OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 15 May 2008 [1]

I — Introduction

1. At times, people invent classifications which endure only in the realm of ideas. However, if those classifications become entrenched and appear to take on a life of their own, there is a risk of commencing arguments which lead nowhere. That outcome is particularly marked when such classifications have an essentially practical scope, as is the case with the law.

2. In the present proceedings, the Austrian Verwaltungsgerichtshof (Administrative Court) asks a question which, of itself, does not have a correct answer. Accordingly, the Court is required to seek the *most correct* reply, even though it may not be *the only viable one*. The question concerns a social security benefit, whose classification under Council Regulation No 1408/71 of 14 June 1971 [2] allows two possible answers, both of which are convincing. However, the uncertainty lies not in the classification itself but rather in the aim pursued by Community law, which is closely linked to the creation of citizenship of the Union, a concept whose definition has been developed in the case-law of the Court of Justice.

3. As Prince Hamlet, the first existentialist of the modern era, guessed, the difference between being and not being is pure fantasy. [3] Accordingly, it is necessary to be absolutely rigorous in order to formulate a just reply in conformity with the law.

1 — Original language: Spanish.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ English Special Edition *1971 (II), p. 416*).

3 — The view that there is no absolute truth but merely a relative truth originates from the sophists, who argued that it was impossible to perceive reality through the senses because each sense interprets the world in a different way. That disenchantment with the truth prompts Hamlet's well-known soliloquy, in which he states that the difference between being and not being is a matter for each individual's imagination (Rosenberg, M., *The Masks of Hamlet*, Associated University Presses, London, 1992, pp. 65 to 82).

II — The facts of the main proceedings

4. Jörn Petersen, a citizen of the Union with German nationality, worked as an employed person in Austria, the country where he resided. In April 2000 he applied to the Austrian Pensionsversicherungsanstalt (Pension Insurance Institution) for an incapacity pension but that application was refused and therefore he brought an action before the courts. While the judicial proceedings were taking place, the Arbeitsmarktservice (Employment Service) granted Mr Petersen advance unemployment benefit, in accordance with Paragraph 23 of the Arbeitslosenversicherungsgesetz 1977 (Law on Unemployment Insurance; 'AlVG'). Through that benefit, Austrian law provides individuals who are unemployed and have applied for an incapacity pension with a guaranteed minimum income while the procedure is taking place.

5. After the advance had been granted, Mr Petersen notified the Austrian authorities of his intention to move to Germany, in the expectation that the benefit would not be subject to suspension or modification. However, on 28 October 2003, the authorities withdrew the benefit on the ground of his change of residence. Mr Petersen brought another action before the courts, contesting that decision in proceedings which have given rise to the present reference for a preliminary ruling.

III — The legal framework

A — *Community law*

6. In the case referred by the Austrian court, a worker who has transferred his residence to another Member State, namely Germany, has had a social security benefit which he was receiving in Austria, where he pursued his working life, withdrawn. Accordingly, the reference concerns the free movement of persons and, more specifically, the free movement of employed persons. It is appropriate to begin by setting out the relevant provisions of the EC Treaty:

'*Article 17*

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.'

'*Article 18*

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

…'

'*Article 39*

1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

…'

'*Article 42*

The Council shall, acting in accordance with the procedure referred to in Article 251, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) aggregation for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries;

(b) payment of benefits to persons resident in the territories of Member States.

…'

7. The provisions of secondary law referred to in Article 42(3)(d) are principally contained in Regulation No 1408/71,[4] Articles 4, 10 and 69 of which have a particular bearing on the present case:

'*Article 4*

1. This Regulation shall apply to all legislation concerning the following branches of social security:

…

(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;

…

4 — That legislative text was replaced by Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).

(e) benefits in respect of accidents at work and occupational diseases;

…

(g) unemployment benefits;

…'

'*Article 10*

Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.

…'

'*Article 69*

1. An employed or self-employed person who is wholly unemployed and who satisfies the conditions of the legislation of a Member State for entitlement to benefits and who goes to one or more other Member States in order to seek employment there shall retain his entitlement to such benefits under the following conditions and within the following limits:

(a) before his departure, he must have been registered with the employment services of the competent State as a person seeking work and must have remained available for at least four weeks after becoming unemployed. However, the competent services or institutions may authorise his departure before such time has expired;

(b) he must register as a person seeking work with the employment services of each of the Member States to which he goes and be subject to the control procedure organised therein. This condition shall be considered satisfied for the period before registration if the person concerned registered within seven days

of the date when he ceased to be available to the employment services of the State he left. In exceptional cases, this period may be extended by the competent services or institutions;

(c) entitlement to benefits shall continue for a maximum period of three months from the date when the person concerned ceased to be available to the employment services of the State which he left, provided that the total duration of the benefits does not exceed the duration of the period of benefits he was entitled to under the legislation of the State. In the case of a seasonal worker such duration shall, moreover, be limited to the period remaining until the end of the season for which he was engaged.

