OPINION OF ADVOCATE GENERAL JACOBS
delivered on 15 December 1993 *

My Lords,

1. In 1984 the University of Cagliari organized an open competition for the recruitment of canteen assistants. One of the unsuccessful candidates was Ingetraut Scholz, who was born a German citizen but acquired Italian nationality by marriage. As emerges from the case-file, the selection board appointed by the university decided that points were to be awarded in respect of the candidates' previous employment in the public service. 2.5 points were to be awarded for each year's service in functions similar or 'superior' to those attaching to the posts to be filled. One point was to be awarded for each year's service in different functions. From 1965 to 1972 Mrs Scholz had worked for the German post office as a postal assistant, and she asked for that experience to be taken into account. The selection board took the view that only experience in the Italian public service could be taken into account and so refused to give her any credit for her years of service with the German post office. Mrs Scholz was 54th in the order of merit drawn up by the selection board. It is clear from the documents before the Court that if her service in the German post office had been taken into account she would have been awarded an extra seven points and would have risen to 11th place. It is moreover clear that, since 21 persons have been appointed as a result of the competition, the failure to take into account her service in the German post office prevented her recruitment as a canteen assistant at the University of Cagliari.

2. On 6 May 1986 the list of successful candidates was published. On 4 July 1986 Mrs Scholz commenced proceedings against the University of Cagliari [1] before the Tribunale Amministrativo Regionale per la Sardegna. She sought the annulment of the decision establishing the list of successful candidates, arguing that the refusal to take into account employment in the public service of a Member State other than Italy was contrary to Community law. The Italian court decided, on 10 June 1992, to seek a preliminary ruling on the question:

'Whether Articles 7 and 48 of the EEC Treaty and Articles 1 and 3 of Regulation No 1612/68 may be interpreted as precluding, in connection with an open competition to fill posts not falling within those covered

* Original language: English.

1 — The order for reference refers to another party to the proceedings, namely Cinzia Porcedda. It appears from the case-file that she was one of the successful candidates in the same competition.

by the reservation referred to in Article 48 (4), the possibility of disregarding work carried out in the public service of another Member State, when work carried out for a public authority of the State in which the competition is published is regarded as relevant experience for the purposes of the list of successful candidates to be drawn up on completion of the competition procedure.'

The order for reference was finally received at the Court on 17 December 1992.

3. Written observations have been submitted by Mrs Scholz, the Commission and the French and Italian Governments. In addition, all were represented at the hearing. All agree that the relevant provisions of Community law must be interpreted as meaning that, in the circumstances of the present case, employment in the public service of another Member State must be taken into account in the same way as employment in the Italian public service.

4. Mrs Scholz points out that Article 48 (2) of the Treaty prohibits 'any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'. She observes that the post for which she was a candidate lies outside the 'public service' exception provided for in Article 48 (4) of the Treaty, in view of the Court's restrictive interpretation of that provision. She then cites *Sotgiu* v *Deutsche Bundespost,* [2] in which the Court held that Community law prohibits 'not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result' (paragraph 11) . She also relies on Article 3 (1) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, [3] which provides as follows:

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

— where they limit application for and offers of employment, or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals; or

— where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered.

This provision shall not apply to conditions relating to linguistic knowledge required

2 — Case 152/73 [1974] ECR 153.
3 — OJ, English Special Edition 1968 (II), p. 475.

by reason of the nature of the post to be filled.'

5. The Commission's position is broadly similar to that of Mrs Scholz but is argued more fully. The Commission observes that the general prohibition of discrimination laid down in Article 7 (now Article 6) of the Treaty may be disregarded since, according to the Court's case-law, it only applies independently in situations not governed by more specific provisions of Community law; [4] the situation that arises in the present case is governed by Article 48 (2) of the Treaty and Article 3 (1) of Regulation No 1612/68. The Commission considers that those provisions may be relied on by Mrs Scholz notwithstanding that she has Italian nationality. The decisive element, according to the Commission, is that she has exercised her right of free movement: having worked first in her Member State of origin, she now seeks employment in another Member State; the fact that she has acquired the nationality of the second Member State does not mean that she cannot claim the benefit of the Community rules on free movement. According to the Commission, the same principles would apply in the case of an ordinary Italian national who had worked in another Member State and then returned to her country of origin. On that point the Commission cites the *Singh* [5] judgment. The Commission then cites a number of cases [6] from which it extracts an all-embracing principle to the effect that no Member State may penalize, in comparison with its own nationals or residents who have spent their entire working life in that Member State, Community workers who have worked in more than one Member State in exercise of their fundamental right of free movement within the Community.

