OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 27 January 2005 [1]

I — Introduction

1. In these proceedings, the Bundesverwaltungsgericht (Federal Administrative Court, Germany) has referred to the Court of Justice a question concerning the compatibility with Article 39 EC of national regulations limiting the reimbursement of travel expenses for legal trainees ('Rechtsreferendare') to that part of the journey taking place on German territory.

II — Factual and legal background

A — *National legislation*

2. Article 7, paragraph 4, fourth and fifth subparagraphs, of the Verordnung über die Gewährung von Trennungsentschädigung (regulation concerning the grant of separation allowance, hereinafter the 'TEVO') of the Land Nordrhein-Westfalen (hereinafter, the 'Land'), dated 29 April, 1988, provides in the version applicable to the present case that, in the case of temporary civil servants ('Beamter auf Widerruf') carrying out a traineeship who are posted abroad to a place of their choice, daily allowances and lodging allowances are calculated only by reference to the rates applicable to the journey on national territory. Travel expenses incurred from getting to and from such a posting are reimbursed only for that part of the journey to the German border and back, by regular transport and in the cheapest class (TEVO, Paragraph 6(7)).

3. An analogous regulation applies to travel expenses for returning home during the period of the traineeship, by virtue of the combined provisions of Paragraph 5(4) and Paragraph 7(7) of the TEVO.

1 — Original language: English.

B — *The present dispute and the reference for preliminary ruling*

4. In the course of his legal traineeship preceding the second State examination in law, Germany, the applicant in the main proceedings, Mr Karl Robert Kranemann, chose to spend four months as a trainee in a firm of lawyers in London. Mr Kranemann was at this time domiciled in Aachen, Germany, and his status under German law was that of a temporary civil servant.

5. During this period, Mr Kranemann received, in addition to his trainee salary, a separation allowance of DEM 1 686.68 from the defendant in the main proceedings, the Land. Mr Kranemann also lodged a request with the Land for reimbursement of travel expenses for the return trip from his home in Aachen to the place of his traineeship, as well as for the cost of a return trip home for a weekend in November 1995, amounting in total to DEM 539.60. In response to this request, he received only a sum of DEM 83.25, which corresponded to the daily allowance for a business trip and a lodging allowance. In particular, as the TEVO limited the reimbursement of travel expenses to the amount necessary for the return journey to and from the German border, and as Aachen was considered to be on the German border, Mr Kranemann was not reimbursed for the other travel expenses claimed.

6. Mr Kranemann's action challenging this refusal was unsuccessful at first instance and on appeal. Mr Kranemann brought a further appeal to the Bundesverwaltungsgericht, which decided to stay the proceedings and to refer the following question to the Court of Justice:

7. 'Is a provision of national law compatible with Article 39 EC if it gives a Rechtsreferendar, who spends part of his traineeship in a place of his choice in another Member State, the right to reimbursement of his travel expenses to the German border only?' The national court raised doubts over the following issues in particular: (1) Do legal trainees who have passed the first State examination in law qualify as 'workers'? (2) Does the simple refusal of an employer to pay for travel expenses for a training period abroad qualify as a relevant restriction of free movement of workers contrary to Article 39 EC? (3) Does Article 39 EC imply an obligation to reimburse the cost of a trip home in addition to the trainee's basic travel expenses to and from the place of training? (4) If so, can such a restriction on free movement of workers be validly justified by budgetary considerations?

8. In accordance with Article 23 of the Statute of the Court of Justice, written observations were lodged in the present proceedings by Mr Kranemann, by the Land, and by the Commission.

this regard, three potential issues have been raised in the parties' submissions: whether legal trainees are 'workers' in the sense of Article 39 EC; whether the situation in point is purely internal to a Member State lacking sufficient connection to Community law; and whether legal trainees fall within the public service exception of Article 39(4) EC.

III — Appraisal

Are Rechtsreferendare 'workers' under Article 39 EC?

9. The question referred by the Bundesverwaltungsgericht can, in my view, best be answered in three stages. First, does a rule such as that in issue in the main proceedings fall within the formal scope of Article 39 EC? Second, if this is the case, does such a rule restrict free movement to an extent incompatible with Article 39 EC? Third, if so, is there a valid justification for such a rule? I will deal with each of these issues briefly in turn.

11. In the Land's contention, the services provided by a legal trainee during his traineeship are of no economic worth and do not give rise to remuneration within the meaning of this jurisprudence.

