OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 8 March 1989 *

My Lords,

1. In this case referred from the Council of State (Raad van State) of the Netherlands for a preliminary ruling, the Court is asked to decide, in essence, whether a person becomes a worker for the purposes of Community law by virtue of undertaking a form of paid employment under the State's social policy programme of training and rehabilitation for work of those who, by reason (usually) of physical or mental disability, are unable to compete in the normal labour market.

2. As appears from the order for reference and from the observations submitted to the Court, the plaintiff in the main proceedings, a German national, entered the Netherlands on 15 July 1980. In 1981 and 1982 he applied to the Dutch authorities for a residence permit; the second application relied in part on the fact that he was undergoing treatment at a drug rehabilitation centre. In 1982 the applications were refused; the plaintiff appealed and the court stayed the appeal in order to allow the plaintiff's continued treatment at a drug rehabilitation centre. In November 1982 the court dismissed the appeal but the plaintiff remained in the Netherlands.

3. On 10 February 1983 the plaintiff obtained a decision from the Netherlands Ministry of Social Affairs and Work Opportunities assimilating him, for the purpose of the law on the provision of work for social reasons (Wet Sociale Werkvoorziening, which I shall refer to as the Social Employment Law), to a Netherlands national, the scheme set up by that law being normally confined to Netherlands nationals. The decision was expressly stated to be without prejudice to the provisions of the law on the residence and employment of aliens. On 18 April 1983 the plaintiff commenced temporary employment with the Ergon undertaking in Eindhoven under the auspices of the Social Employment Law and that temporary employment tacitly became a contract of employment of indefinite duration as from 18 June 1983. His counsel stated at the hearing that he was still employed there.

4. On 4 November 1983, the plaintiff applied again for a residence permit on the ground that he was engaged in work as an employed person. When this was refused on the same day, the plaintiff appealed to the State Secretary who, after consulting the 'Advisory Committee on Aliens', dismissed the appeal on 14 January 1985. Thereafter, the plaintiff appealed on 5 February 1985 to the Raad van State whose reference to this Court was lodged on 6 November 1987.

* Original language: English.

5. The question referred is:

'Is Article 1(1) of Regulation (EEC) No 1612/68 of 15 October 1968 — laying down the right of a national of a Member State, irrespective of his place of residence, to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State — to be construed as meaning that that right is also enjoyed by a national of another Member State who is carrying out work in the territory of the Netherlands within the framework of the Wet Sociale Werkvoorziening in a case where:

(a) he cannot be regarded as having previously been a worker within the meaning of Article 48(1) of the Treaty establishing the European Economic Community, other than in the context of such a social job scheme; and

(b) he is not one of the persons referred to in Title III of Regulation (EEC) No 1612/68 of 15 October 1968?'

6. It emerges clearly from the order for reference that what is in issue in this case is the right of residence. The issue arises in the following way. Under Article 48 of the Treaty freedom of movement for workers is to be secured within the Community. That freedom is to entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and is to include the right, subject to limitations justified on grounds of public policy, public security or public health, to accept offers of employment actually made, to move freely within the territory of Member States for this purpose, to stay in a Member State for the purpose of employment and to remain there after the termination of that employment.

7. Pursuant to Article 49 of the Treaty, those provisions were implemented *inter alia* by Regulation (EEC) No 1612/68 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) and Council Directive 68/360/EEC of the same date on the abolition of restrictions on movement and residence within the Community for workers of the Member States and their families (Official Journal, English Special Edition 1968 (II), p. 485).

8. Regulation (EEC) No 1612/68 has four parts. Part I is headed 'Employment and workers' families' and Part II 'Clearance of vacancies and applications for employment'. Title I of Part I is headed 'Eligibility for employment', and Article 1 reads as follows:

'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.

(a) 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.'

9. Directive 68/360/EEC, which makes detailed provision for the exercise of the right of residence, is expressed by Article 1 to apply to nationals of Member States to whom Regulation (EEC) No 1612/68 applies. The effect of the question referred is therefore whether a national of a Member State has the right of residence in another Member State exclusively by virtue of his employment under a scheme such as that provided for by the Social Employment Law. If he does have that right, then by the provisions of Article 4 of the directive he is entitled to the residence permit provided for by that article on production of the document with which he entered the territory and a confirmation of engagement from the employer or a certificate of employment.

10. In order fully to comprehend the purport of the question it is necessary to consider in some detail the scheme set up by the Social Employment Law. It is a social programme designed to maintain, restore or develop the capacity for work of persons who are able to work but who, owing to personal circumstances, are (perhaps only temporarily) unable to work normally. It became clear at the oral hearing that the scope and purpose of the Social Employment Law was narrower than appeared from the order for reference and the written observations submitted to the Court. In particular it is not the same as schemes which enable disabled persons to be employed in normal commercial concerns. The agent of the Netherlands Government made it clear at the oral hearing that such a scheme existed in the Netherlands but under separate legislation.

