OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 20 February 2002 [1]

I — Introduction

1. Marie-Nathalie D'Hoop, a Belgian national, completed her secondary school education in France, having spent four years at secondary school there, and her French diploma is recognised by the Belgian authorities as equivalent to the Belgian national certificate. On her return to Belgium she attended university. Thereafter she applied for a so-called 'tideover allowance'. This allowance is intended for young unemployed people seeking their first job and, together with a monetary payment, entitles the individual to participate in various employment programmes. Her request was turned down because she did not fulfil the legal requirement that secondary education must have been completed at an educational establishment in the applicant's own country.

2. On the basis of the above facts the Tribunal du travail de Liège (Liège Labour Court) referred to the Court the question as to whether Community law precludes a Member State from rejecting an application for a tideover allowance from one of its own nationals who is seeking her first job, on the grounds that the individual concerned did not complete her secondary education at an educational establishment in her own country, but rather in another Member State.

3. In its reference for a preliminary ruling the referring court asks the Court solely for a ruling on the interpretation of Article 39 EC and Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. [2] However, it is clear from the order for reference and the proceedings that the issue needs to be seen in a wider context, even though Ms D'Hoop has in fact relied not so much on her status as a worker as on the general principle of Community law which prohibits discrimination on grounds of nationality.

4. The observations submitted make it clear that the Court has essentially to deal with two issues in this case. In the first

1 — Original language: Dutch.

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

instance it must consider whether, and if so in what capacity, Ms D'Hoop can invoke Community law in her particular circumstances, namely the fact that a benefit is being denied her not on grounds of nationality, nor of residence, but rather because she completed her secondary education at an educational establishment in another Member State. Secondly, the Court must consider whether Ms D'Hoop is the victim of unjustified discrimination on grounds of nationality within the meaning of Article 12 EC.

II — National law

5. Under the applicable Belgian legislation, young people who have completed their studies and are looking for their first job are entitled to a tideover allowance. Article 36 of the Royal Decree of 25 November 1991 on unemployment [3] requires that young people must meet certain conditions in order to be eligible for the tideover allowance. Article 36(1)(2)(a) of the Royal Decree provides that a young person must have

'completed full-time secondary education or technical or vocational training at a teaching establishment run, subsidised or recognised by a community'.

6. In its judgment in *Commission* v *Belgium* [4] in 1996, the Court of Justice ruled that this requirement discriminates against the children of migrant workers and therefore infringes Community law, specifically Article 39 EC and Article 7 of Regulation No 1612/68.

7. On 1 January 1997 a new provision therefore came into effect, namely Article 36(1)(1)(h), [5] which confers the right to a tideover allowance on those who have completed their studies or training in another Member State of the European Union, provided they comply simultaneously with two conditions. First, the young person must submit documentation proving that the education or training he or she has undertaken is of the same level and equivalent to that specified in Article 36(1)(1)(g). Second, the young person must be a dependant of migrant workers in Belgium, for the purposes of Article 39 EC, at the time of the application for the allowance.

3 — *Moniteur Belge*, 31 December 1991.

4 — Case C-278/94 [1996] ECR I-4307.

5 — Royal Decree of 13 December 1996, *Moniteur Belge*, 31 December 1996.

III — Facts, procedure and the preliminary question

8. Ms D'Hoop is a Belgian national. After spending two years at the European School in Brussels, she completed her secondary education in Lille in France. The French Community in Belgium recognised her diploma obtained in France as equivalent to the Belgian higher school leaving certificate, which entitles students to go on to university. Ms D'Hoop subsequently attended university in Belgium until 23 September 1995. From 27 September 1995 to 26 June 1996 she was registered as a job-seeker with an employment agency.

9. On 20 June 1996 Ms D'Hoop applied to the Office national de l'emploi, (the National Employment Office, hereinafter 'ONEM') for a tideover allowance. Her application was rejected because, so far as is relevant here, she had not completed her secondary education at an educational establishment established, recognised or subsidised by a community, as required under Article 36(1)(1)(a) of the Royal Decree of 25 November 1991.

10. Ms D'Hoop appealed against this decision to the Tribunal du travail de Liège. In its ruling of 17 June 1998 the Tribunal du travail decided to refer the following question to the Court for a preliminary ruling:

'Given that the Court of Justice has already interpreted Article 48 of the EC Treaty and Article 7 of Regulation No 1612/68 to mean that Article 36 of the Royal Decree of 25 November 1991 cannot prevent a dependant child of a Community migrant worker who has completed his secondary education in an establishment in a Member State other than Belgium from being eligible to receive the tideover allowance, are those provisions to be interpreted as meaning that Article 36 of the aforesaid Royal Decree also cannot prevent a Belgian student who has completed his secondary education in an establishment in a Member State other than Belgium and is seeking his first employment from being eligible to receive the tideover allowance?'

