not required of its own nationals in order to take part in such courses constitutes discrimination by reason of nationality, which is prohibited by Article 7 of the Treaty.

O'Keeffe Pescatore

Bosco Koopmans Bahlmann

Delivered in open court in Luxembourg on 13 July 1983.

P. Heim
Registrar

A. O'Keeffe
President of the Fourth Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 26 JANUARY 1983 [1]

Mr President,
Members of the Court,

Two questions for a preliminary ruling are put to the Court by the Juge de Paix [Cantonal Court] of Brussels in relation to the payment of the special enrolment fee described as "fee for foreign students" required from students who are not Belgian or Luxembourg nationals.

The facts are as follows:

Mr Forcheri, an Italian national, works in Brussels. His wife who is also Italian and without occupation lives with her husband in Belgium. She attended a course of instruction for three years at the Institut Supérieur de Sciences Humaines Appliquées — École Ouvrière Supérieure [Higher Institute of Applied Sciences — Higher School of Labour Studies], which mostly trains its students to become social workers. The institute is a further educational establishment for social advance, approved and subsidized by the Belgian Ministry of National Education. To follow the course Mrs Forcheri had to pay, in addition to the enrolment fees paid by Belgian students, the sums of BFR 19 995 for the 1979/80 academic year and BFR 21 723 for the 1980/81 academic year representing the enrolment fee for "foreign students".

1 — Translated from the French.

The fee is a *supplementary* enrolment fee required in Belgium since the 1976 academic year in principle for all students not of Belgian nationality or whose parents are not resident in Belgium. It is charged for each school or university year in all educational establishments subsidized by the Belgian public authorities whether they belong to the official educational system or the independent educational sector and whatever the level of studies they provide, in other words from kindergarten to university.

As regards further education a distinction must be made between university education and non-university education, for the legal system relating to the payment of the fee differs in each case.

For university education the obligation to pay the fee for foreign students arises from Article 85 of the Law of 5 January 1976 supplementing the Law of 27 July 1971 on the financing and supervision of university institutions. That provision is to the effect that in principle students of foreign nationality must contribute to the ordinary costs of running the university institution in which they are enrolled. The fee thus represents that contribution. It is added to the study fees of some BFR 11 000 required from all students. The amount varies according to the university and type of studies from BFR 70 000 to BFR 200 000 per annum. It has been pointed out that the universities have been reluctant to charge the fee and have allowed its payment by instalments.

There are however exceptions enjoyed *inter alia* by students of Luxembourg nationality, those whose parents live in Belgium and students having the status of refugees. Other foreign students are exempt up to a maximum of 2% of the total number of Belgian students "duly taken into account the previous academic year in a plan of studies". [1]

In non-university further education the principle of the payment of the fee is contained in Laws fixing the budget for national education but the details are determined by circulars from the Ministry of National Education. The circular in force at the material time was that of 8 June 1978,[2] applicable not only to further education but also to kindergarten, primary, secondary and special education. It is to be observed that the list of categories exempted pursuant thereto differs from that applicable to university education. It includes in particular the children of foreign officials working in Belgium with SHAPE, NATO, the European Communities and those of staff of embassies established in Belgium as well as students whose spouses are resident in Belgium, are in gainful employment there and pay taxes to the Belgian treasury.

For 1981/82 the circular of 12 May 1981,[3] the scope of which is confined to non-university establishments of further education, assimilates to Belgian students not only students whose parents are

1 — Law of 5 January 1976, Article 85 (3) (1) (f).
2 — No E/EC/CH/2.6.
3 — References ES/RS.

officials of the Communities but also spouses of officials. We learnt at the hearing that for the university year 1982/83 a circular to the same effect was issued on 7 July 1982.

It thus appears that today the spouses of officials of the Communities are exempt from the payment of the fee in non-university further education but not in university education. The difference in treatment is due to the fact that the ministerial circulars do not apply to university institutions; the latter are therefore bound to require payment of the fee or otherwise lose the corresponding part of the subsidy granted to them by the State.

I draw the Court's attention to the fact that, unless obviously coming within a category already exempt, the officials themselves working in Belgium who are not of Belgian or Luxembourg nationality are subject, for their own studies, to the payment of the fee in all kinds of further education without distinction.

Mr and Mrs Forcheri considered that the payments which they had to make for Mrs Forcheri as the fee for foreign students were contrary to Community law. They first of all made approaches to the Belgian administration. The latter replied that exemption from the fee could not be granted to the spouses of officials of the European Communities as the latter did not pay taxes to the Belgian Treasury.[1] They thereupon summoned the Belgian State and the Institut Supérieur de Sciences Humaines Appliquées — École Ouvrière Supérieure — before the Juge de Paix of the Fourth Canton of Brussels for a declaration that the fee was not lawfully due and an order that the defendants refund the sums paid together with default interest.