11. Neither is the Social Employment Law designed for fit workers who are unemployed, whether short-term or long-term. It is intended only for those suffering from such a disability, whether physical or mental, that they cannot, at least for the time being, work normally. Mr Bettray himself, a person who had undergone treatment for drug addiction, is perhaps a very good example of the sort of person for whom the programme was designed.

12. The scheme is implemented in the Netherlands by the local authorities, or communes. It emerged at the hearing that in order to do so groups of communes in each area in the Netherlands have created a total of about 108 projects to provide 'social' employment in the context of the law. The Ergon undertaking in Eindhoven (set up by the commune of Eindhoven and neighbouring communes) at which the plaintiff works is one such. Those undertakings, it appears, are established solely for the benefit of persons unable to work normally, although there is also in each undertaking an administrative staff of persons who do not suffer from any disability and who are responsible for the management of the undertakings.

13. The purpose of each undertaking is not to make profits but to meet the social need of providing work for those who would otherwise be unable to do so. The scheme is very largely financed by central government and by the communes. However, while not actually profit-making, it appears to be the aim of each undertaking to provide participants, within the limits imposed upon it by the law which I will turn to below,

with conditions as similar as possible to normal conditions of employment. That accords with the purpose of the Social Employment Law which is, as stated above, to enable those with particular disabilities to enter or re-enter the labour market.

14. Each undertaking is circumscribed by the Social Employment Law (and regulations made thereunder) as to the activities it may carry out. In particular, the conditions of both the labour market and the market in the goods made may not be improperly affected, and the marketing of the goods produced must not be carried out in such a way as to bring 'social employment' into disrepute.

15. A person wishing to participate in the scheme applies to the local commune which will consider whether he is suitable. If he is accepted, he undergoes a period of two months' probation after which his place is confirmed if he has performed his duties satisfactorily. The employment relationship is with the commune (Article 19), which can also terminate the relationship (Article 28). The commune pays him his wages and it is to the commune he turns in the case of any dispute arising out of his placement on the scheme or the work he performs. However, the contractual relationship is specifically governed by the Social Employment Law itself thereby excluding the participant from the status of employee in the public service or 'ordinary' employee (Article 19). The obligations of the participant include the obligations to perform his work conscientiously and as instructed, to seek to improve his abilities and to cooperate with the authorities in seeking, where appropriate, normal work (Article 21). The wages, working hours and disciplinary measures are laid down by implementing regulations (Article 30).

16. The criteria governing the level of wages are based, provided that the participant receives a certain minimum to provide for his own needs and those of his dependants, on the level of the work carried out and as far as possible reflect equivalent wage levels for similar work in an undertaking operating on the open market but do not reflect the actual amount of work done. The law provides for two categories of participants: A and B. The majority of participants are classified A (as is Mr Bettray) and from them about one-third of the output of a normal worker is expected. The small remainder classified as B are not subject to any such expectation; they are asked to carry out only so much work as is consistent with their well-being.

17. In a nutshell, the Social Employment Law provides a framework for retraining people whose personal difficulties prevent them from seeking normal employment, with a view to their entry or re-entry into the normal labour market. For those — usually in category B — who are unlikely ever to enter the normal labour market it provides a useful therapeutic function.

18. The question then is whether a person becomes a worker for the purposes of Community law by virtue of being employed in such a scheme. The definition of 'worker' has been before the Court on a number of occasions and it is necessary to refer to the case-law on this question even though, for reasons which I will turn to later, I do not think that that case-law can be directly transposed to the unusual circumstances of the present case. The Court has stressed that that term defines the field of application of one of the fundamental freedoms guaranteed by the Treaty and, as such, may not be interpreted restrictively: Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035. In that case the Court held that a person must be regarded as a worker for the purposes of Community law even if he is employed on a part-time basis only and even if his employment yields an income lower than that which is considered as the minimum required for subsistence, provided that he pursues an activity as an employed person which is effective and genuine.

19. The criteria laid down in *Levin* have been clarified and amplified in a series of subsequent decisions. In Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, which was again a reference from the Council of State of the Netherlands, it will be recalled that Mr Kempf worked as a part-time music teacher giving 12 lessons a week and that the Netherlands Government expressed doubts in that case as to whether such work could be regarded as constituting in itself effective and genuine work within the terms of the judgment in *Levin*. The Court, however, found that there was no need to consider that question since the Council of State had itself found that Mr Kempf's work was not on such a small scale as to be purely a marginal and ancillary activity. The Court, in the light of that finding, held that a person in effective and genuine part-time employment did not cease to be a worker for the purposes of Community law merely because the remuneration he derived from it was below the level of the minimum means of subsistence and even though he claimed financial assistance from public funds to supplement that remuneration.