11. Ms D'Hoop appealed against that ruling. In its judgment of 16 March 2001, the Cour du travail (Higher Labour Court) in Liège held that although the amendment to Article 36 of the Royal Decree of 1991 made by the Royal Decree of 13 December 1996 came into effect only on 1 January 1997, that is to say, after the application for the tideover allowance had been made, in the circumstances and in the light of established case-law, the amendment should be applied. This is also not disputed by the parties. The Cour du travail further upheld the ruling of the Tribunal du travail de Liège and remitted the case to it.

12. Once the national court had notified the Court of Justice that the appeal against the order for reference had suspensory effect, the proceedings before the Court of Justice were stayed pending judgment of the appellate court. This judgment was received at the Registry of the Court of Justice on 26 March 2001.

13. In the meantime, the written procedure had already been concluded on 1 October 1998. Written observations were received from Ms D'Hoop, the ONEM, the Belgian Government and the Commission. The oral procedure, attended by Ms D'Hoop, the Government of the United Kingdom of Great Britain and Northern Ireland and the Commission, took place on 20 November 2001. At the request of the Court, particular attention was devoted during the hearing to the recent case-law on the Treaty provisions governing citizenship of the Union.

IV — Appraisal

A — *The scope of the Treaty*

14. In order to determine whether Ms D'Hoop's situation is indeed covered by Community law and whether she can therefore invoke the principle of Community law which outlaws discrimination on grounds of nationality, [6] we must first look at the Community provisions on freedom of movement of workers and services. Thereafter we shall proceed to analyse the provisions on citizenship of the Union, which to my mind are crucial to this case. Finally, I shall deal with a couple of incidental matters which pertain to recent developments in Community policy.

1. The Treaty provisions governing the movement of workers and provision of services

15. Ms D'Hoop and the Commission have pointed out in their written observations that Ms D'Hoop may be able to invoke Community provisions on free movement of workers. This would be possible given her status as a migrant worker or as a member of the family of a migrant worker.

16. Under the Court's established case-law, a young person seeking his or her first employment does not have the status of worker within the meaning of the term in Community law. In its judgment in *Commission* v *Belgium*, the Court held that the

6 — It is common ground that the granting of a tideover allowance such as that at issue in the main proceedings does as such come within the material scope of the Treaty. The Court has, moreover, already ruled that the Belgian tideover allowance involved in this case is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68. See *Commission* v *Belgium*, cited above, paragraph 25.

special employment programmes, which, because of their particular characteristics, were related to unemployment insurance, actually encompassed more than access to employment as such within the meaning of Article 39 EC and Title I of Regulation No 1612/68, in particular Article 3(1) thereof. It is settled case-law that the application of Community law on free movement of workers in relation to national rules concerning unemployment insurance requires that a person invoking that freedom must have already participated in the employment market by exercising a genuine and effective occupational activity by which he or she acquires the status of worker within the meaning of Community law. [7] According to the Court, this cannot, by definition, be the case for a young person seeking his or her first employment. [8]

17. The case-law cited in this context is to my mind to be interpreted in the following way. The Community term 'worker' is interpreted widely, but there are clear limits. A young person whose gainful employment is so minimal as to be purely marginal and ancillary cannot be regarded as a worker within the meaning of Article 39 EC. [9] *A fortiori*, a young person who has never worked at all cannot be defined as a worker. Ms D'Hoop is applying for an allowance as a young person seeking her first employment and is, in that capacity, not yet part of the labour market.

18. It is also clear that Ms D'Hoop's parents did not emigrate to France in order to work there within the meaning of Article 39 EC. At the hearing Ms D'Hoop expressly stated that they had remained in Belgium whilst their daughter completed her secondary education in Lille. Ms D'Hoop cannot therefore invoke the derived rights conferred on members of the families of migrant workers by Regulation No 1612/68. Nor can she invoke rights under the currently applicable Belgian legislation, amended in the wake of the *Commission* v *Belgium* judgment, which now confers rights on the children of non-Belgian migrant workers resident in Belgium. [10]

19. I shall also proceed on the basis that the provisions on free movement of workers are not applicable to this case.

20. The question also arises as to whether Ms D'Hoop, as a recipient of education

7 — With reference to the award of a student grant, the Court refers to Case 197/86 *Brown* [1988] ECR 3205, paragraph 21, and, with reference to State funding, to Case C-357/89 *Raulin* [1992] ECR I-1027, paragraph 10.