12. This argument must, in my view, be rejected.

A — *Does such a rule fall within the formal scope of Article 39 EC?*

13. It is well established that the Community concept of a 'worker' should be interpreted broadly and must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The Court has stated that the essential

10. It is to my mind clear that a rule such as that at issue in the present proceedings falls within the formal scope of Article 39 EC. In

feature of any employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. Neither the sui generis nature of the employment relationship under national law, nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law. [2]

14. Thus, the Court has held that trainee teachers in Germany qualify as 'workers', reasoning that 'the fact that teachers' preparatory service, like apprenticeships in other occupations, may be regarded as practical preparation directly related to the actual pursuit of the occupation in point is not a bar to the application of Article [39](1) if the service is performed under the conditions of an activity as an employed person'. [3]

15. In particular, the test is whether the activities performed by legal trainees are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. [4] In my estimation, this test is satisfied in the present case, for the following reasons.

16. First, the tasks performed by legal trainees such as Mr Kranemann, which may include, for example, drafting memoranda, undertaking legal research, and management of legal files, must be regarded as effective and genuine services provided to those in charge of their traineeship. In particular, as recognised by the referring court in its order for reference, the tasks performed by a legal trainee during his traineeship cannot be said merely to accrue in favour of the trainee, to the exclusion of those running the traineeship. [5]

2 — See, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 17; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26; Case C-456/03 *Trojani*, judgment of 7 September 2004, paragraph 16.

3 — *Lawrie-Blum*, cited in footnote 2, paragraph 19.

4 — See Case 53/81 *Levin* [1982] ECR 1035, paragraph 17 (part-time employment sufficient to establish status as a worker, despite the fact that remuneration is less than minimum guaranteed income in the sector concerned); Case 197/86 *Brown* [1988] ECR 3205 (pre-university vocational training of approximately eight months was sufficient to establish worker status); Case 344/87 *Bettray* [1989] ECR 1621, paragraphs 15 and 16; Case C-3/90 *Bernini* [1992] ECR I-1071 (10-week training course sufficient to establish worker status); Case C-188/00 *Kurz* [2002] ECR I-10691, paragraph 32; Case C-413/01 *Ninni-Orasche*, judgment of the Court of 6 November 2003; and *Trojani*, cited in footnote 2, paragraph 16.

5 — By analogy, as noted by the Commission, the Court has held that the services provided by a legal trainee falls within the scope of Directive 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions: Case C-79/99 *Schnorbus* [2000] ECR I-10997, paragraph 28, where the Court reasoned that the practical training of a Rechtsreferendar constitutes a 'period of training and a necessary prerequisite of access to employment in the judicial service or the higher civil service' and so fell within the scope of the Equal Treatment Directive.

17. Second, the subsistence allowance received by the trainee during his traineeship qualifies as a form of remuneration within the meaning of the Court's jurisprudence. In this regard, the fact that this allowance may be below that awarded for full-time employment does not prevent legal trainees from being regarded as 'workers' provided that the activities performed are effective and genuine. [6] In addition, many legal trainees receive a trainee salary from the practice in charge of their traineeship, which also qualifies as remuneration in this sense.

Is Mr Kranemann's case purely internal to Germany?

18. The Land argues that the situation at issue in the main proceedings is purely internal to a Member State and so does not fall within the scope of EU law, on the ground that a trainee's period abroad merely forms part of his training for a national legal qualification.

19. As observed by the referring court in its order for reference, this argument is without merit. Mr Kranemann's choice to spend four months of his traineeship in another Member State is, in my estimation, a 'connecting factor' sufficient to bring his case within the scope of Community law. [7]

Is Article 39(4) EC applicable?

20. The referring court raises the question of the potential application of Article 39(4) EC, which excludes employment in the public service from the application of Article 39 EC.

21. It is in my view clear that legal trainees such as Mr Kranemann do not fall within the Article 39(4) EC exception. This provision applies only to posts which involve direct or indirect participation in the exercise of powers conferred by public law and duties

6 — See cases cited at footnote 4.

7 — See by analogy, in the context of free movement of citizens, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 30: 'In that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement.' See also, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 27.

designed to safeguard the general interests of the State or of other public authorities, and in particular, where the employment involves a 'special relationship of allegiance' with the State. [8]

22. In my estimation, there are no grounds for finding that such a relationship of allegiance exists in the case of a trainee lawyer. [9] By analogy, the Court in Reyners considered that the exercise of the profession of avocat was not 'connected with the exercise of official authority' within the meaning of Article 45 EC. [10] This is particularly the case with regard to training periods spent in a private undertaking, such as the period at issue in the main proceedings, which was spent by Mr Kranemann in a London law firm. As stated by the Court in *Commission* v *Italy*, 'the concept of employment in the public service does not encompass employment by a private natural or legal person, whatever the duties of the employee'. [11]

23. This reasoning, based on the nature of the employment relationship, is clearly not affected by the formal status of Rechtsreferendare as temporary civil servants. The nature of the legal relationship between a worker and his employer is not decisive for the applicability of Article 39 EC. [12]

B — *Does such a rule restrict free movement of workers to an extent prohibited by Article 39 EC?*

24. The next step of the assessment is to consider whether, on the basis that a rule such as that in issue falls within the formal scope of Article 39 EC, it is capable of impeding freedom of movement for workers.