6. The French Government develops arguments similar to those of the Commission, but then raises certain difficulties regarding the implementation of the principle that experience acquired in the service of another Member State must be treated as equivalent to experience acquired with a public authority in the Member State in which the vacancy is to be filled.

7. In the first place, the French Government observes that it may not always be easy to determine whether employment in another Member State constitutes employment in the public service, since the boundary between the public and private sectors differs from one State to another. If, for example, experience with the German post office is taken into account, would it also be necessary to take into account similar experience in another Member State in which the postal service has been privatized?

4 — Case C-10/90 *Masgio* v *Bundesknappschaft* [1991] ECR I-1119, paragraphs 12 and 13.

5 — Case C-370/90 *R* v *Immigration Appeal Tribunal and Surinder Singh, ex parte Home Secretary* [1992] ECR I-4265.

6 — Case 15/69 *Südmilch* v *Ugliola* [1969] ECR 363; Case 20/85 *Roviello* v *Landesversicherungsanstalt Schwaben* [1988] ECR 2805; Case C-10/90 *Masgio* (cited in note 4) and Case C-349/87 *Paraschi* v *Landesversicherungsanstalt Württemberg* [1991] ECR I-4501.

8. The French Government then points out that public authorities often pursue a policy of internal mobility and fill vacancies by means of competitions in which only officials who are already in their service may participate. If I have understood the argument correctly, it runs as follows: The public administration must, when filling vacancies, be allowed to give preference to its existing servants, even though that will tend to favour its own nationals since most civil servants have the nationality of the Member State which employs them. To hold otherwise would mean that if, for example, the Italian Ministry of Health held an internal competition reserved to its serving officials, it would have to throw the procedure open to officials serving in the corresponding ministries of the other Member States. But on the assumption that public authorities may give preference to their own officials by organizing internal competitions, why should Community law permit that form of 'disguised discrimination' and yet prohibit the practice followed by the University of Cagliari in the present case?

9. At the hearing the French Government stressed that certain difficulties would ensue if the principle of the recognition of periods of employment completed in other Member States were extended beyond the stage of initial recruitment and applied to the continuing career of serving officials. In particular, the French Government seemed concerned that its system of internal promotions would be severely disturbed if seniority acquired in other Member States were taken into account.

10. However, in spite of these reservations the French Government considers that in the type of situation which arises in the present case a public authority must give credit for experience acquired in the public service in another Member State as though it had been acquired in the home State.

11. My views on the issues raised by this case are as follows.

12. Article 48 (1) of the Treaty provides that the free movement of workers within the Community shall be ensured by the end of the transitional period at the latest. According to Article 48 (2), the free movement of workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work. Article 48 (4) excludes the application of those provisions to 'employment in the public service'.

13. More detailed provisions concerning the free movement of workers are contained in Regulation No 1612/68, of which Articles 1 and 3 are mentioned in the question referred. Article 1 of the regulation adds little to Article 48 of the Treaty. Article 3 (1) of the regulation is of interest because it expressly prohibits covert discrimination based on

nationality, a matter which I shall return to later.

14. It is clear from the Court's existing case-law that the posts in question in the present case lie outside the scope of Article 48 (4) and are therefore subject to the principles of free movement and non-discrimination. The Court has construed Article 48 (4) narrowly, holding that it covers only 'posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties designed to safeguard the general interests of the State or of other public authorities'. [7] The justification for excluding such posts from the principle of free movement is that they 'presume on the part of those occupying them the existence of a special relationship of allegiance to the State and reciprocity of rights and duties which form the foundation of the bond of nationality'. [8] Clearly, the post of canteen assistant in a university does not satisfy those criteria.

15. Article 48 (2) prohibits not only overt discrimination based on nationality but also all forms of disguised (or covert) discrimination which, by applying other distinguishing criteria, lead in fact to the same result. [9] Covert discrimination is in addition expressly prohibited by Article 3 (1), second indent, of Regulation No 1612/68, which — as I have already noted — prohibits the application of provisions laid down by law, regulation or administrative action or administrative practices of a Member State 'where, though applicable irrespective of nationality, their exclusive or principal aim or effect is to keep nationals of other Member States away from the employment offered'.

16. In the present case Mrs Scholz is clearly not a victim of overt discrimination, since the disputed practice of the selection board does not expressly provide for a difference in treatment between those who possess Italian nationality and those who do not. As a result of her acquisition of Italian nationality by marriage, Mrs Scholz could not in any event be a victim of overt discrimination against non-Italians. At this juncture it is convenient to point out that Mrs Scholz *might* have suffered overt discrimination, were it not for her acquisition of Italian nationality by marriage: instead of wrestling with the question whether her experience in the German post office is equivalent to experience in the Italian post office, the selection board would presumably have eliminated her on the ground that she did not possess Italian nationality, as required by Article 2 (a) of the competition notice, a copy of which is in the case-file lodged with the Court by the Tribunale Amministrativo Regionale per la Sardegna. That nationality requirement, which is not of course in issue in these proceedings, is a flagrant breach of Article 48 in the light of the case-law cited above.

