# OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 6 February 1997 *

1. Do third-country nationals married to Community workers who have not exercised their free movement rights under the EC Treaty enjoy the same rights as such spouses of Community workers who have? Is the Court's existing case-law on reverse discrimination still valid in 'a Community which is on its way to the European Union'? These are in essence the questions which arise in references from a German labour court in litigation between two foreign-language assistants and their employer.

## I — Facts and procedural background

2. Mrs Uecker is a Norwegian national who has worked since 1974, in different capacities, as a teacher of the Norwegian language, mainly in the Federal Republic of Germany. Her husband is a German national; nothing in the order for reference would indicate that he has worked outside that Member State at any material time. On 24 September 1990, Mrs Uecker signed an employment contract with the Land Nordrhein-Westfalen as a foreign-language assistant at the Nordic Faculty of the University of Münster. For various reasons recited in clause 4 of the contract, this was limited in duration to 30 September 1994. Relying on both the judgment of this Court in *Spotti* [1] and Article 28 of the Agreement on the European Economic Area of 2 May 1992 (hereinafter 'the [EEA] Agreement'), [2] Mrs Uecker successfully challenged the temporal limitation on her employment relationship in proceedings before the local labour court, which also relied in its judgment on Article 11 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (hereinafter 'Regulation No 1612/68' or 'the Regulation'). [3] The Land Nordrhein-Westfalen appealed.

3. By order of 26 January 1996, the Landesarbeitsgericht Hamm (Higher Labour Court, Hamm), referred the following questions to the Court:

'1) May the spouse — not being a national of a Member State — of a national of that Member State in which the spouses

1 — Case C-272/92 *Maria Chiara Spotti* v *Freistaat Bayern* [1993] ECR I-5185.

2 — OJ 1994 L 1, p. 1.

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

* Original language: English.

live and in which the spouse who is a national is employed also rely on the right under Article 11 of Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community?

2) If Question 1 is answered in the affirmative:

Does that right of the spouse who is not a national of a Member State to "take up any activity as an employed person" throughout the territory of the Member State concerned include the right, with respect to the conditions of employment and work, in particular with respect to the conditions for an effective temporal limitation of an employment relationship, to be treated by an employer in the Member State concerned in the same way as that employer would have to treat the spouse who is a national of the Member State?

3) If Question 2 is also answered in the affirmative:

Does Article 7(1) of the said Regulation (EEC) No 1612/68 in conjunction with Article 48(2) of the EEC Treaty confer on a worker in a Member State of which he is a national the right to the same treatment as is due to workers who are nationals of another Member State, and is a national provision which has been held by the Court of Justice to be inapplicable against the latter persons therefore also inapplicable against the relevant Member State's own nationals and their spouses who are not nationals of a Member State?'

4. Mrs Jacquet is a Russian national, who has been teaching the Russian language in different capacities since 1988 at Bochum University; her husband is a German national who, according to the national file, has not worked outside the Federal Republic at any material time. On 14 March 1994, Mrs Jacquet signed an employment contract with the Land Nordrhein-Westfalen as a foreign-language assistant for Russian at Bochum University. According to clause 1 of the contract, this was limited in duration to 30 September 1996 'in order to ensure the present relations with the linguistic situation in the home country'. Relying *inter alia* on Article 11 of Regulation No 1612/68 and Article 7 of Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, [4] Mrs Jacquet unsuccessfully challenged the temporal limitation on her employment relationship. She appealed.

4 — OJ, English Special Edition 1970 (II), p. 402.

5. By order of 1 March 1996 the Landesarbeitsgericht Hamm referred three questions to the Court which are identical to those it had previously referred in *Uecker*.

6. Written observations were received at the Court from Mrs Uecker in Case C-64/96, from Mrs Jacquet in Case C-65/96, and from the French Republic, the Federal Republic of Germany and the Commission on both cases.

## II — Community legislative provisions

7. The fifth recital in the preamble to Regulation No 1612/68 recites, *inter alia*, that 'obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country'.

8. Article 7(1) reads as follows:

'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.'

9. Article 10(1) provides that:

'The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse.'

10. Article 11 reads as follows:

'Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to

take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.'