25. In this regard, the referring court and the Land express the view that such a rule does

8 — Case 149/79 *Commission* v *Belgium* [1980] ECR 3881. See also, the Opinion of Advocate General Stix-Hackl in Case C-405/01 *Colegio de Oficiales de la Marina Mercante Española* [2003] ECR I-10391.

9 — I note that the defendant in the main proceedings has not put forward any argument that the case falls within Article 39(4) EC.

10 — Case 2/74 *Reyners* [1974] ECR 631.

11 — Case C-283/99 *Commission* v *Italy* [2001] ECR I-4363, paragraph 25.

12 — As stated by the Court in *Sotgiu*, 'In the absence of any distinction in the provision referred to, it is of no interest whether a worker is engaged as a workman (ouvrier), a clerk (employé), or an official (fonctionnaire) or even whether the terms on which he is employed come under public or private law. These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law', Case 152/73 [1974] ECR 153, paragraph 5.

not in fact restrict the free movement of workers within the European Union because, as a result of the relatively small sums of money at issue, a refusal to grant travel expenses does not actually influence a trainee's decision to go abroad. [13] This is, it is argued, demonstrated by the fact that Rechtsreferendare do at present often choose to complete a portion of their traineeship abroad.

26. I do not find this argument convincing. It is clear that the Article 39 EC prohibition extends to national rules which are applicable irrespective of the nationality of the workers concerned, but which impede their freedom of movement. [14] As the Court has stated, 'provisions which, even if they are applicable without distinction, preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement constitute an obstacle to that freedom'. [15]

27. I do not accept that a refusal to grant travel expenses for training periods spent abroad would not deter a trainee from exercising his right to free movement. The question whether a worker could be deterred from exercising this right must be examined in all the circumstances of the case. In this regard, although the sums at issue in the present case may be relatively small, these must be placed in the context of the limited nature of the subsistence allowance received by legal trainees during their traineeship, as noted in the submissions of Mr Kranemann. Bearing this in mind, absent additional financial means, I consider that the fact that full travel expenses are reimbursed for a traineeship carried out within Germany, but not within other Member States, may well have an influence on a trainee's decision whether to exercise his Article 39 EC right of free movement.

28. In this sense, the present case bears a certain analogy to the *Köbler* case, as cited by the Commission. In that case, the claimant, who was employed by the Austrian state as a university professor, applied for a special salary increment granted on condition of 15 years' service in Austrian universities. This application was denied as, although the claimant had completed 15 years' service if his experience in all Member States' universities was taken into account, he did not have this experience in Austrian universities alone. The Court found that such a regime was likely to impede freedom of movement of workers. In particular, it rejected the

13 — For example, in Mr. Kranemann's case, while the amount claimed for travel expenses in the present case is DEM 539.60, Mr Kranemann received 1 686.68 DEM from the Land as a separation allowance for the same training period.

14 — Case C-415/93 *Bosman* [1995] ECR I-4921; Case C-190/98 *Graf* [2000] ECR I-493, paragraph 18; Case C-387/01 *Weigel*, not yet reported, judgment of the Court of 29 April 2004, paragraph 52. See also Article 39(3) EC, which specifies that the freedom of movement of workers shall include 'the right, subject to limitations justified on grounds of public policy, public security or public health ... to move freely within the territory of Member States for this purpose ...'.

15 — *Graf*, cited at footnote 14, paragraph 23.

argument that, because the relevant Austrian law contained a provision giving the possibility to grant migrant university professors a higher basic salary in order to promote the recruitment of foreign university professors, their remuneration is often more than that received by professors of Austrian universities, even after account was taken of the special length-of-service increment. This circumstance did not, in the Court's judgment, prevent the rule at issue from constituting unequal treatment between migrant university professors and Austrian university professors and thus creating an impediment to the freedom of movement of workers. [16]

29. For similar reasons, it is my view that a refusal of a right for trainees doing their traineeship abroad to compensation for the cost of returning home upon the same conditions as trainees doing their traineeship in Germany constitutes in principle a restriction of free movement of workers. Even if this may appear at first sight to be a relatively small sum, it may none the less have an influence on a trainee's decision whether to spend part of his traineeship abroad, given that he may have limited financial means at his disposal.