20. The Court stated in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, at p. 2144, paragraph 17 that 'the essential feature of an employment relationship . . . is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.

21. In the judgment of 21 June 1988 in Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] paragraph 23, the Court ruled as follows:

'. . . a national of another Member State who enters into an employment relationship in the host State for a period of eight months with a view to subsequently undertaking university studies there in the same field of activity and who would not have been employed by his employer if he had not already been accepted for admission to university is to be regarded as a worker within the meaning of Article 7(2) of Regulation (EEC) No 1612/68'.

The Court went on, however, to hold (paragraph 27) that the status of worker does not in such circumstances confer the right to an educational grant under Article 7(2) of Regulation (EEC) No 1612/68, since the employment relationship is then merely ancillary to the university studies.

22. The Netherlands Government contends that work carried out under the Social Employment Law cannot be regarded as an effective and genuine activity of the kind envisaged in the *Levin* judgment. The government refers to the special purposes and special characteristics of the Social Employment Law, and relies in particular on the following features.

23. First, the activity is intended to maintain, restore or develop the capacity for work of persons who cannot work under normal conditions. However, it seems to me that, for example, a disabled or handicapped worker who by reason of his disability cannot work under normal conditions but who is none the less engaged by way of employment in an effective and genuine activity must be regarded as a worker for the purposes of Community law, so that this first feature does not take a person outside the scope of the relevant Community provisions. That may well be so, in my view, even if the person in question were permanently disabled and so unlikely to work again, even with rehabilitation and therapy, under normal conditions.

24. Secondly, the Netherlands Government points out that the productivity of participants in the scheme is too low to enable them to be employed in the normal way, that their pay is not dependent on their productivity, and that a very high proportion of the cost of the scheme is met by the public authorities. Again, that does not in my view affect the issue, since it is a commonplace that work schemes of many kinds are subsidized out of public funds — and indeed out of Community funds — for a variety of social and economic purposes.

25. Thirdly, while the government accepts (correctly, in the light of the *Lawrie-Blum* judgment, cited above) that the scheme contains elements of a normal employment relationship, namely carrying out work in return for remuneration under the authority of another person, the government regards those elements as merely the means of achieving the social objectives of the scheme. The measures are measures of a social character, substantially financed by the public authorities for that purpose.

26. That consideration, which was stressed by the agent of the Netherlands Government at the hearing, does, in my view, raise the central issue in this case. If it is right that the elements of the normal employment relationship are indeed merely incidental to the social aims of the scheme, then the activity in question might be regarded as purely 'ancillary', to cite the term used in the *Levin* judgment, to those social aims. True, it still could not be said that the 'activities themselves [were] on such a small scale as to be regarded as purely

marginal and ancillary'. The activity here was substantial. But the *Levin* case was concerned with a normal working relationship while here it could be said that the activity as a whole was in a sense 'ancillary'. Moreover while the Court in the *Brown* case held that Mr Brown was a worker although the employment in question was merely ancillary to his university studies, that ruling again was in the context of a normal working relationship.

27. In that respect it is helpful to refer to the purpose of providing for the free movement of workers. It is, as was stated in the judgment in *Levin*, paragraph 15: '*inter alia* [to promote] throughout the Community a harmonious development of economic activities and [to raise] the standard of living'.

28. It is true that the free movement of workers has wider aims, which are reflected in particular in the preamble to Regulation (EEC) No 1612/68. The third recital is as follows:

'Whereas freedom of movement constitutes a fundamental right of workers and their families; whereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States; whereas the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed.'

29. The recital makes it clear that labour is not, in Community law, to be regarded as a commodity and notably gives precedence to the fundamental rights of workers over satisfying the requirements of the economies of the Member States.

30. Yet, as the language of the recital also makes clear, the concern of the Treaty and of the legislation on the free movement of workers is to ensure equality of access, for all Community citizens regardless of their nationality, to employment opportunities. Those who are not available for access to employment opportunities are not within the purview of those provisions.

31. Support for that view can be found in the language of the Treaty itself which refers in Article 48(3)(a), (b) and (c) to the rights 'to accept offers of employment actually made'; 'to move freely within the territory of Member States for this purpose'; and 'to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action'. The same result follows from the structure and detailed provisions of Regulation (EEC) No 1612/68, including the terms of Article 1 of the regulation, set out above; it will be recalled that Directive 68/360/EEC is expressed to apply to nationals of Member States to whom that regulation applies.