7 — Case 149/79 *Commission* v *Belgium* [1980] ECR 3881, paragraph 10; see also Case 307/84 *Commission* v *France* [1986] ECR 1725.

8 — Ibid.

9 — See most recently, Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, which confirmed established case-law dating back to *Sotgiu* v *Deutsche Bundespost* (cited above in note 2).

17. Though not a victim of overt discrimination (thanks largely to the fortunate circumstance of her marriage), Mrs Scholz has in my view suffered covert or disguised discrimination, since the selection board's practice of refusing to take account of experience acquired in another Member State is likely to affect nationals of other Member States more severely than it affects Italian nationals. That is so because most Italian candidates will have acquired their previous experience (or the greater part of it) in Italy, whereas most candidates from other Member States will have acquired their previous experience (or the greater part of it) in other Member States.

18. Thus, the refusal to take account of Mrs Scholz's experience in the German post office is in principle contrary to Article 48 (2) of the Treaty. It also appears to be contrary to Article 3 (1) of Regulation No 1612/68, since the 'exclusive or principal aim or effect' of distinguishing between employment in the Italian public service and employment in the public service of another Member State is to prevent the recruitment of nationals of other Member States.

19. It is well established that Article 48 (2) of the Treaty has direct effect: *Van Duyn* v *Home Office*. [10] It is clear from the judgment in *Gül* v *Regierungspräsident Düsseldorf* [11] that Article 3 (1) of Regulation No 1612/68 also has direct effect. There, the Court held (in paragraph 26) that:

'... the non-discriminatory treatment provided for in the first indent of Article 3 (1) of Regulation No 1612/68 consists in the application to persons covered by that provision of the same provisions laid down by law, regulation or administrative action and the same administrative practices as are applied to nationals of the host State.'

It is common ground that the University of Cagliari is a public body and that it must therefore be regarded as part of the Italian State for the purposes of obligations flowing from Community law. There is therefore no need to decide whether Article 48 (2) of the Treaty and Article 3 (1) of Regulation No 1612/68 have horizontal direct effect, in the sense that even private employers are prohibited from practising discrimination based on nationality between workers of the Member States.

20. As to the question whether Mrs Scholz's rights are affected by her acquisition of Italian nationality, it may at first sight seem strange that an Italian national should be able to invoke the prohibition of discrimination on grounds of nationality against an Italian rule or practice which discriminates against non-Italians. I am however convinced that that is indeed the case.

10 — Case 41/74 [1974] ECR 1337.
11 — Case 131/85 [1986] ECR 1573.

21. In my view, it would be illogical to hold that Mrs Scholz was entitled to invoke Article 48 (2) as long as she possessed only her original German nationality but that she was suddenly deprived of the right to object to discriminatory practices when she acquired Italian nationality by virtue of her marriage. Her acquisition of Italian nationality is fortuitous and irrelevant, in the sense that it in no way changes the fundamental fact that she is the victim of a practice which amounts to covert discrimination based on nationality. Moreover, she is a victim of that practice because she first worked in her Member State of origin and now wishes to work in another Member State. Hence, she clearly belongs to the category of persons who are intended to benefit from the freedom of movement established by Article 48. She cannot have ceased to belong to that category simply because she has acquired the nationality of the Member State in which she wishes to exercise her freedom of movement.

22. Even if Mrs Scholz had been born an Italian national and had taken up employment in the German post office in exercise of her right of free movement under Article 48, she would in my view still be entitled to ask the Italian authorities to take into account that experience as though it had been acquired in Italy. But it could be that the basis for that proposition lies not so much in Article 48 (2) but rather in Article 48 (1), which — as I stated earlier — provides that 'freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest'. Such freedom of movement would not be secured if a Member State could deter persons from taking up employment in other Member States by refusing to value experience acquired in other Member States when they subsequently return to their country of origin. It is clear that practices adopted by the public bodies of a Member State which impede the free movement of workers can be challenged by all Community nationals, including nationals of the State concerned. [12]

23. The significance of such an obstacle to freedom of movement should not be underestimated. Suppose for example that a teacher with the nationality of Member State A went to work in Member State B for 20 years, before deciding to continue his career in Member State A, and that the authorities in that country determined his grade and salary without consideration of his experience acquired in Member State B. If such a practice were permitted, the persons affected by it would have such a strong incentive to pursue their entire career in a single State that freedom of movement would be illusory.