16 — Case C-224/01 *Köbler* [2003] ECR I-10239, paragraphs 75 and 76. The Court noted that the 'absolute refusal to recognise periods serviced as a university professor in a Member State other than the Republic of Austria impedes freedom of movement for workers established in Austria inasmuch as it is such as to deter the latter from leaving the country to exercise that freedom' (paragraph 74). Similarly, in *Sotgiu*, cited at footnote 12, the Court considered that a separation allowance fell under the concept of 'conditions of work' for the purposes of Regulation No 1612/68, insofar as it represented supplementary remuneration granted for the inconveniences suffered by a worker for separation from his home (paragraph 8).

C — *Is there a justification for such a rule so as to make it compatible with Article 39 EC?*

30. The final stage in the present assessment is to consider whether a rule such as that in issue is justified by reasons of public interest.

31. In this regard, the referring court in its order for reference expresses its uncertainty whether, in the event that such a rule constitutes in principle a restriction on the free movement of workers, this restriction is justified by national budgetary considerations. I note that the Land itself has not, in its written submissions, raised such a justification.

32. It is clear that purely economic grounds, including considerations of a national budgetary nature, do not as a rule constitute a relevant justification for a restriction of free movement of workers. [17]

33. On this point, the Commission makes reference to the *Kohll* case, which concerned the conformity with Article 49 EC of Luxembourg's rules making reimbursement of the cost of dental treatment provided by an orthodontist established in another Member State subject to authorisation by an insured person's social security institution. In that case, in response to the argument that such rules were necessary in order not to upset the balance of the social security system, the Court considered that it could not be excluded that the risk of seriously undermining the financial balance of a Member State's social security system may constitute an overriding reason in the general interest capable of justifying a barrier of that kind. [18]

34. I would emphasise that, in my view, the Court's statement in *Kohll* in no way calls into question the general principle that economic grounds do not suffice to justify a restriction on the right to free movement. On the contrary, the Court makes this statement in the context of a very specific factual matrix, namely where the potential justification of the rule in question is the preservation of the cohesion of a discrete national social security system. The concerns arising in such a situation differ fundamentally from the concerns arising where, as is alleged in the present case, the aim of the rule at issue is the protection of the governmental budget in general. [19]

17 — See, for example, Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraph 34 (a restriction on the free movement of services cannot be justified by a concern to secure for a national public foundation all the revenue from the advertising that is destined for the public of that Member State); Case C-398/95 *SETTG* [1997] ECR I-3091 (aim of maintaining industrial peace as a means of bringing a collective labour dispute to an end and thereby preventing any adverse effects on an economic sector, and thus on the State economy, is an economic aim insufficient to justify a restriction on free movement of services); Opinion of Advocate General Stix-Hackl in Case C-42/02 *Lindman* ECR 13519, paragraph 88 (economic interest, in gambling, including financing for benevolent objectives, does not serve as a valid justification for restriction on free movement of services). See also in the context of equal treatment of the sexes, Case C-343/92 *Roks* [1994] ECR 571 and Case C-226/98 *Jørgensen* [2000] ECR I-2447.

18 — Case 158/96 Kohll [1998] ECR I-1931, paragraph 42. However, the Court found on the facts of the case that reimbursement of the costs of dental treatment provided in other Member States in accordance with the rate of the Member State of insurance (i.e., Luxembourg) had 'no significant effect' on the financing of Luxembourg's social security system.

19 — I note in any event that the designation of the German border as a 'cut-off point' for the reimbursement of travel expenses seems, from a budgetary viewpoint, arbitrary and does not necessarily function to exclude reimbursement of those travel costs that are higher than others. Clearly, as noted in the submissions of Mr Kranemann, travel expenses for a legal trainee from one end of Germany to another (for example, Munich to Berlin) may well in many cases exceed travel expenses just across the border to another Member State (for example, Aix-la-Chapelle to Liège).

35. In this regard, it is of course right to say that national or regional governmental bodies may validly take budgetary considerations into account when deciding whether and at what level to grant legal trainees travel and other expenses. In so doing, however, they are none the less bound to respect the fundamental principle of free movement of workers, as discussed from paragraph 10 onwards of this Opinion, and any reimbursement system selected must comply with this principle.

IV — Conclusion

36. I am therefore of the opinion that the Court should give the following answer to the question referred by the Bundesverwaltungsgericht:

A national rule confining the reimbursement of a Rechtsreferendar's travel expenses to that part of the journey carried out within the Member State's territory constitutes a restriction of the free movement of workers contrary to Article 39 EC.