8 — *Commission* v *Belgium*, cited above, paragraph 40.

9 — See for example *Raulin*, cited above, paragraph 13.

10 — By analogy with Case C-90/97 *Swaddling* [1999] ECR I-1075, to which the Commission refers in its written observations.

services, should be able to rely on the Treaty provisions governing the provision of services. It is conceivable that the rules concerned might deter pupils of Belgian nationality and resident in Belgium from completing their secondary education in another Member State because they would thereby subsequently forfeit the right to a tideover allowance. Although this alternative was not advanced by any of the parties, it is in my view a possibility worthy of consideration.

21. Bearing in mind *inter alia* the significance of trans-national education in Community policy-making as envisaged in what was Article 128 of the EEC Treaty, and the implications for free movement of persons, the Court in 1985 in *Gravier* observed that 'access to and participation in courses of instruction and apprenticeship' fall within the scope of Community law. [11] The provision of education is undeniably a service within the meaning of the Treaty, and a student or pupil can therefore be regarded as the recipient of an education-related service in such a case.

22. Article 50 EC, however, requires that services be normally provided for remuneration. This must be taken as meaning that the payment constitutes consideration for the service in question. [12] In *Humbel*, the Court held that this defining characteristic was absent in the case of courses offered by a technical institute which was part of the secondary education provided under the national education system. The State's intention in establishing and maintaining such a system is not to engage in gainful activity but to fulfil its social, cultural and educational obligations towards its population. Moreover, the system in question is generally funded by the public purse and not by pupils or their parents. [13]

23. In circumstances where education is paid for entirely or primarily by students or their parents, rather than by the State, the application of the provisions governing services is thus not automatically excluded. In the present case there is insufficient information on the file to determine whether Ms D'Hoop's education in France was provided for consideration, for example at a private establishment run on a commercial basis. [14]

11 — Case 293/83 *Gravier* [1985] ECR 593, paragraphs 19 to 25.

12 — For an example of the settled case-law, see Case 263/86 *Humbel* [1988] ECR 5365, paragraphs 17 to 19.

13 — The fact that pupils or their parents may be required to pay fees or a contribution to costs is irrelevant, according to the Court; see *Humbel*, cited above, paragraphs 18 and 19.

14 — During the oral proceedings Ms D'Hoop's counsel was unable to answer a question relating to consideration.

24. However, if one assumes that Ms D'Hoop did receive a private education in France for which consideration was provided and that Articles 49 and 50 therefore apply, it is then necessary to ascertain whether there is any restriction on the freedom to supply services where the completion of secondary education in one's own country is a precondition governing eligibility for a tideover allowance. The Court has consistently ruled that Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services within one Member State. [15]

25. The Belgian requirement in no way hinders educational establishments in other countries from providing services to Belgian nationals. At most it might be argued that the rules may deter Belgian pupils from attending educational establishments in other Member States. The argument of deterrent effect in regard to the provision of services has been developed by the Court in particular in its judgments in *Kohll* and *Smits and Peerbooms*. These cases dealt with a requirement imposed by health assurance providers on those insured with them, namely that prior authorisation would have to be sought if such persons wished to consult providers of medical services in another Member State. The view of the Court is that this constitutes a barrier to the freedom to provide services for both the insured persons and the service providers. [16]

26. However, in these circumstances a direct link can be shown between the national rules imposing the prior authorisation requirement and the consultation of providers of medical services established in other Member States. In the present case there is no such direct link. The effect of the provision in this instance can only be indirect and marginal. From the point at which pupils opt to pursue and complete their secondary education in Belgium or in another Member State, it will normally be some years before they may come up against the requirements of the Royal Decree relevant to this case regarding eligibility for tideover allowances. The restrictive effects which the contested provision has on free provision of services are to my mind so uncertain and indirect that they cannot be considered a barrier to the freedom to provide and receive services as between Member States. [17]

15 — See Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 61.

16 — See Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 35, and in *Smits and Peerbooms*, cited above, paragraph 69. See also in another context, concerning the free movement of employed and self-employed persons, Case C-370/90 *Singh* [1992] I-4265, at paragraph 19: 'A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.'