During the proceedings the parties agreed to ask that two questions be submitted to this Court for a preliminary ruling. The Juge de Paix acceded to the request and by judgment dated 11 December 1981 stayed the proceedings and referred to this Court two questions for a preliminary ruling pursuant to Article 177 of the EEC Treaty.

The first and main question concerns the interpretation of:

(1) the principle of non-discrimination between nationals of the Member States of the Community which is embodied *inter alia* in Article 7 of the EEC Treaty and, in the context of movement for workers, in Articles 48 and 49 of the EEC Treaty;

(2) Article 12 of Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community; and

(3) Article 12 of the Protocol on the Privileges and Immunities of the European Communities.

The second question which is in the nature of an alternative relates to the interpretation of the second paragraph of Article 13 of the same protocol.

Before answering those questions it seems to me proper to determine whether or not the payment of an enrolment fee in an establishment of further education in a Member State comes within the scope of the Treaty.

1 — Letter of 7 May 1980 from the private office of the Minister for National Education.

Put thus in a general way and independent of the status of the student concerned as a citizen of a Member State the question calls, in my opinion, for more than one answer.

It is apparent from the judgment in the case of *Casagrande* of 3 July 1974 that the effective exercise of the powers of the Community may be hindered by the effects of national measures adopted in a sphere, such as that of education and training policy, in respect of which the Treaty has not as such conferred power upon the Community institutions.[1] In so far as such national measures constitute an obstacle to the full exercise of the powers properly delegated to the Community they can no longer, in my opinion, have effect except in so far as they observe the Community legal system.

Obviously, full exercise of the powers of the Community presupposes that each of its institutions operates as well as possible, and such operation is itself influenced by the attitude of the Member States with regard thereto. As the Court held in the judgment of 15 September 1981 in Case 208/80 the Member States are bound "not to take measures which are likely to interfere with the internal functioning of the institutions of the Community". That duty is an illustration of the obligation which the Members have accepted in Article 5 of the Treaty to "facilitate the achievement of the Community's tasks" and "abstain from any measure which could jeopardize the attainment of the objectives of this Treaty".[2]

The obligation imposed on the spouses of officials of the Communities working in Belgium to pay the fee cannot be regarded as a measure likely to impede the internal functioning of the institutions of the Community. In that respect it seems to me to be both too limited and too indirect. It is true the obligation may appear in itself to be discriminatory since it applies on the basis of the nationality of a student who is the spouse of an official, but it cannot have a sufficiently perceptible effect upon the functioning of the institutions to be reasonably regarded as an obstacle. Accordingly it loses in my opinion the only possible point of any connection with Community law. It is necessary to exclude any consideration of the similar situation of migrant workers which requires the interpretation of provisions without relevance to the present case.

To decide otherwise would moreover give rise to the further scarcely negligible inconvenience of creating another discrimination, this time between the official himself, who is required, let us remember, to pay the fee in all kinds of further education, and his spouse who would be exempt.

The Commission has raised the problem of recruitment. It observes that the freedom to recruit their officials on the widest possible geographical basis appears to constitute one of the fundamental principles of the functioning of the Community institutions. That need is the reason for numerous

1 — Case 9/74 *Casagrande* v *Landeshauptstadt München* [1974] ECR 779 and in particular paragraph 6 thereof; in another sphere: the judgment of 14 January 1982 of the Third Chamber in Case 65/81 *Reina* [1982] ECR 33, paragraph 15 at pp. 44 and 45.

2 — Case 208/80 *Lord Bruce of Donington* v *Aspden* [1981] ECR 2205, paragraph 14 at p. 2219.

provisions in the Staff Regulations and the Protocol on the Privileges and Immunities. Can it nevertheless be considered that the payment of a fee for the spouse of an official desirous of pursuing further education is likely to inferfere with the unity of the family or force the spouse to leave home to pursue education at less cost elsewhere?

I do not think seriously that such considerations are likely to restrict the number of applicants for posts in the Community.

For those reasons I propose that the questions put by the Juge de Paix of the Fourth Canton of Brussels should be answered to the effect that there is no rule or principle of Community law to undermine the validity of a national rule providing for the payment of a special enrolment fee for foreign students in establishments of further education which has to be paid *inter alia* by the spouses of officials of the Communities having the nationality of certain Member States and residing together by reason of the officials' duties in the service of the Community.