# OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 14 March 1996 *

1. In these proceedings the Commission accuses the Kingdom of Belgium of infringing Article 48 of the EC Treaty and Articles 3 and 7 of Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community [1] (hereinafter 'the Regulation').

2. The Kingdom of Belgium allegedly committed that infringement by keeping in force certain national rules which subsidize and promote access to employment for young people who have completed their secondary education in a teaching establishment run, subsidized or recognized by the Belgian State or one of its communities. In the Commission's view, that results in disguised discrimination in favour of young Belgians, who for the most part fulfil that requirement, and against the remainder of Community young people seeking their first job.

3. Specifically, the Commission requests that the Court declare that

— 'by requiring, in Article 124 of the Royal Decree of 20 December 1963 which was replaced by Article 36 of the Royal Decree of 25 November 1991 on unemployment, that young people seeking their first employment have completed their secondary education in an establishment subsidized or approved by the Belgian State (or by one of its communities) in order to be eligible for tideover allowances,

— and by encouraging employers at the same time to take on beneficiaries of those unemployment allowances by providing, in Articles 81 to 84 of the Law of 22 December 1977 and Articles 2 to 9 of Royal Decree No 123 of 30 December 1982, for the State to assume responsibility in such a case for the wages and social contributions for such workers if they are wholly unemployed and on benefit, the Kingdom of Belgium has failed to fulfil its obligations under Article 48 of the EC Treaty and Articles 3 and 7 of Regulation No 1612/68.'

## The national rules at issue

4. The national rules of which the simultaneous application gives rise to the alleged

* Original language: Spanish.

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

infringement may be placed in two categories: those which relate to the 'tideover allowance' ('allocation d'attente') and those which relate to the special programmes to combat unemployment.

5. Among the former, Article 124 of the Royal Decree of 20 December 1963 provided:

'... to qualify for the unemployment allowances, young workers seeking their first employment must in all cases have completed their full-time secondary education or technical or vocational training at a centre run, recognized or subsidized by the State'.

6. Article 36 of the Royal Decree of 25 November 1991 on unemployment replaced Article 124 of the abovementioned Royal Decree, replacing the old 'unemployment allowance' for the young people in question by the new 'tideover allowance'. The amended text provided:

'1. To qualify for the tideover allowance, the young worker must have:

(1) completed his compulsory education;

(2) either (a) completed his secondary education or technical or vocational training at a centre run, recognized or subsidized by a community;

or (b) obtained from the competent authority of a community the diploma or educational certificate corresponding to the studies mentioned in (a) above'.

7. As far as unemployment policy is concerned, the Law of 22 December 1977 on budgets for 1977-1978 included a chapter entitled 'Programme to combat unemploy-

ment' and Article 81 provided, under the heading 'Special temporary category':

'1. The State may take over responsibility for the remuneration and social contributions of workers who are recruited by certain project promoters [2] undertaking tasks in the general interest and who fall within the following categories of job-seekers:

(1) wholly unemployed persons on benefit; [3]

(2) the wholly unemployed persons referred to by Article 123(5) of the Royal Decree of 20 December 1963 on employment and unemployment'.

8. Pursuant to Article 87 of that Law, the Office National de l'Emploi (National Employment Office) takes over payment of the wages of such workers.

9. The Office National de l'Emploi is also regarded by the Law as an employer for the purposes of the provisions on tax and social security for such workers. Compliance with those provisions — including those relating to accidents at work and occupational illness — and with requirements concerning membership, contributions and income tax obligations is the responsibility of the Office National de l'Emploi, as regards workers taken on by certain project promoters [4] within the 'Special temporary category'.

10. Finally, Royal Decree No 123 of 30 December 1982 on the recruitment of unemployment persons assigned to specified projects for economic expansion for the benefit of small and medium-sized businesses provided as follows:

'Article 2(1). Subject to the availability of budgetary credits, the State may, for a period not exceeding two years, assume responsibility, to the extent specified in Article 3(2), for remuneration and social-security contribu-

2 — According to the Royal Decree of 8 December 1978, as amended by Royal Decree No 472 of 28 October 1986, 'project promoters' may be the State, provinces, conurbations, federations or groups of municipalities, municipalities, public establishments, agencies operating in the public interest under the auspices of the foregoing, and non-profit-making associations.

3 — Under Belgian legislation, a 'wholly unemployed' person means one who is not bound by any contract of employment. If such a contract exists but its implementation has been suspended wholly or in part (for reasons of *force majeure*, technical difficulties, lockouts, etc.) the person concerned is merely 'temporarily unemployed'.

4 — Those promoters therefore do not in practice take over all the obligations attaching to employers in the strict sense.

tions [5] of the workers referred to in Article 5 who are recruited for a project.

...

Article 5. The employment covered by this decree is restricted to people who are wholly unemployed and on benefit. For the application of this article, unemployed persons working for the public authorities, workers employed within the special temporary category and persons engaged in the non-commercial sector shall also be regarded as wholly unemployed and on benefit'.

**The Community provisions allegedly infringed**

11. Article 48 of the Treaty guarantees freedom of movement for workers within the Community. Article 48(2) provides that freedom of movement is to entail the abolition of any discrimination on grounds of nationality between workers of the Member States as regards employment, remuneration and other working conditions.

12. Giving effect to that general principle, Article 1 of the Regulation provides:

'1. Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

2. He shall, in particular, have the right to take up available employment in the territory of another Member State with the same priority as nationals of that State.'

13. Article 3 of the Regulation provides:

'1. Under this regulation, provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

— where they limit application for and offers of employment, or the right of

5 — The percentage of wages and social contributions borne by the State varies according to a number of criteria, laid down by that Royal Decree and others. The percentage is 50, 75 or 100, as the case may be.

foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

— 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.

...'

14. Finally Article 7 of the Regulation provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.

...'.

**Preliminary considerations concerning the Commission's position**

15. It cannot be clearly inferred, either from the reasoned opinion or from the application, whether the Commission's action is limited only to the children of migrant workers; neither does a reading of its arguments, together with the literal wording of the forms of order sought, clarify the point entirely.

16. The Commission referred expressly to the children of migrant workers as a clearly defined category of persons when criticizing the combined effect of the Belgian Laws which, on the one hand, require a secondary education certificate obtained in a Belgian teaching establishment as a precondition for grant of the tideover allowance and, on the other, accord favourable treatment to the recipients of that allowance as regards access to employment.

17. In its defence, the Belgian Government laid emphasis on the 'inseparability of access to employment and the right to tideover allowances', the latter, in its view, being similar to unemployment allowances. It is precisely upon that 'close link', it stated subsequently in its rejoinder, that its defence is based.

18. In its reply, the Commission clarified the debate to some extent, stating that it considered it 'extremely important not to mix the two charges: on the contrary, they should be differentiated as regards their content and legal basis and the persons affected'.

19. Similarly, in response to a written question [6] put to it by the Court, for clarification, it repeated that 'it is of the greatest importance ... to distinguish between the two charges, in particular as regards the categories of persons affected'.

20. The Commission has thus indicated that only the second charge (tideover allowance) relates to the children of migrant workers, whilst the first (priority access to employment) affects 'all workers, having the nationality of any Member State, who are seeking their first job'.

21. I shall follow the same scheme of reasoning, but in reverse order. I shall thus consider first whether the tideover allowance constitutes a social advantage which must be granted to the children of migrant workers, regardless of the country in which they completed their secondary education. Secondly, and adopting a more general approach, as advocated by the Commission, I shall analyse the Belgian scheme to combat youth unemployment, in relation to the recipients of that subsidy and to the principle of freedom of movement for workers.

**The tideover allowance as a 'social advantage'**

22. According to the case-law of the Court of Justice, [7] 'social advantages' are 'all those 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'.

23. Over the years the Court has taken the view that the following are examples of social advantages for the purposes of Article

6 — The Court asked the Commission to state 'whether the two charges are limited in scope to children who are the dependants of Community migrant workers established in Belgian territory where such children are seeking their first job'.

7 — See, *inter alia*, Case C-310/91 *Schmid* [1993] ECR I-3011 and Case 249/83 *Hoeckx* [1985] ECR 973.

7(2) of the Regulation: interest-free childbirth loans granted by a credit institution incorporated under public law, on the basis of guidelines and with financial assistance from the State, to families with a low income with a view to stimulating the birth rate; [8] a social benefit guaranteeing minimum income for old people; [9] a social benefit guaranteeing in general minimum subsistence for those who have insufficient income and are unable to increase it; [10] the possibility for a migrant worker of obtaining permission for his unmarried companion to reside with him, where that companion is not a national of the host Member State; [11] assistance granted for maintenance and training with a view to the pursuit of university studies leading to a professional qualification; [12] birth and maternity benefits paid in cash [13] and invalidity allowances. [14]

24. The tideover allowance granted by Belgian legislation to young people seeking their first job is also a social advantage as defined by Article 7(2) of the Regulation. This was expressly confirmed by the Court in its judgment in *Deak*. [15]

25. The question submitted for a preliminary ruling by the Cour de Travail, Liège, in *Deak* related to the same allowance, which was then withheld by the Office National de l'Emploi from Mr Deak, a young man of Hungarian nationality, the son of an Italian who herself was a migrant worker residing in Belgium. The allowance was withheld on the specific ground that the young man seeking his first job was of non-Community nationality.

26. The Court of Justice, accepting the Commission's views, considered that the Belgian administration's refusal to grant the allowance was not contrary to Regulation No 1408/71 [16] (the measure to which the Belgian court's question related) but that, on the contrary, that allowance constituted a social advantage under Regulation No 1612/68.

27. The reasoning by which that conclusion was reached in the judgment in *Deak* was as follows:

— according to settled case-law, the term 'social advantage' used in Article 7(2) of Regulation No 1612/68 refers to all advantages which, whether or not linked to a contract of employment, are gener-

8 — Case 65/81 *Reina* [1982] ECR 33.

9 — Case 261/83 *Castelli* [1984] ECR 3199 and Case 157/84 *Frascogna* [1985] ECR 1739.

10 — *Hoeckx*, cited above, and Case 122/84 *Scrivner* [1985] ECR 1027.

11 — Case 59/85 *Reed* [1986] ECR 1283.

12 — Case 39/86 *Lair* [1988] ECR 3161.

13 — Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817.

14 — *Schmid*, cited in footnote 7.

15 — Case 94/84 [1985] ECR 1873.

16 — Regulation No 1408/71 of the Council on the application of social security to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

ally 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;

— it is also settled case-law [17] that the principle of equal treatment laid down in Article 7 of Regulation No 1612/68 is also intended to prevent discrimination against descendants of a worker who are dependent on him;

— a worker anxious to ensure for his children enjoyment of the social benefits provided for by the legislation of the Member States for the support of young persons seeking employment would be induced not to remain in the Member State where he had established himself and found employment if that State could refuse to pay the benefits in question to his children because of their foreign nationality.

28. Consequently, according to *Deak*, 'under Article 7 of Regulation No 1612/68 a Member State cannot refuse to grant the dependent children of a worker who is a national of another Member State the benefits provided under its legislation for young persons seeking work, on the grounds that those children are nationals of another State.'

29. It is true, as the Belgian Government contends, that the *Deak* judgment did not go so far as to examine the requirement that young people seeking employment must have completed their education in a teaching establishment in that country as a precondition for receipt of the allowance in question. Such an analysis was not relevant to that case, since Mr Deak had indeed completed his secondary education in Belgium at a teaching establishment meeting the prescribed requirements and therefore his lack of a Community nationality was the sole ground for the withholding of the allowance.

30. What is important in my view is that two inferences may be drawn from *Deak* which are relevant to this case:

(a) there is no doubt that the allowance in question is a social advantage within the meaning of Article 7 of the Regulation;

(b) the grant or withholding of that advantage to young people seeking their first job, who are descendants of Community

17 — Case 32/75 *Cristini* [1975] ECR 1085 and Case 63/76 *Inzirillo* [1976] ECR 2057.

migrant workers, [18] cannot be affected by considerations relating to their nationality.

**Discrimination on grounds of nationality regarding the availability of the allowance**

31. On examination it does not seem that, in terms, the Belgian provisions governing the allowance involve discrimination relating to the nationality of its recipients. The latter are identified by reference to a factor which, in the abstract, would appear unconnected with nationality, namely the fact that they completed their studies in an educational establishment run, subsidized or recognized by the Belgian State or any of its communities.

32. In order to classify those provisions from the legal point of view and decide whether they conflict with Community law it is, however, necessary to see whether, despite their appearance of neutrality, they involve disguised discrimination on grounds of nationality to the detriment of migrant workers and their descendants.

33. The case-law of the Court of Justice concerning discrimination on grounds of nationality deriving from the various rules or administrative practices of the Member States is well known. Briefly, it makes it clear that the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. [19]

34. As far as the subject-matter of these proceedings is concerned, the prohibited restrictions must be deemed to be both direct and indirect or disguised restrictions, that is to say those which, although ostensibly neutral, favour young nationals in search of employment and at the same time operate to the detriment of foreign descendants of migrant workers, who are excluded from the labour market in exactly the same way.

35. The criteria, which although not appearing to be concerned with 'nationality', in practice have discriminatory effects on migrant workers or in general the citizens of

18 — It is irrelevant whether the children are of full age, since, as stated in Case 316/85 *Lebon* [1987] ECR 2811, paragraph 13, and repeated in *Schmid*, cited above, descendants of a worker who are of full age and are dependent on him may invoke the right to equal treatment guaranteed by Article 7(2) to claim a social benefit provided for by the legislation of the host Member State.

19 — The leading case is Case 152/73 *Sotgiu* [1974] ECR 153, paragraph 11.

other Member States, include the requirement that the children must reside in the host State as a precondition for the availability of certain social advantages.

36. Such a condition is contrary to Community law, for which reason the Court of Justice found it necessary to declare void Article 73(2) of Regulation No 1408/71, which adopted the residence of children as one of the criteria for determination of the legislation applicable to family benefits. [20]

37. In this case, if the children of migrant workers have to complete their secondary education in Belgium, as a precondition for the availability of the tideover allowance, they are in fact being subjected to a prior obligation of residence in order to be entitled to a social advantage at a later stage.

38. That residence requirement, moreover, will not only cover the last part of secondary education — to which the Belgian provisions in question make direct reference — but also, as a rule, the previous academic years. Thus, in general, only young people who have followed a number of earlier courses in an educational establishment in Belgium will be able to satisfy the Belgian secondary education requirements. [21]

39. According to the Belgian Government, the onus of proof falls on the Commission, which should show — not merely assert — that the number of Belgian young people who meet that requirement is 'proportionally much greater' than that of young people from other Member States.

40. I do not share that view. On the contrary, I consider that little explanation and few statistics are needed for it to be inferred that the students who complete their secondary education in educational establishments in Belgium are, in the majority, young Belgians. [22]

41. Whilst it may be true that on occasions the Court of Justice has resolved disputes

20 — Case 41/84 *Pinna* [1986] ECR 1.

21 — The fact that some students in Belgian educational centres cross the frontier to attend them is of little relevance in view of the small number involved.

22 — Moreover, Article 43(1) of the Royal Decree of 25 November 1991 on 'foreign workers and stateless persons' provides that Article 36 (governing the tideover allowance) applies to foreigners only under an international convention and to nationals of the countries listed in the Law of 13 December 1976 on the approval of bilateral agreements on the employment of foreign workers in Belgium.

concerning alleged discrimination on grounds of nationality by comparing proportions of national workers and migrant workers affected, [23] or even by accepting statistical evidence, [24] it is usual to focus on the potentially unfavourable impact which the national measures, as such, have on non-nationals.

42. For that purpose, it is possible to apply by analogy the same considerations as those mentioned by the Court of Justice in its judgment in *Schumacker* of 14 February 1995, [25] in relation to discrimination of another kind, also on grounds of nationality, disguised by use of the criterion of residence, [26] in which it stated '[n]on-residents are in the majority of cases foreigners'.