17 — In the context of the free movement of goods, see Case C-44/98 *BASF* [1999] ECR I-6269, paragraph 21.

27. Ms D'Hoop, in my opinion, also falls outwith the scope *ratione personae* of the Treaty provisions on the movement of workers, and it does not appear that she could successfully invoke the Treaty provisions on services on the basis of the information available.

28. However, the case-law cited is not without significance. These and other decisions illustrate a development in Community law which concerns the scope of the Treaty as it applies to free movement of persons and education. This development flows in part from the extensive interpretation of the original EEC Treaty by the Court, which brought within the Treaty's scope interests which are not primarily economic, such as access to education, with the result that the fundamental principle outlawing discrimination by reason of nationality applies. Those who drafted the Treaty and the Community legislature [18] have acted on these rulings by granting to Community citizens a number of rights not directly related to economic interests. This offers another angle from which to analyse the question referred for preliminary ruling.

2. The Treaty provisions on citizenship

29. The Commission and counsel for Ms D'Hoop have examined the issue in the light of the provisions on citizenship of the Union enshrined in Articles 17 EC to 22 EC since the Treaty of Maastricht. As a national of a Member State who was legitimately resident in another Member State for educational purposes, Ms D'Hoop argues that she should fall within the scope *ratione personae* of those Treaty provisions. Article 17 EC attaches to the status of citizen of the Union the rights and duties imposed by the Treaty. These include the right under Article 12 EC not to be discriminated against on grounds of nationality within the scope *ratione materiae* of the Treaty as applicable when the discriminatory provision was implemented. [19]

30. This approach was challenged at the hearing by counsel for the Government of the United Kingdom of Great Britain and Northern Ireland, who averred that Ms D'Hoop cannot in this case invoke provisions on citizenship of the Union. She would be able to do so had she followed a vocational training course in another Member State, since such training does come within the scope of Community powers. However, the general course of study undertaken by Ms D'Hoop in France is not covered by these Community powers, according to the United Kingdom Government.

18 — Together with, essentially, the Charter of Fundamental Rights of the European Union, OJ 2000 C 364, p. 1.

19 — Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraphs 61 to 63.

31. The Court has held that the status of citizen of the Union is 'destined to be the fundamental status of nationals of the Member States'. [20] The application of the provisions governing citizenship of the Union depends on the legal context and facts of each case. It is my clear understanding that Ms D'Hoop, a Belgian national, availed herself in this instance of her right as a citizen of the Union to freedom of movement and residence in another Member State. Article 18 EC offers citizens of the Union 'the right to move and reside freely within the territory of the Member States'. This freedom of movement is more closely defined in secondary Community law, specifically in the directives referred to as the directives on rights of residence. These provisions enable citizens of the Union to take advantage of other rights conferred on them by Community law, including the freedom to reside in another Member State for educational purposes. During her stay in France Ms D'Hoop followed a course of study recognised as equivalent in Belgium. She was therefore resident for a purpose specifically envisaged by the Community legislature, [21] and thus in my view comes within the scope of the Treaty.

32. An important precedent in the areas of education, movement of persons and citizenship was set in *Grzelczyk*. In this recent judgment, the Court held that a citizen of the European Union following a course of study in a Member State other than that of which he or she is a national is entitled under Article 12 EC, read in conjunction with Article 18 EC, to move and to reside freely in the territory of the Member States. The Court's conclusion is based on the evolution in the Treaty brought about by the incorporation of the Treaty provisions on citizenship, and on education and vocational training, as well as reference to the directive on rights of residence for students. Mr Grzelczyk was a French national following a four-year course of study in Belgium. During the first three years he met his own living expenses, but in his fourth and final year he was unable to engage in employment due to the pressure of his studies. Without a minimum income he would have been unable to retain a Belgian residence permit. Following the Court's interpretation of the abovementioned provisions in that case, Mr Grzelczyk's right to minimum subsistence could not be made contingent upon compliance with the requirement that he fall within the scope of Regulation No 1612/68 if such a requirement did not apply to Belgian nationals. [22]

33. In the present case, the scenario is essentially the reverse. Ms D'Hoop is not encountering barriers pertaining to the

20 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31.

21 — See in this context Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59) and paragraphs 41 to 43 of the present Opinion.

