The fact that Mrs Ninni-Orasche is unable to claim a right to study finance in the main proceedings must be attributed to the limited scope *ratione personae* of the Studienförderungsgesetz. The refusal of the Federal Minister was made purely on grounds of nationality and therefore constitutes blatant discrimination which is contrary to the principle that Union citizens have the right to equal treatment before the law under Article 12 EC.

98. Inequality of treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions. [51] Although I have strong doubts as to whether an objective ground exists in the present case, [52] no reasoned view can be given on this matter. Neither the national court nor the parties which submitted written observations have examined it. Therefore, the national court in the main proceedings will have to carry out that examination as to the substance.

99. In my view, Articles 12 and 17 EC confer on EU nationals who have already

51 — Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27, and *D'Hoop*, cited in footnote 11, paragraph 36.

52 — See *D'Hoop*, cited in footnote 11. The Court considers that the criterion that the place where the diploma of completion of secondary education was obtained is too general and exclusive in nature to attain the legitimate objective of ensuring that special employment programmes are accessible only to young people who have a real link to the national employment market (paragraphs 38 and 39). In the present case Austria could rely on its legitimate interest in maintaining an effective system of study finance. That system could be jeopardised by an excessively large influx of students from other Member States having recourse to national maintenance grants. In my view, this argument does not apply on account of the particular circumstances of the present case.

resided lawfully for a considerable time as economically non-active citizens in the territory of another Member State and have commenced university studies there, entitlement to study finance under the same conditions as those which apply to nationals of the host Member State. Inequality of treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions.

V — Conclusion

100. In light of the foregoing I propose that the Court should answer the questions referred by the Verwaltungsgerichtshof for a preliminary ruling as follows:

(1) Status as a worker within the meaning of Article 48 of the EC Treaty (now Article 39 EC) is not precluded by the fact that an activity was pursued for a period of only two and a half months on a temporary contract if it is established that an effective and genuine activity was pursued. In that respect it is irrelevant that the person concerned took up the job only some years after her entry into the host State, that shortly after the end of her short, fixed-term employment relationship she obtained a diploma in her State of origin conferring eligibility for entry to university in the host State, or that she attempted to find a new job after her employment relationship had come to an end.

(2) A national of another Member State who commences university studies in the host Member State, having carried on an occupational activity there, may rely

on 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 only where

— there is a substantive relationship between her previous occupational activity in the host Member State and the subsequent course of study, or

— following involuntary unemployment, the conditions on the employment market in the host Member State oblige her to undertake occupational retraining in another field of activity.

Whether there is a substantive relationship between the previous occupational activities and the subsequent course of study, or whether there is involuntary unemployment, and whether the conditions on the employment market indicate that retraining is necessary to carry on another occupational activity, must be deduced from the objective circumstances of the case.

(3) Articles 12 and 17 EC grant to EU nationals who have resided lawfully for a considerable time as economically non-active citizens in the territory of another Member State and have commenced university studies there, a right to study finance under the same conditions as those which apply to nationals of the host Member State. Inequality of treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions.