OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 8 November 1990 *

Mr President,
Members of the Court,

1. By decision of 14 June 1989, the High Court of Justice, Queen's Bench Division, referred to the Court for a preliminary ruling two questions on the interpretation of provisions of Community law relating to the free movement of workers in connection with a situation in which a national of a Member State wishes to take up employment in the territory of another Member State. More specifically, the national court asks about the legal conditions attaching to the residence of the person concerned in the State in which he is seeking employment.

2. In the main proceedings, Mr Antonissen, a Belgian national, applied to the High Court of Justice, Queen's Bench Division, for judicial review of a decision of the Immigration Appeal Tribunal dismissing his appeal against a decision taken by the Secretary of State on 27 November 1987 to deport him. Mr Antonissen, who had entered the United Kingdom in October 1984, had not yet worked there when, in September 1986, he was arrested on a charge of unlawful possession of cocaine and possession of that drug with intent to supply. On 30 March 1987 he was sentenced to imprisonment by the Liverpool Crown Court. The deportation order was made while he was still serving his sentence. Mr Antonissen was released from prison on parole on 21 December 1987. He left the United Kingdom on 14 June 1989.

3. The outcome of the main proceedings turns on Community law in so far as the powers of the national authorities in the field of deportation are subject to special limitations as regards nationals of other Member States with a right of residence by virtue of the freedom of movement of workers. It is pointed out in particular that whereas the right to stay in a Member State for the purpose of employment as provided for in Article 48(3)(c) of the EEC Treaty may be subject to 'limitations justified on grounds of public policy, public security or public health', [1] it follows from Article 3 of Council Directive 64/221/EEC of 25 February 1964 [2] that measures taken on grounds of public policy or of public security, which may consist of deportation measures, must be 'based exclusively on the personal conduct of the individual concerned' and that 'previous criminal convictions shall not in themselves constitute grounds for the taking of such measures'. Consequently, leaving aside certain aspects of Mr Antonissen's situation which were taken into account by the Secretary of State in ordering his deportation, it must be determined to what extent a national of a Member State who is looking for employment in the territory of another Member State may rely on the protective provisions included among the rules governing the free movement of workers.

4. In its first question, the national court asks essentially whether it is contrary to the

* Original language: French.

1 — Article 48(3) of the EEC Treaty.

2 — Council Directive 64/221/221 of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition 1963-1964, p. 117).

provisions of Community law governing the free movement of workers for the legislation of a Member State to provide that a national of another Member State who entered the first State in order to look for employment there may be required to leave the territory of that State (subject to appeal) if after six months he has failed to find employment. It was under such legislation that the relevant deportation order was issued. The second question seeks to establish what weight the national court should attach to the declaration contained in the minutes of the meeting of the Council at which Directive 68/360/EEC was adopted.[3] As we shall see, the second question will be answered as a matter of course during the discussion to which the first question will give rise.

5. Mere exegesis of the wording of Article 48 of the EEC Treaty might lead one to doubt whether a national of a Member State seeking employment in the territory of another Member State has the right to stay there by virtue of the freedom of movement of workers. According to Article 48(3)(a), the right to move freely within the territory of Member States to which Article 48(3)(b) refers is for the purpose of accepting 'offers of employment actually made', which is not the same as looking for employment. However, the Community legislature, which is responsible for bringing about, by progressive stages, freedom of movement for workers,[4] does not seem to have kept to such an exegesis, which would in fact have given rise to a quite narrow, quite unrealistic conception of the circumstances in which a person obtains employment.

3 — Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (Official Journal, English Special Edition 1968 (II), p. 485).

4 — Article 49 of the EEC Treaty.

6. Article 1(1) of Council Regulation No 1612/68 of 15 October 1968[5] provides that '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'. Article 5 of the regulation, which, like Article 1, also occurs in Title I 'Eligibility for employment', provides that 'a national of a Member State who seeks employment in the territory of another Member State shall receive the same assistance there as that afforded by the employment offices in that State to their own nationals seeking employment'. It can be noted already at this stage that nationals of a Member State seeking employment in another Member State are included in the set of persons referred to in Article 1 of Regulation No 1612/68 as having the 'right to take up an activity as an employed person' in the territory of another Member State. According the second recital in the preamble, that regulation sets out to adopt 'provisions (...) to enable the objectives laid down in Articles 48 and 49 of the Treaty in the field of freedom of movement to be achieved'. Consequently, the case of a national of a Member State seeking employment in the territory of another Member State comes under the free movement of workers. This being the case, does such a national have a right to *reside* in the territory of the State where he is seeking employment?

7. The clear wording of Regulation No 1612/68, quoted above, suggests that a national of a Member State who is seeking employment in the territory of another

5 — Regulation No 1612/68/EEC of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

Member State may claim the benefit of Article 48(3)(b) of the Treaty, that is to say, 'move freely' within that territory. But can the right to move be equated with a right to stay? As far as the Treaty itself is concerned, the right to move within the territory in question is set out in Article 48(3)(b), quoted above, whilst the right to stay appears in Article 48(3)(c) and is stated to be *for the purpose of employment.* Regulation No 1612/68 does not, *on the face of it,* enable Community nationals seeking employment to be counted among those who qualify for *that* right to stay. Those provisions of the regulation that refer to seeking employment are to be found, as has already been mentioned, in Title I, which is expressly entitled '*Eligibility* for employment' whereas *actual employment* is dealt with in Title II. However, it must not be overlooked that the question of the movement and residence of persons qualifying for free movement by virtue of the freedom of movement of workers is the subject of special rules in the shape of Directive 68/360, cited above.[6] Does this measure of secondary legislation contain more precise details concerning the point at issue?

8. According to the first recital in the preamble thereto, Directive 68/360 has the following aim: 'measures should be adopted for the abolition of restrictions which still exist concerning movement and residence within the Community, which conform to the rights and privileges accorded by [Regulation No 1612/68] to nationals of any Member State who move in order to pursue activities as employed persons (. . .)'. Article 1 of the directive provides that 'Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of nationals of the said States (. . .) to whom Regulation No 1618/68/EEC applies'. Consequently, Community nationals seeking employment, who fall, as I have already mentioned, within the field of application of Title I of Regulation No 1612/68, should, *prima facie,* be concerned by the conditions 'as provided in [the] Directive'. Is this the case in practice?

9. According to Article 3 of the directive, 'Member States shall allow the persons referred to in Article 1 to enter their territory simply on production of a valid identity card or passport'. There is no doubt that Community nationals seeking employment in another Member State have the right to enter that State as provided in Article 3. One aspect of their right of movement has crystallized. But what of the actual right of residence?

10. Article 4 of the directive provides that 'Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3'; as 'proof' of this right of residence a 'residence permit' is to be issued. Paragraph 3 of Article 4 draws a distinction, as regards the documents to be produced for the issue of a residence permit, between the 'worker' and 'members of the worker's family'. The 'worker' must be able to produce 'the document with which he entered [the] territory' and 'a confirmation of engagement from the employer or a certificate of employment'. By definition, a person seeking employment is not in a position to produce a confirmation of engagement or a certificate of employment; it appears therefore that such a person

6 — See note 3.

cannot benefit under Article 4, that is to say, by virtue of Article 6 of the directive, for a right of residence valid for at least five years and automatically renewable. Does this mean that the directive embodies no right of residence for a Community national seeking employment?

11. Article 6(3) of the directive provides for a more limited right of residence where a worker is employed for a period exceeding three months but not exceeding a year, in which case the host Member State is to issue a 'temporary residence permit, the validity of which may be limited to the expected period of the employment'. Moreover, under Article 8 'Member States shall, without issuing a residence permit, recognize the right of residence in their territory' of certain categories of persons in short-term employment or residing some of the time in the territory of a Member State other than the Member State in which they are employed or engaged in seasonal work. However, as far as the right of residence is concerned, no provision of the directive covers Community nationals seeking employment.

12. Consequently, perusal of the legislation suggests that a Community national seeking employment in the territory of another Member State is entitled, having regard to the express provisions of Regulation No 1612/68, to move within the territory of that State, as provided in Article 48 of the Treaty, and that Directive 68/360 formally sanctions his right to enter that territory. In contrast, no provision of that directive, or of any other piece of Community legislation, has formally provided for a right of residence for such a Community national. Must the conclusion be reached that such a right does not exist?

13. This conclusion has not commended itself to the Court of Justice. Without ruling directly and specifically on Community nationals' right to reside in a Member State where they are seeking employment, it has, incidentally but quite unequivocally, referred to the existence of such a right. Thus, in its judgment of 8 April 1976 in *Royer*,[7] the Court stated as follows:

'the right of nationals of a Member State to enter the territory of another Member State and *reside* there for the purposes intended by the Treaty — in particular *to look for* or pursue an occupation or activities as employed or self-employed persons (. . .) — is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation'.[8]

More recently in the judgment of 23 March 1982 in *Levin*[9] the Court stated that

'. . . the rights deriving from the principle of freedom of movement for workers and more particularly the right to enter and *stay* in the territory of a Member State are (. . .) linked to the status of a worker or of a person pursuing an activity as an employed person *or desirous of so doing*'.[10]

14. In view of those judgments, it would appear to me to be incorrect to argue, as the German Government does, that a Community national seeking employment in

7 — Judgment of 8 April 1976 in Case 48/75 *Royer* [1976] ECR 497

8 — Paragraph 31, my emphasis

9 — Judgment of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035

10 — Paragraph 9, my emphasis.

another Member State has no right to stay in its territory. In my estimation, the Court has accepted that such a right exists in principle, but without specifying its formal source. In view of the apparent silence of Directive 68/360, it is more tempting to seek that source in Articles 1 and 5 of Directive 1612/68 in conjunction with Article 48(3) of the Treaty. It also still has to be determined whether the right of residence in question to which the Court has referred is embodied in the right to move within the territory or whether it is in some way a necessary corollary thereto. But another observation has to be made, too: the right of residence of a Community national seeking employment in another Member State which has been held to exist in principle has not been expressly dealt with by detailed rules of Community law, specifically in secondary legislation. In particular, neither the Treaty nor Directive 68/360 formally specify whether the right of residence in question is subject to a time-limit. Indeed, precisely this question is raised by the national court. Consequently, the Court must take the process of legal analysis beyond the mere letter of the legislation mentioned so far and beyond the concise words of its previous judgments.

15. It is at this point that the question arises as to the potential role, in the interpretation which the Court is asked to give, of the declaration in the minutes of the Council meeting at which Regulation No 1612/68 and Directive 68/360 were adopted.

16. The declaration, which is reproduced in the judgment in *Levin*,[11] cited above, under the heading 'Facts and Issues', reads as follows:

'the persons referred to by Article 1 (of Directive 68/360), that is to say nationals of a Member State who move to another Member State in order to find employment, have a minimum period of three months in which to do so; if at the end of that period they have not found employment, their stay in the territory of that other State may be terminated. However, if during that period the abovementioned persons become dependent on public support (social assistance) in that other State they may be requested to leave its territory'.

17. That declaration was made by the Council, not by one or more Member States. It was adopted unanimously by the members of the Council. On 17 April 1989 the Council authorized its production in the High Court of Justice, Queen's Bench Division, but it had already been taken into account by the Court of Justice in the judgments in *Levin*[12] and *Lebon*.[13]

18. When that declaration was adopted, the proceedings of the Council were governed by 'provisional rules of procedure'. According to the first paragraph of Article 18 thereof the principle was that 'the deliberations of the Council shall be covered by the obligation of professional secrecy', while the second paragraph of that article made it clear that the Council might 'authorize the production of a copy or extract from its minutes for use in legal proceedings'.[14] Those provisions were taken over verbatim in Article 18 of the Rules of Procedure adopted by the Council on 24 July 1979.[15] In contrast, the provisions of Article 7(1) of the latter rules, according to which minutes are to be drawn up of

11 — At p. 1043.

12 — Cited above.

13 — Judgment of 18 June 1987 in Case 316/85 *Centre public d'aide sociale de Courcelles* v *Lebon* [1987] ECR 2811.

14 — French text reproduced in '*Le droit de la Communauté économique européenne*', M. Waelbroeck, J. V. Louis, D. Vignes, J. L Dewost, J. Amphoux, J. Verges, Vol. 9, Annexes, p. 20, ULB 1979.

15 — OJ 1979 L 268, p. 1.

each meeting of the Council, indicating in general in respect of each item on the agenda the decisions taken and 'the statements made by the Council and those whose entry has been requested by a member of the Council or the Commission', are new inasmuch as the provisional rules of procedure to which I have averted made no mention of statements of the Council. Accordingly, the Rules of Procedure in force when the regulation and the directive of 15 October 1968 were adopted gave no particular status to declarations of the Council, simply dealing with the confidential character of the minutes in which such declarations were entered. Consequently, it appears difficult to infer therefrom the essential information as to the legal effects of the declaration in question.

19. It seems that more precise indications as to the scope of declarations entered in minutes of the Council may be derived from the case-law of the Court.

20. In the judgment of 18 February 1970 in *Commission* v *Italy*[16] the Court stated with regard to a statement made by Italy on the occasion of the adoption of the so-called 'Acceleration Decision' of the Council of 26 July 1966 that:

'The scope and effect of the [said decision] must be assessed in the light of its terms and therefore cannot be restricted by reservations or statements which might have been made in the course of drawing up the measure concerned'.[17]

21. The judgment of 7 February 1979 in the *Vincent Auer* case[18] gave the Court the opportunity to state its position, this time not on a unilateral declaration of one of the Member States represented on the Council, but on a declaration of the Council as a whole. After stating that it followed from the general structure both of the General Programmes drawn up in implementation of Articles 54 and 63 of the Treaty and of the directives issued in implementation of those programmes, that the field of application, *ratione personae*, of the measures for securing freedom of establishment and freedom to provide services was to be determined on each occasion without distinction based on the nationality of those concerned, the Court added that, in so far as the practice of the profession of veterinary surgeon was concerned, this idea was

'fully confirmed by a declaration concerning the definition of the persons covered by the directives, which was recorded in the minutes of the meeting of the Council during which the directives relating to the mutual recognition of diplomas and the co-ordination of provisions laid down by law, regulation or administrative action in respect of the activities of veterinary surgeons were adopted'.[19]

22. In the judgment of 15 April 1986 in *Commission* v *Belgium*,[20] the Court had to answer the following argument put forward by the defendant Member State. Since, according to a statement inserted in the Council minutes when Directive 77/187/EEC of 14 February 1977[21] was adopted, Member States undertook to inform the Commission of the categories of employee excluded from the scope of the first subparagraph of Article 4(1) of the directive pursuant to the second subparagraph of that provision, and the

16 — Judgment of 18 February 1970 in Case 38/69 *Commission* v *Italy* [1970] ECR 47.

17 — Paragraph 12.

18 — Judgment of 7 February 1979 in Case 136/78 *Ministère Public* v *Vincent Auer* [1979] ECR 437.

19 — Judgment in *Vincent Auer*, cited above, paragraph 25.

20 — Judgment of 15 April 1986 in Case 237/84 *Commission* v *Belgium* [1986] ECR 1247.

21 — Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ 1977 L 61, p. 26).

defendant Member State had notified the exclusion of certain categories of employee without the Commission's having reacted thereto, it could not subsequently be accused of having in fact excluded categories of employee which did not satisfy the conditions laid down for such a measure in the second subparagraph of Article 4(1). The Court stated in response that, as it had consistently held,

'the true meaning of rules of Community law can be derived only from those rules themselves, having regard to their context'

and that meaning 'cannot therefore be affected' by a statement such as that invoked by Belgium. [22]

23. In the light of these few judgments it seems to me to be difficult to take the view that a declaration of the Council entered in the minutes of one of its meetings has as a matter of principle no role to play in the interpretation of provisions of Community law. Moreover, the express reference made in the recent judgment of 23 February 1988 in *United Kingdom* v *Council*[23] to 'preparatory measures' [24] and to 'preparatory documents' [25] testifies to the fact that there is indeed scope, in the interpretation of a measure of secondary legislation, for consideration of documents which prepared the way for or accompanied the adoption of the measure. Having said this, the conditions for and limits to reference to declarations of the Council entered in the minutes of a Council meeting have to be defined.

22 — Case 237/84, paragraph 17.

23 — Judgment of 23 February 1988 in Case 131/86 *United Kingdom* v *Council* [1988] ECR 905.

24 — Paragraph 26.

25 — Paragraph 27.

24. An initial limit seems in my view to have to be set with a view to complying with the concept of preparatory documents. I consider that a declaration entered in the Council's minutes can constitute a guide for interpretation only when the declaration was made on the occasion of the adoption of a measure of secondary legislation which the Council has the power to adopt and only as regards that measure. This is because, under the Treaties, no competence is conferred on the Council to give interpretations of the treaties. Of course, for the purposes of its own legislative activity it falls to it to interpret the treaties in order to determine the context of its action. But it cannot transform the means into an end so as to formulate interpretations which would subsequently be regarded as binding on the Court of Justice or on the national courts. Besides, I consider that a declaration made by the Council after the event concerning a measure of secondary legislation adopted in the past could not claim the credit which attaches solely to documents *preparatory* for the adoption of such a measure and which presupposes that those documents antedate, or were concurrent with, the measure.

25. A second limit, which is clearly identified in the Court's case-law, lies in the fact that a declaration entered in the minutes of the Council cannot be relied on where its terms conflict or are incompatible with the clear wording of the measure of secondary legislation to which it relates. This aspect does not, I feel, need developing at any greater length.

26. A third limit ensues from the respect which is due, under the law relating to the Community institutions, for the formal requirements laid down by the Treaties for the drawing up and the adoption of measures of secondary legislation. It means that it is impossible for the Council to supplement, by means of a declaration entered in its minutes, provisions of the

relevant measure of secondary legislation. Such a declaration cannot constitute a parallel means of legislation. This would, indeed, be the outcome if the content of such a declaration were to be allowed to be added to the provisions of a regulation or a directive or to fill a *lacuna* therein, if it were to be accepted that it was possible for rules to appear in the minutes of the Council which the Council omitted to set out in the legislative measure itself. That which is to be legislated on must be set out in the measure which is adopted and must satisfy the formal requirements laid down for adopting that measure in the field concerned. Failing this, it would be tantamount to allowing the Council to legislate in a particular field partly in accordance with the formal requirements laid down for the valid adoption of a regulation or a directive — which are definitely subject to review as to their legality — and partly dispensing with those rules by merely entering a declaration in its minutes. This is all the more inconceivable in my view because in principle Council minutes are secret and only the Council can authorize their production in national judicial proceedings.

27. I therefore conclude that a declaration of the Council entered in its minutes can constitute a guide for the interpretation of provisions of a measure of secondary legislation the drawing up or adoption of which gave rise to that declaration, only in so far as the aim is to clarify the meaning of those provisions which are *ex hypothesi* ambiguous or equivocal. In contrast, such a declaration cannot serve to fill a *lacuna* in the provisions. It must be added, in order to take account of the judgment in the case of *Vincent Auer*, cited above, that such a declaration cannot be the only reference and that it must be used in conjunction with others, in the sense that it can be verified whether it confirms the interpretation ensuing in other respects from the tenor of the provisions in question and from their context.

28. Analysed thus, the declaration referred to in the national court's second question does not seem to me to afford the slightest useful guidance for determining the extent to which Community law provides for a right of residence on the part of Community nationals seeking employment in the territory of another Member State. As far as the *principle* of such a right of residence is concerned, either the declaration means that by fixing a three-month time-limit the Member States intended implicitly to recognize that right — and that merely confirms that which has been in no doubt since the Court's judgments in *Royer* and *Levin*, cited above, — or it reflects the Member States' wish to arrange a mere concession, and that seems at odds with the Court's case-law. As for the *rules* governing residence set out in the declaration, they do not clarify the provisions of Directive 68/360, since it contains no provisions relating to that right of residence. In fact, the declaration embodies, or rather sets out to embody, exhaustive legal rules on the residence in question, thereby filling a gap in the Community rules which do not provide, whether in the Treaties or in secondary legislation, for a time-limit or for any limit as to financial cover by way of public assistance. This form of 'parallel legislation' by declaration entered in the minutes cannot, even by way of interpretation, be taken into account. Consequently, I take the view that the reply to the second question referred by the national court should be that the declaration in question cannot be taken into account in order to determine the circumstances in which a Community national may stay in a Member State where he is seeking employment.

29. If reference may not be made to that declaration, it must be observed that, even after recourse to the resources of interpretation, no provision of Community law can

be regarded as governing the right of residence which the Court has recognized as existing in principle. Must it therefore be concluded that this situation leaves each Member State free to settle these rules in its territory as far as it is concerned? The case-law of the Court seems to answer this question unambiguously in the negative. In the field of the free movement of workers, the Court stated in the judgment of 19 March 1964 in *Hoekstra (née Unger)*[26] that the terms 'worker' and 'activity as an employed person' may not be defined by reference to the national laws of the Member States but have a Community meaning. The Court repeated that view in the judgment in *Levin* (cited above), adding that:

'If that were not the case, the Community rules on freedom of movement for workers would be frustrated, as the meaning of those terms could be fixed and modified unilaterally, without any control by the Community institutions, by national laws which would thus be able to exclude at will certain categories of persons from the benefit of the Treaty'.[27]

If, in this case, one were to allow the rules on residence to be determined by national laws this would be tantamount in the final analysis to leaving it to national laws to define the very content of the status of a Community national seeking employment in the territory of another Member State, and that content would, of course, be liable to vary considerably from one country to another. Since the time after which one could no longer rely on being a Community national seeking employment for the purposes of the rules on the free movement of workers would be peculiar to each Member State, the point would be reached where persons in identical situations might be treated differently as regards the enjoyment of rights arising under the freedom of movement of workers; in other words, there would be variation from one Member State to another in the field of application *ratione personae* of the relevant Community rules, contrary to the case-law of the Court. The fact that, as the Court was informed at the hearing, a number of Member States apply the same minimum time-limit of three months, thus complying with the *political* agreement represented by the declaration adopted by the Council, does not alter in that respect the *legal* analysis resulting from the case-law. Besides, the application by the United Kingdom of a minimum time-limit of six months seems to me to provide a perfect illustration of the risks which I mentioned of a right of residence with a non-uniform content, albeit coming under a fundamental freedom under the Treaty, that of the free movement of workers. Consequently, reference to national laws is absolutely inconceivable in the field with which we are concerned.

30. For all that, is it possible, given that there are no Community rules and that it may not be left to national law to determine them, to take the view that the right of residence of a Community national seeking employment in the territory of another Member State is absolutely unlimited? That does not seem to me to be possible, since such a solution would create inconsistencies in the overall legal régime for the free movement of workers. As the United Kingdom has rightly pointed out, the intention or result of Community law

26 — Judgment of 19 March 1964 in Case 75/63 *Hoekstra* v *Bedrijfsvereniging Detailhandel* [1964] ECR 177.

27 — Case 53/81, cited above, paragraph 11.

cannot be to confer greater rights on a person who has never been employed in the State in question than on the person who is employed there on temporary or seasonal work. Article 6(3) of Directive 68/360, cited above, provides that the right of residence of a worker employed for a period exceeding three months but not exceeding a year in the service of an employer in another Member State can be limited to the expected duration of that employment. Article 8 of the directive also gives rise to limitations as to the right of residence of certain categories of worker in view of the temporary or seasonal nature of their employment. In those circumstances, it appears hard to hold that a person who has no employment at all has a right of residence which is subject to no limits of any sort.

31. We have now reached the conclusion that it is necessary to limit to some extent the right of residence of a Community national seeking employment. But how can that limitation be determined? Would it be conceivable for the Court itself to determine the maximum time-limit beyond which a Community national who has not yet found employment in another Member State may no longer rely on a right of residence there? Rejecting the idea of fixing a time-limit *ex nihilo*, which falls within the competence of the legislature, it may be asked whether the approach which the Court adopted in the judgment of 11 December 1973 in *Lorenz*[28] might not afford a solution. Asked about the effects, in the context of the prior control of State aid, of delay on the part of the Commission in submitting its comments on aid plans notified to it or in initiating the procedure for finding the plans incompatible with the common market, or of failure on the Commission's part to take such action, the Court pointed out that according the wording of Article 93 of the Treaty the Commission had to be informed of aid plans 'in sufficient time to enable it to submit its comments' and that if it considered the plan to be incompatible with the common market it was bound to initiate the contentious procedure 'without delay', since the Member State concerned could not put the proposed measures into effect until that procedure had resulted in a final decision. The Court went on to observe that whilst the provisions intended to allow the Commission sufficient time to define its attitude on an aid plan, there was no regulation specifying the period of time involved. The Court then observed that the Member States could not unilaterally terminate the preliminary period which was necessary for the Commission to fulfil its role. However, the Commission could not be regarded as acting with proper diligence if it omitted to define its attitude within a *reasonable period.* The Court concluded that it was appropriate to be 'guided by Articles 173 and 175 of the Treaty which, in dealing with comparable situations, provide for a period of two months'.[29] When that period had expired, the Member State concerned might implement the plan after giving prior notice to the Commission.

32. However, in this case application of similar reasoning would come up against a major difficulty owing to the absence of any clearly comparable situation to be used as the basis, as the period provided for in Articles 173 and 175 were used to determine the reasonable time imposed on the

28 — Judgment of 11 December 1973 in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471

29 — Paragraph 4.

Commission under Article 93. The right of residence of a Community national seeking employment in another Member State does not lend itself readily to useful comparisons in the field of Community law. Reference, as suggested by the United Kingdom, to the three-month period laid down in Article 69 of Regulation No 1408/71 [30] affords a good illustration of this. No real similarity, or even analogy, exists between the rule laid down in that provision, under which the entitlement to unemployment benefits under the legislation of a Member State of a person who goes to another Member State to seek employment is to continue for three months, and the limit which should be applied to the right of residence of a person seeking employment in the territory of another Member State. I cannot find the necessary legal connection between the right to unemployment benefit in the Member State of origin and the right to stay in the host State. I would point out, moreover, that persons with no entitlement to unemployment benefit in their Member State of origin — because, for instance, they are seeking their first jobs — may perfectly well be entitled to reside in the host State as persons seeking employment. Moreover, the three-month period referred to in Article 8(1)(a) of Directive 68/360, to which the United Kingdom also refers, does not seem a more convincing guide. The fact that the Member States, without issuing residence permits, recognize that workers pursuing an activity as employed persons have a right of residence where the activity is not expected to last for more than three months does not, to my mind, provide logical support for a solution under which a person who has been seeking employment in another Member State for three months and a day no longer has the right to stay there.

33. I would add that it would appear to me to be difficult to accept the reference to the three-month period made in the Council minutes. Apart from the fact that it would be inconsistent to end up by giving legal effects to a declaration which, as I have already stated, seems to me to be devoid of such effects, it must in fact be appreciated that, even regarded as a simple factual element, the time-limit in question could give rise to dispute. Is it in fact relevant to refer to a time-limit envisaged by six Member States in 1968 when in the enlarged European Community of the late nineteen-eighties the labour market was considerably different than it was in the late 1960s. The average time spent in looking for employment has probably increased a great deal between 1968 and the present day. To adhere to a three-month period as envisaged by the Member States in 1968 would mean treating this fact as negligible. For my part, I am unwilling to do that.

34. Consequently, there are no incontestable references which would enable a concept of a reasonable period to be adopted without abandoning the task of specifying it completely to the Member States. Admittedly, in previous judgments the Court has also referred to reasonable periods without specifying them by means of comparisons with periods lawfully and expressly laid down. For instance, in the judgment of 7 July 1976 in *Watson and Belmann* the Court stated, as regards the period within which the arrival in a Member State of nationals of another Member State must be reported, that

'the provisions of the Treaty are only infringed if the period fixed is *unreasonable*'. [31]

30 — Council Regulation No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (consolidated version in OJ 1983 L 230, p. 8).

31 — Judgment of 7 July 1976 in Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 19, my emphasis.

But where, as in this case, it is a question as to whether or not a person *qualifies* for the right of residence provided for *in principle* by Community law and, not, as in the case of *Watson and Belmann*, a question of the extent to which *rules governing the exercise of that right* which do not directly call in question the right of residence conferred by the Treaty may be applied under national legislation, it seems to me that the legal disadvantages of referring to limits, the reasonableness of which is more in the nature of a wish than a definition, are excessive. In reality the national legislature would be left with the barely disguised task of determining the extent of the right of residence of persons seeking employment, which would mean the Court's turning its back on its former statements about the need for a Community definition of the field of application of the rules on the free movement of workers.

35. Admittedly, by making the reasonableness of the time-limits laid down by national law subject to its supervision, the Court could seem not to be leaving it purely and simply to the Member States to determine the extent of the right of residence in question. In that way, there would be a minimal Community control over the fixing of the national time-limits. However, such a solution would only constitute a slight and *ex post facto* attenuation of leaving the matter to national law, which is contestable in principle. As far as it can, the Court must, through its interpretations, enable the national authorities and courts to identify the guarantees afforded by Community law with certainty and assurance. Interpretations which would be liable to lead to protracted uncertainty must be avoided as far as absolutely possible, since obviously they would make lasting inroads into the requisite uniformity of the application of Community law.

36. Consequently, one may legitimately ask whether the only outcome compatible with the present state of Community legislation and justified by the heed which must certainly be paid to the development of the employment market over the last two decades might not lie in the adoption of a *realistic* approach to the time-limit for the right of residence. Would not an approach be possible whereby this right is vested in a Community national seeking employment in the territory of another Member State *so long as* he is *actively, persistently and seriously* engaged in this endeavour? In that light, repeated failure to make himself available to take up offers corresponding to his personal abilities and skills might, for example, be taken into account by the national authorities so as to prompt them to ask him to leave the country, without his entitlement under the host State's legislation to public assistance being able to justify such a measure independently of the considerations connected with the fact that he is not actually looking for employment.

37. The approach which I have just adumbrated would be consonant to some degree with the approach taken in the case-law, as exemplified by the judgments in *Levin*, cited above, and in *Kempf*[32] and by the Court's recent decision in *Bettray*,[33] in which for the purpose of defining the field of application of the rules on the free movement of workers the Court stressed that they covered only the pursuit of an *effective* and *genuine* activity. In so doing, the Court in fact asks the national authorities and courts specifically to consider the genuineness of the activities of persons claiming the benefit of being classed as a worker. When it comes to seeking employment, the right of

32 — Judgment of 3 June 1986 in Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741

33 — Judgment of 31 May 1989 in Case 344/87 *Bettray* v *Staatssecretaris van Justitie* [1989] ECR 1621

residence should in some way be linked with 'effectively and genuinely seeking an effective and genuine activity'. Would there be serious obstacles to adopting such an analysis?

38. The first which comes to mind is the risk of persons moving to another Member State under cover of looking — in actual fact, not very actively — for employment in order to receive the social benefits provided for under the legislation of the host State. I shall say forthwith that that risk appears to me to be substantially limited. The judgment of 18 June 1987 in *Lebon* seems to have clearly circumscribed the scope of the principle of equality of migrant and national workers with regard to social advantages by stating that that equal treatment as laid down by Article 7(2) of Regulation No 1612/68 operates 'only for the benefit of workers and does not apply to nationals of Member States who move in search of employment'.[34] This appears to mean that although persons seeking employment in another Member State may enter its territory by virtue of the freedom of movement of workers and stay there, they cannot claim the equal treatment conferred in connection with that freedom as regards social advantages. Therefore, even if account is taken of a recent tendency to put a broad construction on the concept of the field of application of the EEC Treaty and, as a result, on the effect of the principle of non-discrimination set out in Article 7 thereof,[35] as Community law stands it does not seem that a person seeking employment in the territory of another Member State may claim, on the strength of that right, equal treatment as regards the social advantages provided for under the legislation of that State. Consequently, the possibility of an abuse, from the point of view of social advantages, of a protracted stay in another Member State does not seem to be capable of paying a determining role in shaping the solution to be adopted in this case.

39. It must be added that if the national authorities check that employment is being sought seriously, effectively and consistently, this should enable them in any event to identify those persons who are not genuinely looking for employment. Such persons could not claim a right of residence, even if they recently arrived in the host State, or as a result abuse the social advantages accruing under national law.

40. Admittedly, I do not deny that there may be disadvantages, from the point of view of the simplicity of the measures to be put into effect in practice, in adopting a solution based on a realistic approach, necessitating consideration *in concreto* of the situation of the Community national in question rather than a formal, 'across-the-board' solution, based on the straightforward expiry of a time-limit. However, it must be borne in mind that such checks would not constitute a complete novelty for the national administrative authorities. Very often legislation providing for unemployment benefit makes continued payment of benefit conditional on the recipient's actually seeking employment and introduces supervisory measures to that end. Such a control procedure is mentioned moreover in Article 69(1)(b) of Regulation No 1408/71.

41. Moreover, I take the view that even if it were to involve the national authorities in more exertion than that involved in simply

34 — Judgment of 18 June 1987 in Case 316/85 *Centre public d'aide sociale de Courcelles* v *Lebon* [1987] ECR 2811, point 3 of the operative part.

35 — Cf. the judgment of 2 February 1989 in Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195.

consulting a calendar, the solution of a right of residence which is linked to seriously and effectively seeking employment would not be subject to major objections. Should it be preferred over a solution whereby the Member States would be left to fix a reasonable period, subject to a measure of review by the Court of Justice on a reference from the national courts? I think so. I take the view that, in the absence of Community rules on residence in the case of persons seeking employment in another Member State, the realistic approach is the one which diverges the least from the present state of Community law, particularly in view of the Court's case-law concerning the necessarily Community nature of the concepts determining the field of application of freedom of movement of workers. Moreover, this solution affords the — in my opinion, not inconsiderable — advantage of not ignoring the reality of the employment market in the host State. Consequently, I propose that the Court should adopt this approach.

42. Before bringing this Opinion to a close, it is necessary to advert to certain recent legislative developments relating to the right of nationals of one Member State to reside in another Member State. On 28 June 1990, the Council adopted three directives on, respectively, the 'right of residence',[36] the 'right of residence for employees and self-employed persons who have ceased their occupational activity'[37] and the 'right of residence for students'.[38] The first directive provides that Member States are to grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law, provided that they are covered by sickness insurance and have sufficient resources. The validity of the residence permit issued to such nationals may be limited to five years on a renewable basis; the Member States may, when they deem it necessary, require revalidation of the permit at the end of the first two years of residence. The other two directives also make the right of residence which they introduce dependent on the person concerned having sufficient resources to avoid his 'becoming a burden on the social security system of the host Member State'. The date for complying with these directives is 30 June 1992. Consequently, the first directive arranges for a right of residence of appreciable duration without its being necessary for the person concerned to provide evidence of economic activity. Moreover, it is noted that the three directives make the possession of sufficient resources a *conditio sine qua non* for the right of residence.

43. This latest position of the Council with regard to three particular categories of Community nationals does not appear to me to enable the requirements laid down by Community law with regard to another category, namely persons seeking employment, to be prejudged. Admittedly, as regards the latter category, the declaration adopted by the Council on 15 October 1968 did refer, at least by implication, to a requirement of sufficient resources. However, as we have seen, that declaration could not be taken into consideration for the purposes of interpreting Community law with regard to the right of residence at issue in this case. I can see no legal reason for introducing, on basis this time of the directives of 28 June 1990, a requirement that Community nationals with respect to whose right of residence the Council has as yet omitted to lay down any rules should have sufficient resources. Besides, it would not be possible for the Court to lay down a requirement that a

36 — Directive 90/364/EEC, OJ 1990 L 180, p. 26

37 — Directive 90/365/EEC, OJ 1990 L 180, p 28.

38 — Directive 90/366/EEC, OJ 1990 L 180, p. 30.

person seeking employment should have sufficient resources to avoid becoming a burden on the social assistance system of the host State without raising a number of problems of compatibility with the Court's statement in the judgment in *Kempf*, cited above, to the effect that the Community scope of the concepts determining the extent of the field of application of the free movement of workers would be jeopardized if the enjoyment of rights conferred under the principle of freedom of movement for workers were 'precluded by the fact that the person concerned has had recourse to benefits chargeable to public funds and created by the domestic legislation of the host State'.[39] Moreover, the recent Council directives on the right of residence do not appear to me to warrant any change in the approach taken in this Opinion.

44. In the final analysis, I propose that the Court should rule as follows:

'(1) A national of a Member State who is seeking employment in the territory of another Member State is entitled, by virtue of the freedom of movement of workers, to reside there so long as his search for employment is effective and serious; the authorities of the host Member State may not rely on the mere expiry of a time-limit prescribed by national law in order to ask him to leave the territory unless they have found that he is not genuinely seeking employment.

(2) The declaration adopted by the Council on 15 October 1968 cannot provide indications which the national court can take into consideration in order to determine the rules governing the right of residence referred to in point 1 above.'

39 — Case 139/85, cited above, paragraph 15.