43. In those circumstances, the children of migrant workers who, for linguistic, family or other reasons, have received their secondary education in their countries of origin, and are seeking their first employment, will encounter an obstacle to reintegration with their family in the latter's host country: the possibility of obtaining employment in that country will be considerably reduced for them in view of the preference accorded, on recruitment, to young people (of whom the majority are Belgian) who have completed their studies in a Belgian educational establishment and are therefore in receipt of the tideover allowance.

44. That dissuasive effect on the children logically rebounds on to the parents — migrant workers — who will find themselves deprived of one of the social advantages normally available to the children of Belgian families. [27] Such workers, whose children have completed their secondary education in their country of origin and are seeking employment, will find it more difficult to go to a Member State which withholds from their descendants something which it grants to the children of national workers: a tideover allowance, which also carries with it preference as regards access to certain jobs.

45. Consequently, the contested provisions give rise to a barrier to the free movement of migrant workers within the Community since, by virtue of an ostensibly neutral or

23 — Case C-279/89 *Commission* v *United Kingdom* [1992] ECR I-5785, paragraph 42.

24 — Case 143/87 *Stanton* [1988] ECR 3877, paragraph 9.

25 — Case C-279/93 [1995] ECR I-225. To the same effect, but in relation to the requirement that the deductible social contributions had to have been made in Belgium, see the judgments in Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305.

26 — That case involved national legislation which drew a distinction, based on the criterion of residence, whereby non-residents were denied certain tax advantages which were, however, granted to those resident within the national territory.

27 — The fact that some of the children of migrant workers may have completed their secondary education in Belgium, having lived there with their parents, does not alter the fact that there is discrimination. As the Court of Justice held in its judgment in Case 20/85 *Roviello* [1988] ECR 2805, discrimination is not compensated for or eliminated merely because it adversely affects some, but not all, migrant workers.

objective condition, the Belgian rules at issue give rise to discrimination on grounds of nationality, either indirect or disguised, favouring Belgian nationals to the detriment of migrant workers who have not completed their secondary education in Belgium.

**The repercussions of the Kuyken judgment on this case**

46. The Belgian Government has contended, from the outset, that the judgment of the Court of Justice in *Kuyken* [28] shows that the contested domestic provisions are in conformity with Community law and that consequently there are no discriminatory effects.

47. The unemployment allowance mentioned in the preliminary question which gave rise to that judgment was governed by Article 124 of the same Belgian Royal Decree of 20 December 1963, cited earlier. In that case the allowance applied for by Mr Kuyken, a Belgian national who had completed his secondary education in Belgium, was withheld because five years had elapsed between his obtaining the relevant diploma (1971) and the date on which he applied for the allowance (1976), a period one year longer than that prescribed for the purpose by the Belgian legislation.

48. The issue in those proceedings was whether the studies undertaken by Mr Kuyken in the Netherlands, after obtaining his secondary education diploma, could be treated as if they had been followed in a Belgian educational establishment and be taken into account in calculating the period laid down by the Decree of 20 December 1963 for the purposes of granting the unemployment allowance.

49. The Court's judgment stated, essentially, [29] that neither the Treaty nor the provisions of Regulation No 1408/71 required the Member States, for the purposes of the award of unemployment benefits for former students who had never been employed, to treat studies completed in another Member State as though they had been completed in an establishment provided, recognized or subsidized by the competent State.

50. The *Kuyken* judgment approached the problem from the point of view of Regulation No 1408/71, in relation to its provisions on unemployment (Articles 67, 69 and 71). Starting from the premiss that an unemployed student who has never been in

28 — Case 66/77 [1977] ECR 2311.

29 — See, in particular, paragraph 23.

employment and has never been treated as an employed person is not entitled to unemployment benefits in his own country, it held that such a person was likewise not entitled to the rights conferred by Regulation No 1408/71.

51. Finally, that judgment declared Articles 48 to 51 inapplicable to the position of a person who, during his period of studies, was not insured under a social security scheme set up for the benefit of employed persons. [30]

52. I consider that the particular circumstances of the *Kuyken* case, which accounted for the approach taken in the judgment, are not such as to cause the present case to be decided in favour of the Kingdom of Belgium.

53. In the first place, the Court was not able at that time to examine the question from the viewpoint of the rights of migrant workers and their descendants since Mr Kuyken fell into neither of those categories. And it is precisely the latter aspect which the Commission's present application seeks to have examined.

54. Secondly, the regulation analysed in that case was concerned with the application of social security schemes to employed persons moving within the Community. This action, on the other hand (in so far as it refers to the allowance as such), is concerned not with the availability of a traditional social security benefit but rather with that of a 'social advantage', affecting only the dependent descendants of migrant workers.

55. Thirdly, the issue here is not to determine whether or not studies completed in one Member State are to be treated as though they were completed in another Member State in connection with entitlement to certain unemployment benefits. The operative part of *Kuyken* specifically referred only to that point.

56. Finally, it must be pointed out that the judgment in *Deak*, delivered nine years after *Kuyken*, widened the latter's apparently narrow scope. I have already indicated that *Deak* — in contrast to *Kuyken* — did not confine itself to holding that Regulation No 1408/71, the only measure mentioned in the national court's question, did not affect the plaintiff, with the necessary consequence of the preliminary question having to be answered in the negative.

57. On the contrary, *Deak* took the analysis of discrimination on grounds of nationality further and held that, from that viewpoint, the Belgian tideover allowance constituted a 'social advantage' which had to be made available to all workers and their descen-

30 — Paragraph 22.

dants, without any restriction based on nationality.

58. It may be true that the Court of Justice, in *Kuyken*, had stated that '[t]he file shows that the condition of completion of a period of study in an educational establishment provided, recognized or subsidized by the Belgian State applies without distinction to Belgian nationals and to the nationals of other Member States'. [31]

59. However, I believe that if that statement is construed — as it may reasonably be — as excluding the existence of discrimination on grounds of nationality, that interpretation must be regarded as having been corrected subsequently by the *Deak* judgment. As a last resort, in the event of its not being so construed, I suggest that the Court take the opportunity provided by this action to confirm expressly that a requirement of that kind, imposed on migrant workers as a precondition for the award of assistance or a social advantage for their children who are seeking employment, is discriminatory.

**The programmes to combat unemployment**

60. The Commission, as guarantor of freedom of movement for workers, considers that the contested Belgian provisions, in so far as they relate to employment programmes (that is to say Articles 81 to 84 of the Law of 22 December 1977 in conjunction with Articles 2 to 9 of Royal Decree No 123 of 30 December 1982), encroach upon that freedom since they encourage recruiting employers to give preference to the recipients of the allowances provided for in Article 36 of the Royal Decree of 25 November 1991 (tideover allowances), [32] the majority of whom are Belgian citizens.

61. At this stage, I must repeat that the Commission's second charge is concerned not with the children of migrant workers but with young citizens of any Member State who are seeking employment. The Commission has made that point abundantly clear.

62. As I said when considering the first charge, the Commission at no stage contends that the Belgian tideover allowances should be made available to young citizens of all the Member States: on the contrary, it confines its attention to the children of migrant workers established in Belgium. The fact is, however, that the employment programme called in question by the Commission links the State incentives to the employment by undertakings of precisely those people who are in receipt of the tideover allowances.

31 — Paragraph 21.

32 — The Commission's application terms those allowances 'allocations de chômage' (unemployment allowances). It does so in paragraph 1 and in the final wording of the forms of order sought, which coincides with that used in the operative part of the reasoned opinion.

63. Taken together, those two factors give rise to a somewhat paradoxical situation since the Commission concedes that young Community citizens (with the exception of the children of migrant workers) may be denied the tideover allowance but it does not concede that the same applies to the immediate consequence thereof which, under the Belgian legislation, consists in the availability of certain incentives conducive to their being given employment.

64. If what it seeks is the avoidance of a general obstacle to freedom of movement for those who have no work, it would seem more logical to claim that the allowance should extend to all classes of young people seeking their first job, whether or not they are the children of migrant workers, since only then would they, under the Belgian legislation, qualify for access to the special employment programmes.

65. In other words, if the recipients of the tideover allowance are given the benefit of a particular incentive conducive to their recruitment, and the Commission considers that incentive to be contrary to Community law but at the same time does not want the allowance to be extended to every young Community citizen seeking employment, perhaps the most logical approach would be to require the Kingdom of Belgium to amend its legislation so as to eliminate entirely the link between the grant of the allowance and the special employment programmes for specific undertakings or projects.

66. There is another paradox in the Commission's thesis in that it objects to the Belgian policy of encouraging the employment of 'wholly unemployed persons on benefit' not in its entirety but only to the extent to which a category of those unemployed persons comprises recipients of the tideover allowance, the majority of whom are young Belgian nationals.

67. The Commission, I repeat, has at no time contended that the incentives given by the Belgian State to encourage businesses to recruit unemployed persons in receipt of the allowance are contrary to Article 48 of the Treaty. At the hearing it expressly conceded that the Belgian system of incentives for the employment of 'wholly unemployed persons on benefit' was entirely lawful.

68. Subject to that preliminary observation, and as the defendant Government emphasizes in its observations, this second paradox consists in the fact that Community workers who have gone to Belgium in search of work, after being employed in their own countries, will only be entitled to the benefits available under the Belgian scheme for 'wholly unemployed persons on benefit' if:

(a) either they meet the temporal requirements of that scheme, for which purpose the aggregation provided for in Article

67 of Regulation No 1408/71 requires them to have completed in Belgium, most recently, a previous period of employment or insurance; [33]

(b) or to have in their own country an unemployment benefits scheme similar to the Belgian one and retain the right thereto under the conditions and within the limits laid down for the 'export' of benefits provided for in Article 69 of Regulation No 1408/71.

69. Where that is not the case, as will frequently occur, such workers do not come within the category of recipients of the unemployment allowance in Belgium and, to the same extent, since they are not 'wholly unemployed persons in receipt of a subsidy' under Belgian law, there are no incentives to encourage their employment. However, the Commission appears to accept that consequence of the application of the domestic Belgian legislation.

70. In my opinion, the Commission has not taken sufficient account of the fact that the Belgian provisions to combat unemployment, appearing under the heading 'Special temporary category' in the budget law for 1977-1978, [34] belong to the sphere of social and employment policy which, as Community law stands, is within the competence of the Member States and is an area in which they enjoy a considerable degree of latitude. [35]

71. Where national unemployment legislation includes an instrument designed to combat a particular type of unemployment, it is logical that it will apply to a clearly defined category of people, limited to the most needy occupational or social group. The choice of that aim and the legal or budgetary means for its attainment, as well as selection of the sectors to benefit, are matters for each Member State in the absence of any Community rules purporting to harmonize national provisions in that area.

72. There would be discrimination on grounds of nationality contrary to the Treaty if the Belgian legislation excluded from the programmes to combat unemployment those 'wholly unemployed persons on benefit' who, being established in Belgium and having fulfilled the requirements to be regarded as such by that legislation, were foreigners. That is not the position in this case. [36]

33 — It is not necessary to examine here the two possible exceptions to that rule set out in Article 67(3) of Regulation No 1408/71, cited in footnote 16.

34 — See paragraph 7, above.

35 — See Case C-229/89 *Commission* v *Belgium* [1991] ECR I-2205, paragraph 22, and Case C-444/93 *Megner* [1995] ECR I-4741 and Case C-317/93 *Nolte* [1995] ECR I-4625.

36 — The Belgian Government recognizes in its defence (Part II) that EEC citizens who have been employed in Belgium are entitled to the unemployment allowance on the same basis as Belgian nationals.

73. I do not believe, however, that as Community law stands the Belgian Government is obliged to 'open up' its special programmes to combat unemployment to an unemployed person from any Member State who is looking for work if he does not meet the specific requirements [37] laid down by the Belgian legislation in defining the term 'unemployed' or in establishing the general requirements to be met by the potential beneficiaries of such programmes.