22 — See *Grzelczyk*, cited above, paragraphs 34 to 37.

right to freedom of movement and the right of residence.[23] On the contrary, in her 'primary capacity' as a Community citizen she has exercised the very right granted under Article 18 EC which enables a Belgian national to reside in France. She took advantage of the opportunity to spend four years in secondary education in France and concluded that period of study with a diploma which is recognised in Belgium as being equivalent to the Belgian higher school leaving certificate. The recognition of the French diploma by the authorities of the French-speaking Community in Belgium also flows from the Community-law obligation of mutual recognition of diplomas and other qualifications, a principle firmly enshrined in the Community.[24]

34. Ms D'Hoop is being denied the right to a tideover allowance purely on the grounds of these activities. In my view, by analogy with the Court's reasoning in the *Grzelczyk* judgment, we can only conclude that in the circumstances of the case Ms D'Hoop is entitled to invoke Article 12 EC outlawing discrimination on grounds of nationality. Where citizens of the Union are entitled to invoke the prohibition of discrimination against infringements of their right of residence within the meaning of Article 18 EC, the same conclusion must apply regarding nationals who consider that they have been the victims of unequal treatment precisely because they have availed themselves of the right granted under Article 18 EC in a way which is relevant to the purposes of Community law. Normally, the obtaining of a diploma in an educational establishment in another Member State necessarily presupposes a period of residence in the Member State in which the educational establishment is located.

35. Why Ms D'Hoop went to school in France and how she came to take advantage of the freedom granted under Article 18 EC to attend school in Lille are matters irrelevant in the present context: it may have been as part of an exchange programme or may have been at her own initiative. The right of residence is granted to every citizen of the Union, irrespective of status.[25] Assuming that Ms D'Hoop was legitimately resident in French territory — and this is not disputed in the case —, she would accordingly come within the scope *ratione personae* of the provisions on citizenship of the Union.[26]

36. In this context, the United Kingdom's argument that this case does not involve vocational training, and that the Commu-

23 — The restriction on rights of residence referred to in Article 18 EC, which states that such rights apply 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect', is also irrelevant in the present case.

24 — For an overview of these principles I refer simply to the judgment of 22 January 2002 in Case C-31/00 *Dreessen* [2002] ECR I-663.

25 — See Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

26 — See also in this regard *Martínez Sala*, cited above, paragraph 61.

nity therefore has no competence in this area, is untenable. This position seems not only incorrect but also irrelevant. The distinction on the basis of the type of education undertaken is not pertinent to the case, which is less concerned with education as such and more with the rights of young people as citizens of the Union to undertake part of their education in another Member State and to have this recognised as equivalent in their own country.[27] Further, as the Commission has stated, the term 'vocational training' has since the *Humbel* judgment been broadly construed, and may include secondary education. Moreover, as illustrated below, the Treaty provisions on education are no longer restricted to vocational training but now cover education at every level, including intermediate education.

37. The ONEM in effect submitted that in the light of the judgment in *Commission* v *Belgium* it could be argued that this was a case involving reverse discrimination in what was otherwise a purely internal affair. It observes that the scope of the judgment in *Commission* v *Belgium* is clearly restricted to dependant children of Community migrant workers living in Belgium,[28] with the result that it does not cover reverse discrimination against a Belgian national who seeks his or her first employment and has concluded his or her secondary education at an educational establishment in a Member State other than Belgium.

38. This argument implies that there is no transnational dimension to the case, with the result that primary Community law in principle cannot be applicable.[29] However, the facts cited above undeniably show that there is indeed an inter-State dimension to the problem to which Community law has attached certain consequences. It is settled case-law that the fact that Ms D'Hoop is invoking Community law against the State of which she is a national is not a conclusive factor in rendering the rule against discrimination inapplicable. The Treaty may not be interpreted in such a way as to preclude the application of Community law to a Member State's own nationals if they have been legitimately resident in the territory of another Member State and there pursued an activity relevant to Community law, with the result that, *vis-à-vis* their State of origin, they are in the same position as all other individuals enjoying rights and freedoms guaranteed by the Treaty.[30]

39. It follows that Ms D'Hoop may, in her situation, invoke the special rights, *inter*

27 — See *Humbel*, cited above, paragraphs 10 to 12.

28 — See paragraph 17 of the judgment.

29 — See for example Case C-97/98 *Jägerskiöld* [1999] ECR I-7319, paragraphs 42 to 45.

30 — See Case 115/78 *Knoors* [1979] ECR 399, paragraph 24, and also in particular Case C-19/92 *Kraus* [1993] ECR I-1663, paragraphs 15 and 16.

alia the right to non-discrimination, which citizens of the Union derive from the Treaty.