…'

B — *The national legislation*

8. The social security benefit at issue in these proceedings is governed by the AlVG, particularly Paragraphs 7, 16 and 23 thereof.

'*Paragraph 7*

1. A person who:

(1) is available to the employment services,

(2) has completed the eligibility period, and

(3) has not finished the benefit period

is entitled to unemployment benefit.

2. A person is available to the employment services if he can and is entitled to take up employment (subparagraph 3), and is capable of working (subparagraph 8), is willing to work (subparagraph 9) and is unemployed (subparagraph 12).

…

4. The requirement that a person must have the capacity to work shall not apply in respect of unemployed persons who have been granted measures for professional rehabilitation, where such persons have achieved the purpose of those measures (Paragraph 300(1) and (3) of the Allgemeines Sozialversicherungsgesetz (General Law on Social Security; ASVG)) and completed the required eligibility period in accordance with those measures.

…'

'*Paragraph 16*

1. Entitlement to unemployment benefit is suspended where:

…

(g) the person is abroad, to the extent that neither subparagraph 3 nor other provisions based on international treaties are applicable;

…

3. On application by the unemployed person, and after hearing the Regionalbeirat (Regional Board), the suspension of unemployment benefit under subparagraph 1(g) above may be lifted in exceptional circumstances for up to three months while the entitlement to benefit exists. Exceptional circumstances are circumstances in the interests of terminating unemployment, in particular where the unemployed person provides evidence that he has gone abroad in order to seek employment, to introduce himself to an employer, to undertake training, or for compelling family reasons.

…'

'*Paragraph 23*

1. Unemployed persons who have applied for:

(1) a benefit on the ground of total or partial incapacity for work, a temporary

payment under the statutory pension and accident benefits scheme, or

(2) a benefit on the ground of old age from the pension insurance scheme under the Allgemeines Sozialversicherungsgesetz, the Gewerbliches Sozialversicherungsgesetz (Law on Commercial and Industrial Social Security), or the Bauern-Sozialversicherungsgesetz (Law on Farmers' Social Security), or an exceptional benefit under the Nachtschwerarbeitsgesetz (Law on Strenuous Night Work)

may be granted an advance payment of that benefit or of unemployment allowance until the decision on their application is made.

2. An advance grant of the benefit or of unemployment allowance may be made if:

(1) apart from capacity to work, willingness to work and readiness to work under number 1 of Paragraph 7(3), the other requirements for the grant of the benefit are satisfied,

(2) on the basis of the existing circumstances it is likely that the social security benefit will be granted, and

(3) in the case of number 2 of subparagraph 1, there is confirmation from the competent insurance body that it will probably be unable to give a definite decision on the benefit within two months of the date of entitlement to the pension.

...

4. The advance shall be granted in accordance with number 1 or 2 of subparagraph 1, in the amount of the benefit (or allowance) payable, subject to a maximum of one thirtieth of the average amount of the benefits, including child supplements. Where the regional office of the Arbeitsmarktservice is made aware by a written notice from the competent insurance body that the benefit will be lower than that amount, the advance payment shall be reduced accordingly. Where number 2 of subparagraph 1 applies, the advance shall be paid retroactively with effect from the date of entitlement to the pension, provided that the applicant submitted his application within 14 days of the issue of the confirmation under number 3 of subparagraph 2.

5. If a regional office has granted an advance of a benefit or of unemployment allowance under subparagraph 1, any entitlement of the unemployed person to a benefit under number 1 or 2 of subparagraph 1 for the same period shall be assigned to the Federal Government, for the purpose of managing employment policy, in the amount of the benefit allocated by the regional office, except for sickness insurance contributions, provided that the regional office makes a claim to the competent social security institution for the entitlement to be assigned (assignment *ipso jure*). That assignment of the entitlement shall be effective only up to the limit of the total amount of the benefits in respect of which payment is pending; the corresponding right of credit shall be preferential.

6. Sickness insurance contributions paid out of unemployment insurance funds for the period identified in subparagraph 5 shall be reimbursed by competent statutory sickness insurance institutions through the Hauptverband der österreichischen Sozialversicherungsträger (central association of Austrian social security institutions), at the percentage laid down by Paragraph 73(2) of the ASVG of the amounts which are reimbursed by the competent pension insurance institutions in accordance with subparagraph 5.

7. If a pension is refused under subparagraph 1, the advance shall be regarded as a benefit or as unemployment allowance for so long as and in the amount in which it has been paid, so that it shall not be necessary to pay any shortfall and the period of payment shall be shortened in accordance with Paragraph 18.'