74. In other words, I consider that national legislation may encourage, by the use of special programmes to combat unemployment, the preferential recruitment of unemployed persons belonging to various categories (long-term unemployed, those over a particular age, those who have undergone industrial retraining, and so on) and may also limit the grant of such incentives to those unemployed persons who meet certain objective conditions, including that of having previously been in receipt of certain unemployment benefits. To the extent to which, to gain access to the latter, the national legislation observes the guidelines of Regulation No 1408/71, the resultant exclusion should not be regarded as contrary to Community law.

75. In my opinion, if the Member States can limit their unemployment benefits by granting them only to those unemployed persons who meet the requirements of Articles 67 and 69 of Regulation No 1408/71, they can, for the same reasons (which, essentially, concern the division of powers between the Community and the Member States), limit to that category of unemployed persons the grant of certain allowances which, in this case, merely constitute another form of the abovementioned unemployment benefits. [38]

76. That social policy is based on the principle that it is preferable to use public funds (including those deriving from social security) actively for employment creation, rather than merely distributing them passively in the form of cash handouts. [39]

37 — Including the completion of a specified prior contribution period, to which the Community system of 'aggregation' mentioned earlier may possibly apply.

38 — As I stated earlier, the incentives which the Belgian State provides by means of the contested provisions to encourage the recruitment of unemployed persons in that category involve its assuming responsibility for all or part of the wages and social charges relating to their employment.

39 — It is thus a question of taking a positive and preventive approach to unemployment insurance by means of measures to encourage apprenticeships, vocational training and, where appropriate, the re-engagement of the unemployed, that is to say their reintegration into the world of work. Council Regulation (EEC) No 2084/93 of 20 July 1993 amending Regulation (EEC) No 4255/88 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Social Fund (OJ 1993 L 193, p. 39) states, in the same spirit, 'it is necessary to take account explicitly of persons exposed to exclusion from the labour market and to render more flexible the eligibility criteria for categories that are already eligible; ... owing to the seriousness of the unemployment situation, Community action will relate predominantly to ... combating long-term unemployment and facilitating the integration into working life of young people ... will remain priorities ... it is necessary to provide for a widening of that action, especially employment aids which may, for example, take the form of aids for geographical mobility, *recruitment* and the creation of self-employed activities ...' (emphasis added).

77. Those measures may be legitimately directed towards those same unemployed persons who had previously been in receipt of direct allowances paid in cash under the social security system. Thus, they involve the same public funds, directed towards the same categories of persons and pursuing the same aim. The only change is in the way in which funds are allocated: in this case they are channelled in such a way that the State does not hand the allowance to the unemployed worker but 'invests' it, helping to create a job which that worker will take. [40]

78. If it is accepted, from the Community point of view, that public funds may be properly used for that purpose and that a State may therefore encourage the preferential recruitment of certain categories of recipients of unemployment allowances, to the exclusion of those workers from other Member States who do not, for that purpose, satisfy the conditions laid down by Articles 67 and 69 of Regulation No 1408/71, the same conclusion must be held to be applicable, *a fortiori*, to young people from other Member States who have completed their secondary education and still have no job. Otherwise, they would receive less favourable treatment, as regards freedom of movement for workers, than that which they would receive by application of the Community legislation to unemployed persons who had previously been employed and received unemployment benefits in their countries and moved to another Member State.

79. Since I suggest that only some of the applicant's pleas in law be upheld, the parties should each bear their own costs pursuant to Article 69(2) of the Rules of Procedure.

## Conclusion

80. Consequently, I suggest that the Court of Justice partially uphold the Commission's action, and therefore:

(1) Declare that by requiring the children of migrant workers, as a precondition for their entitlement to the tideover allowances provided for by Article 36 of

40 — The Court of Justice has consistently held that the classification of an allowance as a social security benefit does not depend on the way in which it is financed. See Case C-45/90 *Paletta* [1992] ECR I-3423, paragraph 18.

the Royal Decree of 25 November 1991 on unemployment, to have completed their secondary education in an establishment subsidized or approved by the Belgian State or by one of its communities, the Kingdom of Belgium has failed to fulfil its obligations under Articles 3 and 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community;

(2) For the rest, dismiss the action;

(3) Order the parties to bear their own costs.