3. The Treaty provisions on education and employment

40. Prior to more detailed analysis of the applicability of Article 12 EC to the present case, I shall look at two legal developments which may be of significance, albeit less immediate, to this case. The first is related to Community action in the field of education, training and youth (Articles 149 EC and 150 EC), [31] and the second to the coordinated employment policy (Articles 125 EC to 130 EC inclusive).

41. First, let us examine education, training and youth policy. Due to increasing market integration, greater attention is being devoted to education and the transnational aspects of policy in that area. The Member States increasingly recognise the importance of the generation, dissemination and application of knowledge, most particularly in enhancing their competitive position and employment potential. [32] European integration has created an environment conducive to transnational education. Inter-State education is, moreover, viewed as an important instrument in promoting mutual solidarity and tolerance as well as the dissemination of culture throughout the European Union.

42. The Community has its own role to play in this context. Article 3(q) EC requires the Community to make a contribution to education and training of quality. Article 149(2) EC provides that Community involvement is to be aimed at developing the European dimension in education and promoting the development of exchange programmes for young people. The Community institutions have undertaken a number of initiatives aimed at achieving this. The most significant and best known is the 'Socrates' programme, which brings together eight Community action programmes under one umbrella. [33] One of these ('Comenius') [34] is targeted

31 — Ms D'Hoop and the Commission relied on these provisions and the interpretation thereof in support of their submissions.

32 — See in this context the conclusions of the Presidency at the European Council meeting in Lisbon on 23 and 24 March 2000, on 'employment, economic reform and social cohesion' (*inter alia* available via www.europarl.eu.int/home, under 'activities' and then 'summits'.

33 — Decision No 253/2000/EC of the European Parliament and the Council of 24 January 2000 establishing the second phase of the Community action programme in the field of education 'Socrates', OJ 2000 L 28, p. 1.

34 — See the Annex to the Decision, Point II, Action 1. Admittedly, this action programme, unlike 'Erasmus' for higher education, does not deal with the mobility of students.

specifically at school education. Other Community action programmes focus particularly on various activities for young people. [35]

43. These programmes are implemented in parallel with enhanced mobility of young people, who are thus able to take advantage of freedom of movement between Member States. In the instant case, Ms D'Hoop exercised the rights to freedom of movement and residence which she enjoys as a citizen of the Union for precisely the objectives envisaged by the Treaty. It is significant that in her application, as cited in the order for reference, she states: 'with a view to broadening my horizons and in the context of European integration, I was educated under the French system for four years.' For this reason too, her position should be treated as coming within the scope *ratione materiae* of the Treaty.

44. A second and further argument can be derived from the nature of the Belgian tideover allowance and the way it links in to Community employment objectives. The Community's employment strategy encompasses programmes to combat youth unemployment which include measures to enhance employability, including work experience for young unemployed people. The coordinated European employment strategy, introduced by the extraordinary European Council on employment held in Luxembourg in 1997, has meanwhile led to the issuing of specific guidelines to the Member States, the implementation of which is subject to annual review. [36]

45. These objectives fit in neatly with those of the employment programmes established under Belgian legislation. Participants receive a cash allowance in addition to the benefits from the scheme. The active element in the Belgian unemployment insurance scheme involves *inter alia* programmes under which employers receive financial incentives to take on young people in receipt of the tideover allowance. [37] Given the scope of the employment guidelines, the refusal to allow nationals access to the programmes purely because they completed their education in another Member State appears problematic. Ms D'Hoop's own national authorities should

35 — See in particular, in relation to the present case, Articles 2 and 5 of the current Community Action Programme 'Youth' (Decision No 1031/2000/EC of the European Parliament and the Council of 13 April 2000, OJ 2000 L 117, p. 1.

36 — See Decision No 2001/63/EC of the Council of 19 January 2001 on Guidelines for Member States' employment policies for the year 2001, OJ 2001 L 22, p. 18 (especially Chapter 1 of the Annex), and Recommendation 2001/64/EC of the Council of 19 January 2001 on the implementation of Member States' employment policies (in particular paragraph 12 of the recitals, which states that, in order to tackle youth unemployment, all young people should have the opportunity to gain entry to the world of work before they have been unemployed for six months).

37 — For a more detailed overview of the relevant Belgian legislation, see *Commission* v *Belgium*, cited above, in particular paragraphs 3 to 8 and 38. That judgment was handed down at the time of the events in the main proceedings in the present case.

be supporting her attempt to participate actively in the labour market, in keeping with Community policy in this area. However, the likelihood of her being entitled to a place on this type of job creation scheme in another Member State is slim.