## III — Analysis

11. It is clear that, on its face, the English version of Article 11 of Regulation No 1612/68 would not cover the situation of Mrs Uecker or Mrs Jacquet (hereinafter, for convenience, 'the employees'), as it refers explicitly only to spouses (and dependent children) of 'a national of a Member State [who] is pursuing an activity as an employed or self-employed person *in the territory of another Member State*' (emphasis added), while neither of the spouses of the employees appears to have worked outside Germany. It transpires, however, that the word 'another' is missing from the German version of this provision on which the national court relied; in that version the expression underlined reads simply 'in the territory of a Member State' ('im Hoheitsgebiet eines Mitgliedstaates'). The German version corresponds in this respect to the Dutch ('op het grondgebied van een Lid-Staat'), French ('sur le territoire d'un Etat membre'), Italian ('sul territorio di uno Stato membro'), Greek ('στήν πικράτεια νός Κράτους μέλους'), and Portuguese ('no território de um Estado-membro') versions, while the English version corresponds to the Danish ('på en anden medlemsstaats område'), Spanish ('en el territorio de otro Estado miembro'), Swedish ('en annan medlemsstats territorium') and Finnish ('toisen jäsenvaltion alueella') versions.

12. The question of the interpretation of this provision cannot be resolved on the basis of its wording alone, and, as the Court, faced with such linguistic inconsistency, held most recently in *Merck* v *Primecrown*, it is therefore appropriate to take account of 'the general scheme and the purpose of the regulatory system of which the provisions in question form part'. [5] While it might be considered somewhat surprising that the inconsistency of the different linguistic versions of this important measure has not arisen expressly before the Court in the last 23 years, the matter is not of any great difficulty.

13. Title III ('Workers' families') of Part I ('Employment and Workers' Families') of the Regulation contains three articles. Article 10 which establishes a right of residence for the members of the family of a Community worker 'who is employed in the territory of another Member State', including family members with the nationality of a third country, does not appear to suffer from the same linguistic anomalies as Article 11. The same is true of Article 12, which equally sets employment, or past employment, in the territory of another Member State as a precondition of the right it grants the children of a Community worker. While it is true that Article 11 grants a right of access to employment to family members of a worker pursuing an activity as a self-employed person, as well as to those of a worker in employment, the essential requirement that the Community national work or have worked in a Member State other than that of which he is a national is present in each case.

5 — Joined Cases C-267/95 and C-268/95 *Merck & Co. Inc. and Others* v *Primecrown Ltd and Others* [1996] ECR I-6285, paragraphs 21 and 22 of the judgment.

14. That Article 11 should be interpreted in conjunction with the other provisions of Title III of Part I of the Regulation [6] is supported by the case-law of the Court, particularly its judgment in *Diatta*. [7] The content and the objectives of the Regulation were identified in paragraphs 15 and 21 of that judgment as follows:

'That regulation is one of the various measures intended to facilitate the achievement of the objectives of Article 48 of the Treaty. It must therefore enable a worker to move freely in the territory of the other Member States and to reside in their territory in order to work there.

.... (omissis)

As regards Article 11 of Regulation No 1612/68, it is clear from the terms of that provision that it does not confer on the members of a migrant worker's family an independent right of residence, but solely a right to exercise any activity as employed persons throughout the territory of the State in question. Article 11 cannot therefore constitute the legal basis for a right of residence without reference to the conditions laid down in Article 10.'

15. In my opinion, it follows that granting the non-Community spouse of a Community worker the right of access to employment in the Member State of which the worker is a national in circumstances such as those of the present cases would not advance the objectives of either Regulation No 1612/68 or Article 48 of the Treaty, which it was adopted to implement; it would not, in the words of the fifth recital in the preamble, remove one of the 'obstacles to the mobility of workers'. The absence of such a right of access to employment for the worker's spouse does not have any effect on the situation of a worker who does not exercise his rights of free movement.

16. The Court has long held that '[the] provisions of the Treaty on freedom of movement for workers cannot ... be applied to situations which are wholly internal to a Member State, in other words, where there is no factor connecting them to any of the situations envisaged by Community law'. [8] The same is true of Regulation No 1612/68: in *Morson and Jhanjan*, the Court specifically held that Community law does not prohibit a Member State from refusing to allow third-country relatives, who would otherwise benefit from Article 10 of the Regulation, to enter or reside in its territory where the worker had never exercised the right of freedom of movement within the Community. [9]

6 — This does not imply, however, that the scope of each of these provisions *ratione personae* is necessarily identical for the same category of family members of a worker: Case C-7/94 *Gaal* [1995] ECR I-1031.

7 — Case 267/83 *Diatta* v *Land Berlin* [1985] ECR 567.

8 — Case 175/78 *Regina* v *Saunders* [1979] ECR 1129, paragraph 11 of the judgment; see also Case C-332/90 *Steen* v *Deutsche Bundespost* [1992] ECR I-341, paragraph 9; Case C-153/91 *Petit* [1992] ECR I-4973; Case C-206/91 *Koua Poirrez* v *CAF* [1992] ECR I-6685, paragraph 10; Case C-134/95 *USSL di Biella* v *INAIL* [1997] ECR I-195, paragraph 19.