32. Those who are unable to accept offers of employment on the labour market are not therefore, in my view, included within the purpose of the Treaty provisions or the

scope of the legislation. Mr Bettray, a man who had undergone treatment for drug addiction, was not able to work normally. He was accepted into the scheme provided by the Social Employment Law, and this fact shows that he was prevented from working normally. He was not in competition with other workers for employment on the normal labour market. After his retraining is complete, he will, under the terms of the Social Employment Law, be discharged from the scheme and will then be in the position of an ordinary citizen of the Communities, entitled to enter any Member State in order to seek work (see the judgment of 18 June 1987 in Case 316/85 *Centre public d'aide sociale de Courcelles* v *Lebon* [1987]) and entitled to reside in that State if he finds effective and genuine employment.

33. What is significant in the present case is the essentially social nature of the scheme provided by the Social Employment Law. Although the working conditions in the undertakings follow as closely as possible working conditions on the open market, that is done for retraining purposes; the goods produced and the work done are carefully circumscribed so as not to compete improperly with open market goods and work. The scheme is comparable to those, often run by charitable foundations, under which the disabled make or package small household items. These may then be sold, but the purchaser generally buys the items not because he particularly needs them, but in order to contribute to the charity. In this way, the charity can fulfil a double purpose. It raises funds and also provides something for its beneficiaries to do — and those same beneficiaries are also given the chance to feel that they are contributing to their own upkeep. But the work done by the beneficiaries is not intended to contribute to the economic activities of the Community, nor to raise the standard of living; it is purely social and deliberately kept away from the open market. Although the scheme provided under the Social Employment Law is managed by the State and not by a charity, it is nevertheless fulfilling an essentially social objective to which the fact that work is done and goods are provided is purely ancillary. Although, in such schemes, goods may be produced and sold, and the work carried out, in conditions designed to reflect normal working conditions, such activities are not, in my view, of a kind which constitute an effective and genuine activity as envisaged in the *Levin* judgment or in Article 48 of the Treaty.

34. In such cases as these, the relationship between the individual and the work is the reverse of that in the normal employment situation. In the normal employment situation, the purpose is the production of goods or services, and the job is a means to that end. Moreover the identity of the worker is not generally material. But in schemes such as those I have mentioned, it is the person who is central, and the work is created and adapted to suit his needs. The job in itself is of no economic significance, but is created to fulfil the aims of the scheme. The position might well be different if participants in such schemes were placed in a normal commercial enterprise. But in the present case, the enterprise itself is

created to provide simulated conditions of employment for the benefit of the participants.

35. Before concluding, I should mention the plaintiff's alternative submission that he must be regarded, if not as a worker, then as benefiting from a privileged status as a recipient of services. Although no question upon that issue has been referred by the national court, it may be appropriate to point out that an issue might arise whether the plaintiff falls within the Chapter of the Treaty on services (Articles 59 to 66) by reason of being a recipient of services and so has, if not a right of residence as a worker, at least the rights provided for by Article 4(2) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community of nationals of Member States with regard to establishment and provision of services (Official Journal 1973, L 162 p. 14), which reads as follows:

'The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.'

However, the Treaty provisions on services are confined by the terms of Article 60 to services which are normally provided for remuneration, so that those provisions do not seem applicable here. Moreover those provisions do not contemplate stays of a very lengthy or indefinite duration. In its judgment of 5 October 1988 in Case 196/87 *U. Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159, the Court held that an activity pursued on a permanent basis or without any foreseeable limit in time cannot be governed by the Community provisions regarding the provision of services, and ruled that Articles 59 and 60 of the Treaty do not cover the situation where a national of a Member State goes to reside in the territory of another Member State and establishes his principal residence there in order to provide or receive services there for an indefinite period. For those reasons, the plaintiff's alternative submission would in my view have to be rejected.

36. Reverting to the central issue, I would emphasize that the facts of this case are unusual and that the conclusion which I reach is therefore of limited scope. It is not decisive, in my view, whether a person is unable, by reason of some disability, to work in a normal working environment since if he were enabled to work in such an environment by the necessary facilities being provided there, he might still be regarded as a worker. Nor is it decisive whether the scheme is a voluntary one or whether it is substantially financed by the public authorities. It is not decisive whether the participant is employed by the concern itself or whether the employment relationship is with the public authorities, since what counts is the substance of the arrangements, not their legal form. The sole decisive criterion in my view is that the concern exists solely and specifically to give those who are unable to work in normal

conditions an activity similar to that in which a person might be engaged if he were able to work in a normal working environment. In such a situation, the activity is created for the person, and it is not a case of access to employment at all.

37. Accordingly, in my opinion the question referred by the Council of State should be answered as follows:

'The provisions of Community law relating to free movement of workers do not apply to nationals of a Member State who, being unable to work in a normal situation of employment, are engaged in an occupational activity in another Member State in a concern established solely and specifically to create the opportunity for such activity.'