B — *Discrimination on grounds of nationality*

46. Having outlined why I believe that Ms D'Hoop's case falls within the scope of the Treaty, it is now necessary to examine whether a Community national in circumstances such as those in the main proceedings can successfully rely on the prohibition contained in Article 12 EC, read in conjunction with the Treaty provisions on citizenship. [38]

47. The Court has already ruled that in such circumstances, the Treaty entitles citizens of the Union to equal treatment before the law, irrespective of nationality and without prejudice to specific exceptions. [39] Thus a Belgian national can invoke Article 12 EC in Belgium in all situations falling within the scope of Community law.

48. Procedurally, the important question is with which group of individuals a person in Ms D'Hoop's position should be compared. The Belgian Government assumes that after amendment to the national rules concerned, nationals and the relevant Community nationals will be entitled under equal conditions to the tideover allowance. During the hearing, counsel for the United Kingdom Government argued that this was not a case of unequal treatment, since under the rules a national of another Member State seeking his or her first job in Belgium is also not entitled to a tideover allowance.

49. I do not accept that view. Within the framework of non-discrimination rules in the Treaty, like cases must be compared with like. Thus, in *Commission* v *Belgium*, the Court is implicitly comparing the requirements applying to children of migrant workers with those applying to

38 — For the same test, see *Grzelczyk*, cited above, paragraph 30.

39 — See *Grzelczyk*, cited above, paragraphs 30 to 32. The Court has also consistently held that where Community citizens in their status as recipients of services fall within the scope of the Treaty, national provisions may not discriminate against persons on whom Community law has conferred the right to equal treatment (see *inter alia* the judgment in Case 186/87 *Cowan* [1989] ECR 195).

children of Belgian workers.[40] As already indicated, Ms D'Hoop's parents' status as migrant workers is irrelevant to this case. As a Belgian national she is undeniably linked to the Belgian legal system. She is entitled to a residence permit because of her nationality and the order for reference shows that she attended university in Belgium prior to applying for a social benefit. It is therefore clear that Ms D'Hoop's position is analogous to that of a Belgian national who has completed equivalent secondary education and university studies in Belgium. The sole obstacle to her eligibility for a tideover allowance is the fact that Ms D'Hoop completed her secondary education in a Member State other than Belgium. This is the crucial distinction as compared with Belgian applicants who completed their studies in Belgium and who, like Ms D'Hoop, fulfil the objective eligibility requirements for a tideover allowance.

50. Belgian legislation places Ms D'Hoop at a disadvantage as compared with Belgian nationals who have completed their secondary education in Belgium, inasmuch as eligibility for the tideover allowance is conditional on secondary education having been undertaken and completed in Belgium. The Royal Decree in question has therefore introduced a distinction between the treatment of nationals who do not avail themselves of the right to free movement and residence and those who do.[41] For Belgian students who have undertaken and completed their studies in Belgium, compliance with the requirements of Article 36(1)(2)(a) of the Royal Decree will be straightforward. A Belgian student such as Ms D'Hoop, who received part of her secondary education in another Member State and completed it there, is for that reason ineligible for a tideover allowance. That requirement therefore discriminates against Ms D'Hoop within the meaning of Article 12 EC.

51. In this context, a comparison with *Kraus* is instructive. In that case, the German authorities refused to recognise a German national as being entitled, without prior authorisation, to use an academic title acquired through postgraduate studies in another Member State. No such prior authorisation was required where the academic title had been obtained at a German

40 — *Commission* v *Belgium*, cited above, paragraphs 26 to 30.

41 — See, along the same lines, Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 38. See also Case C-322/95 *Iurlaro* [1997] ECR I-4881. These judgments pertain to persons who have the status of employed or self-employed persons, but there is no reason why they cannot equally be applied in the context of the provisions on citizenship of the Union. The right to non-discrimination by reason of nationality enshrined in Article 12 EC applies to all situations falling within the scope *ratione materiae* and *ratione personae* of the Treaty. In principle it makes no difference whether the scope of provisions is determined by the economic freedoms enshrined in the Treaty or the rights attached to citizenship of the Union.

university. The Court held that Articles 39 EC and 43 EC constituted a barrier to this type of provision, in the absence of justification. The national measure could hamper or render less attractive the exercise by Community nationals, including those of the Member State which had enacted the measure, of the fundamental freedoms guaranteed by the Treaty. [42]