9 — Joined Cases 35/82 and 36/82 *Morson and Jhanjan* v *State of the Netherlands* [1982] ECR 3723, paragraph 18 of the judgment; see also Case 147/87 *Zaoui* v *Cramif* [1987] ECR 5511, paragraph 15.

17. The interpretation of Article 11 I have suggested was clearly that adopted by the Court in *Gaal*. [10] There the Court identified the beneficiaries of Article 10(1) as being 'the spouse of a worker who is a national of one Member State and who is employed in the territory of *another* Member State, and ... those of his descendants who are under the age of 21 years or are dependants' (emphasis added). The Court went on to hold that '[P]ursuant to Article 11 of that Regulation, the same persons have the right to take up any activity as employed persons throughout the territory of the State where the worker is employed'. [11]

18. It also appears to me that the interpretation suggested by the referring court would deprive the expression 'in the territory of a Member State', contained in the four original language versions of this provision, of any useful meaning. Article 48(1) of the Treaty seeks to ensure freedom of movement for workers 'within the Community'; it is clear that Article 11 of the Regulation could not as it stands have the effect of conferring rights in a non-Community country on the spouse of a Community worker working in that third country. In these circumstances, the requirement that the national of a Member State work in the Community territory, which is the meaning of Article 11 which results from the interpretation suggested by the employees, would be superfluous.

19. To unearth an explanation of why the word 'another' does not appear in Article 11 to qualify the Member State of work of the Community worker would partake more of legal archaeology than of interpretation. [12] It is in my view significant, however, that, according to the second recital in its preamble, Regulation No 1612/68 was adopted with a view to 'perfect[ing] measures adopted successively under Regulation No 15 on the first steps for attainment of freedom of movement and under Council Regulation No 38/64/EEC of 25 March 1964 on freedom of movement for workers within the Community'. The equivalent provisions of the earlier measures, Article 12 of Regulation No 15 of 1961 [13] and Article 18 of Regulation No 38/64/EEC, [14] each provided expressly that the right of access to employment for the spouse and dependent children was subject to the condition that the worker be engaged in gainful activity in the territory of *another* Member State.

20. In both orders for reference, the referring court indicated that it was 'unable to agree with the view that the legal relations between a Member State and its own nationals are irrelevant to Community law', and in particular that a national of a Member State cannot rely on Community law against his own State.

10 — Case C-7/94, cited in footnote 6 above, paragraph 17 of the judgment.

11 — The point is even clearer in certain other language version of the judgment; the French version of this sentence, for example, refers to 'l'ensemble du territoire de cet *autre* État' (emphasis added).

12 — Curiously, the word 'another' does appear in Article 11 of the Commission's proposal (Journal Officiel 1967 No 145, p. 11), and neither the European Parliament nor the Economic and Social Committee suggested that it be deleted (respectively, Journal Officiel 1967 No 268, p. 11 and Journal Officiel 1967 No 298, p. 17).

13 — Journal Officiel 1961 No 57, p. 1073.

14 — Journal Officiel 1964 No 62, p. 965.

In the first place, a Community national may, in situations of fact governed by Community law, rely upon rights deriving therefrom even as against the Member State of which he is a national. As the Court held in *Knoors*, 'freedom of movement for persons, freedom of establishment and freedom to provide services ... which are fundamental in the Community system, could not be realized if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities existing in the matter of freedom of movement'. [15] The general rule was formulated thus in *Scholz*: '[any] Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement of workers and who has been employed in another Member State, falls within the scope of' Regulation No 1612/68 and Article 48 of the Treaty. [16] Secondly, it is clear from the case-law of the Court cited above, and in particular the judgment in *Diatta*, that the rights which are granted under Article 11 of the Regulation are derived rights, and that the third-country spouse can only benefit from these where his or her spouse comes within a situation governed by Community law.

21. In the light of the foregoing, I am of the view that Article 11 of Regulation No 1612/68 should be interpreted as meaning that where the spouse of a Community worker is a national of a third country, the said spouse can rely upon the rights conferred by this provision only where the Community worker is pursuing an activity as an employed or self-employed person in the territory of a Member State other than that of which the worker is a national.

22. If the Court were to follow my recommendation that the first question be answered in the negative, it follows that, in accordance with the terms of the order for reference, the second and third questions need not be answered. In explaining the reasoning behind the third question, however, the referring court raises a point of more general import which, if its views were upheld, could have an impact on the Court's answer to the first question, and which I therefore propose to deal with briefly.