24. Although it may not be possible to oblige private employers to take account of

12 — See Case C-19/92 *Kraus* v *Land Baden-Wurttemberg* [1993] ECR I-1663, paragraphs 16 and 17, which concerned the obligation on a Member State to recognize educational qualifications acquired by its nationals in other Member States; see also paragraph 19 of my Opinion in Case C-111/91 *Commission* v *Luxembourg* (cited in note 9).

experience acquired in other Member States, it is clear in my view that a public body which acts as an employer must in principle, by virtue of Article 48 of the Treaty and Article 3 (1) of Regulation No 1612/68, equate experience acquired in other Member States to experience acquired in the Member State concerned, when deciding whether and on what terms to employ a Community national.

25. It is clear from the *Sotgiu* judgment that covert discrimination is not prohibited by Article 48 (2) if the difference in treatment is objectively justified. Thus, if there were sound reasons for considering that the experience acquired by Mrs Scholz in the German post office is not as relevant as experience acquired in the Italian public service, having regard to the nature of the post for which she is a candidate, the University of Cagliari might be entitled to disregard that experience partially or totally.

26. In order to appraise whether the University's refusal to recognize experience acquired in another Member State is objectively justified it would be useful to consider briefly the purpose of the rule according to which points are awarded in respect of a candidate's previous employment in the public service. In this regard, it is important to note that, under the rule applied by the selection board, points were to be awarded even in respect of previous experience in functions that were unrelated to those of a canteen assistant. It is clear therefore that no argument could be founded, in the present case, on the obvious differences between the functions of a postal assistant and those of a canteen assistant or on the equally obvious differences between the gastronomic traditions of Germany and Italy. Mrs Scholz's previous experience was disregarded not because it involved a different type of work but because it was acquired in a different Member State.

27. What then is the purpose of a rule under which points are awarded in respect of a candidate's previous employment in the public service, even though the duties performed were entirely different from those attaching to the vacant posts? It seems to me that its main purpose is to give credit to those who have shown an aptitude for public service, on the assumption that those who serve the State in its many manifestations develop a special ethos — which may not be shared by the employees of private undertakings — and are motivated by factors that differ essentially from those obtaining in the private sector. Typically, employment in the public service implies a willingness to accept relatively modest financial rewards in return for greater long-term security, together, perhaps, with the satisfaction of rendering service to the collectivity.

28. If that is the underlying purpose of the rule in question, I do not see what objective justification there can be for disregarding a candidate's previous employment in the public service of another Member State. A candidate who has worked in the German post office is as likely to have developed a special aptitude for public service as a candidate who has worked in the Italian post office. Indeed, the suggestion that someone who has worked in the public service in Germany is by that token less meritorious than someone who has worked in the public service in Italy is contrary to the whole spirit of Community law.

29. I should like finally to address briefly the concerns expressed by the French Government about the wider implications of a ruling that would require experience acquired in other Member States to be taken into account when posts in the public service are filled.

30. As regards first of all the difficulty of determining whether experience acquired in another Member State was in the public sector or not, I do not see how that practical problem can affect the application of the principle that Community nationals should not suffer discrimination on grounds of nationality in the field of employment. If there were some doubt about the public or private nature of a candidate's previous employer in another Member State, that doubt could readily be resolved, for example on the basis of certificates issued by the employer in question or by the consular authorities of the Member State in which it is situated.

31. As regards the possibility of filling vacancies by means of internal procedures reserved to the serving officials of certain government departments or public authorities, I do not think that the ruling to be given in the present case need prejudge the question of the legality of such procedures. If they operate to the disadvantage of the nationals of other Member States, the issue will perhaps be raised in some future case and the Court will be able to rule on it in the context of a specific factual situation.

32. As regards the question whether previous experience acquired in another Member State by a serving official need be taken into account when the further career of such an official is considered, that question also is not directly raised in the present case. In view of the concerns expressed by the French Government, it would be preferable in my opinion to limit the ruling in the present case to the question of discriminatory barriers placed in the way of a Community national's initial recruitment by a public authority of a Member State.

Conclusion

33. I am accordingly of the opinion that the question referred to the Court by the Tribunale Amministrativo Regionale per la Sardegna should be answered as follows:

Article 48 of the Treaty, in conjunction with Article 3 (1) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, must be interpreted as meaning that, where a public body of a Member State, in recruiting staff for posts which do not fall within the terms of Article 48 (4) of the Treaty, provides for account to be taken of candidates' previous employment in the public service, that body may not, in relation to Community nationals, differentiate between employment in the public service of that State and employment in the public service of another Member State.