52. There is also an important similarity between Ms D'Hoop's position and the facts underlying the judgment in *Angonese*. The central issue in *Angonese* was the interpretation of Article 39 EC. A private bank in Bolzano in Italy claimed the right, in advertising for a recruitment competition, to require applicants to hold a language diploma which could only be obtained in one Italian province. Mr Angonese, an Italian national who had clearly acquired the required linguistic skills during a four year period of study in Austria, was wrongly excluded for this reason. The Court held that a non-resident of the province had only a slim chance of obtaining the required certificate. Although the Court described the requirement as discriminatory *vis-à-vis* nationals of other Member States as compared with Italians, there is to my mind no doubt that the Court's condemnation of the disputed measure is also valid in regard to Mr Angonese, since he, as an Italian national, had acquired his linguistic skills in another Member State. [43]

53. Mr Angonese, Mr Kraus and Ms D'Hoop have all been placed at a disadvantage by discriminatory provisions of the Member States of which they are nationals, which penalise them retrospectively for a period of residence in another Member State. In all three cases the discrimination — albeit in differing ways — relates to access to the labour market. The distinction lies essentially in the fact that in the cases of *Angonese* and *Kraus* the Court could compare the national provision with the provisions on non-discrimination of Article 39 EC and Article 43 EC, whereas, given the special circumstances of Ms D'Hoop's case, it is necessary to opt for the general non-discrimination provisions of Article 12 EC.

54. Unequal treatment, within the meaning of Article 12 EC, can be justified only if it is based on objective criteria independent of the nationality of the individual involved and is proportionate to the legitimate aim

42 — See *Kraus*, cited above, paragraph 32.

43 — See Case C-281/98 *Angonese* [2000] ECR I-4139, in particular paragraphs 38 to 41.

of the national legal provisions. [44] We must therefore examine whether in this case there may be objective grounds of justification which have been proportionately applied. An objective justification must relate to the type of discrimination in question, which means that in this instance some justification must be found for the different treatment of a Belgian national who has completed his or her secondary education in Belgium as compared to a compatriot who did so in another Member State.

55. In this regard, neither the Belgian Government nor the ONEM has provided objective grounds for justification. [45] At the hearing the Commission pointed out that their stance would have been justified if the tideover allowance had been conditional on applicants' having completed their most recent course of study in their own country. A Member State cannot be compelled to grant a tideover allowance to every student who has completed his or her studies in the Community and subsequently seeks his or her first job in the relevant country. The Commission accepts that in such circumstances it is reasonable to require that the student have a certain connection with the host Member State.

56. The aim of the Royal Decree is essentially to ensure greater flexibility in the transition between education and the labour market and to guarantee a certain minimum subsistence for the individuals involved. The exclusion of a country's own nationals from the right to a tideover allowance simply because they have not completed their secondary education at an educational establishment in Belgium, but have instead done so at an educational establishment in another Member State, does not to my mind square with the declared objective. Moreover, the requirement goes beyond what is necessary to ensure a meaningful link with the Belgian labour market. In this case the link is more than adequate. Not only is Ms D'Hoop a Belgian national, but her French diploma is recognised as equivalent in Belgium, and she completed her university studies in Belgium prior to her application.

57. I therefore take the view that this situation is covered by Article 18 EC, and that the non-discrimination provisions of Article 12 EC preclude the rejection of an application for a tideover allowance. Ms D'Hoop's situation fits into the overall picture of increasing transnational mobility of citizens who are not yet active participants in the economy. Freedom of movement for school pupils and students and the mutual recognition of equivalent educational courses completed in another Member State are now seen as important achievements in the process of European integration. A country may therefore not discriminate against its own nationals who have availed themselves of such achievements.

44 — See, for example, Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27.

45 — Nor can any such grounds be inferred from the above judgment in *Commission* v *Belgium*.

V — Conclusion

58. In the light of the foregoing, I propose that the question referred for preliminary ruling by the Tribunal du travail de Liège be answered as follows:

Article 12 of the Treaty precludes the denial of a tideover allowance under Article 36 of the Belgian Royal Decree of 25 November 1991, as amended by the Belgian Royal Decree of 13 December 1996, to a Belgian national who has completed her university studies in her own country and is seeking her first job there, on the ground that she completed her secondary education in another Member State, a diploma from which is recognised as being equivalent to the Belgian higher school leaving certificate, rather than in her own country.