23. The matter is formulated in identical terms in both orders for reference as follows:

'... the question is whether the fundamental principles of a Community which is on its way to the European Union continue to permit a rule of national law which has been declared by the Court of Justice to be in breach of Community law on the ground of an infringement of Article 48(2) of the EEC Treaty still to be applied by the Member State concerned against its own nationals and their spouses originating from non-member countries.'

15 — Case 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399, paragraphs 19 and 20 of the judgment.

16 — Case C-419/92 [1994] ECR I-505, paragraph 9 of the judgment.

In this regard, the national court had earlier referred to *Spotti*, [17] where the Court had held the application of Paragraph 57b(3) of the German Hochschulrahmengesetz (Framework Law on Higher Education) to a contract between the Freistaat Bayern and a foreign-language assistant of Italian nationality to be incompatible with Article 48(2) of the Treaty; the temporal limitation on the contracts at issue in the present cases was also based on Paragraph 57b(3) of the Hochschulrahmengesetz.

24. The matter raised by the referring court concerns essentially the relationship between the Treaty and provisions of national law which are incompatible with it, following the entry into force of the Treaty on European Union. Given the answer I have proposed to the first question, it is only if the Treaty on European Union had brought about a change in that relationship that the employees in the present cases could rely upon *Spotti* to challenge the temporal limitation on their contracts. Whatever the significance for the application of Community law of the establishment of the European Union in accordance with Article A of the Treaty on European Union, it is clear that this did not, in any respect which is relevant to the present proceedings, modify either that relationship or the scope of the provisions of Community law concerning the free movement of persons.

25. The relationship between directly applicable Community provisions and national provisions on the same matter may be gleaned from the Court's judgments concerning the primacy of Community law, and in particular *Costa* v *ENEL*, [18] *Simmenthal* [19] and *Factortame I*. [20] In *Simmenthal*, the Court held that in accordance with this principle Community provisions 'not only by their entry into force render automatically inapplicable any conflicting provision of current national law but — in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States — also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions'. [21] There is, on the other hand, nothing in the Treaty which would prevent a Member State applying to a situation which is purely internal and, therefore, outside the scope of Community law a national provision whose application to a situation governed by Community law has been held to be incompatible with the Treaty. In my opinion, both the general scheme of the Treaty on European Union and the wording of Article M, which provides that 'nothing in this Treaty shall affect the Treaties establishing the European Communities' except those provisions which specifically amend those Treaties, militate against the view that the Treaty on European Union has modified the relationship between Community and national law, as the referring court has suggested.

26. Both France and Germany in their observations examined at some length the possible application of the EEA Agreement

17 — Case C-272/92, cited in footnote 1 above.

18 — Case 6/64 [1964] ECR 585.

19 — Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629.

20 — Case C-213/89 *Factortame and Others* [1990] ECR I-2433.

21 — Case 106/77, cited in footnote 19 above, paragraph 17 of the judgment.

to the factual situation of Mrs Uecker, in that she is of Norwegian nationality and might under certain circumstances be able to claim rights under Article 28 thereof. However, while clearly aware of this legal possibility, the national court deliberately abstained from posing any question to the Court on the issue, and explicitly held that Mrs Uecker could not rely on the Agreement in her dispute with the Land Nordrhein-Westfalen. In these circumstances, it seems to me that the Court has no jurisdiction in the present proceedings to examine any question concerning the EEA Agreement, and that to do so would encroach on the competence attributed to the national court in accordance with Article 177 of the Treaty. [22] It would, of course, be open to the referring court, or any other national court dealing with Mrs Uecker's case, to refer such a question to the Court. [23]

## IV — Conclusion

27. In the light of the foregoing, I am of the view that the second and third questions referred by the Landesarbeitsgericht Hamm in each order for reference should not be answered, and that the first question should be answered as follows:

Article 11 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community should be interpreted as meaning that where the spouse of a Community worker is a national of a third country, the said spouse can rely upon the rights conferred by this provision only where the Community worker is pursuing an activity as an employed or self-employed person in the territory of a Member State other than that of which the worker is a national.

22 — Case 247/86 *Alsatel* v *Novasam* [1988] ECR 5987, paragraph 8 of the judgment.

23 — On the temporal application of the EEA Agreement, see Case T-185/94 *Geotronics* v *Commission* [1995] ECR II-2795; the case is currently under appeal (see the Opinion of Advocate General Tesauro of 30 January 1997 in Case C-395/95 P [1997] ECR I-2271).