IV — The questions referred for a preliminary ruling and the procedure before the Court of Justice

9. That being the situation, on 25 April 2007, the Austrian Verwaltungsgerichtshof referred the following questions to the Court for a preliminary ruling:

'(1) Is a monetary unemployment benefit granted to unemployed persons who have applied for the grant of a benefit under the statutory pension and accident insurance scheme on the ground of reduced capacity to work or incapacity to work until a decision is made on their application which is an advance payment of such benefit and is to be subsequently set off against such benefit, and which, although subject to the conditions that the person is unemployed and has completed a minimum eligibility period, is not subject to the other require-

ments for the payment of unemployment benefit, namely capacity to work, willingness to work and readiness to work, and which is paid only if, having regard to the circumstances, it is likely that benefits will be granted under the statutory pension and accident insurance scheme, an unemployment benefit within the meaning of Article 4(1)(g) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, or an invalidity benefit within the meaning of Article 4(1)(b) of that Regulation?

(2) If the answer to the first question is to the effect that the benefit referred to is an unemployment benefit within the meaning of Article 4(1)(g) of Regulation No 1408/71:

Does Article 39 EC preclude a national provision which provides that — apart from a discretion available on application by the unemployed person in cases of exceptional circumstances for up to three months — the claim to the benefit is suspended if the unemployed person lives abroad (in another Member State)?'

10. The reference for a preliminary ruling was registered at the Court Registry on 9 May 2007.

11. Written observations were lodged by Mr Petersen, the German, Austrian, Spanish and Italian Governments, and the Commission.

12. At the hearing, held on 3 April 2008, oral argument was presented by the legal representative of Mr Petersen and by the agents of the Austrian Government and the Commission.

V — Analysis of the questions referred for a preliminary ruling

A — *Preliminary observations: citizenship of the Union and the coherence criteria in the case-law of the Court of Justice*

1. The provisions on citizenship and their interpretation in case-law

13. The questions referred concern the free movement of workers. However, as is usual in this type of case, the dispute ultimately relates to citizens of the Union who exercise the right of freedom of movement. Thus, having introduced the concept of citizenship, the proceedings do not fall exclusively within the scope of Article 39 EC, since there are other provisions of the Treaty, specifically Articles 17 EC and 18 EC, whose subject-matter has not yet been fully defined in the case-law of the Court.

14. Those who have participated in these preliminary ruling proceedings have asserted the relevance of the concept of citizenship provided for in the EC Treaty. Mr Petersen, the Commission, and the German and Spanish Governments have all referred to Article 18 EC in support of their arguments, but Articles 17 EC and 18 EC are general provisions which are applicable to the extent that there are no special provisions. That requirement is satisfied in the case before the Court, where a worker has exercised the right of freedom of movement and relies on Article 39 EC to exercise his rights vis-à-vis a Member State.

15. There have recently been significant advances in the case-law in this field. Since the judgment in *Martínez Sala*, [5] the concept of citizenship of the Union has gathered unprecedented momentum and taken its place at the forefront of the principal areas within the jurisdiction of the Court, which, following the introduction of Part Two of the EC Treaty in 1992, has been in a position to interpret the will of the legislature, affording individuals who exercise freedom of movement greater status than that attributed to economic operators. [6] Slowly but surely, Community protection has been extended to individuals who did not traditionally fall within the scope of the Treaties, such as students, [7] those claiming benefits [8] and

5 — Case C-85/96 [1998] ECR I-2691.

6 — There is an interesting historical analysis of the negotiations which led to the inclusion of citizenship of the Union in the Treaty on European Union in O'Leary, S., *The Evolving Concept of Community Citizenship. From the Free Movement of Persons to Union Citizenship*, Kluwer Law International, The Hague, 1996, pp. 23 to 30.

7 — Case C-209/03 *Bidar* [2005] ECR I-2119 and Joined Cases C-11/06 and C-12/06 *Morgan and Bucher* [2007] ECR I-9161.

8 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193 and Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451.

nationals of third countries who are related to a citizen of the Union.[9] To express it more clearly, the Court has transformed the paradigm of *homo economicus* into that of *homo civitatis*.[10]

16. I have had the opportunity to express my views on the reasons for that step forward, which was taken, bravely but also wisely, in order to strengthen the personal situation of individuals, and which relegates to a secondary position the debate about barriers to entry and discrimination.[11] In short, as Advocate General Jacobs pointed out in *Konstantinidis*, 'a Community national who goes to another Member State as a worker or self-employed person ... is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values ... In other words, he is entitled to say "*civis europeus sum*" and to invoke that status in order to oppose any violation of his fundamental rights'.[12]

17. Although that Opinion of Advocate General Jacobs focuses on invoking the fundamental rights of the Union, in my view the Court has accepted its reasoning.[13] Cases such as *Carpenter*,[14] *Baumbast and R*,[15] *Bidar*,[16] *Tas-Hagen and Tas*[17] and *Morgan and Bucher*[18] demonstrate a tendency towards protecting individuals, a concern with the personal situation of those who exercise a right under the Treaties which in the past was much less evident. Thus, the free movement of persons acquires its own identity, imbued with an essential nature that is more constitutional than statu-

9 — Case C-60/00 *Carpenter* [2002] ECR I-6279 and Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

10 — In *Common Market Law Review*, No 1, Vol. 45, 2008, pp. 2 and 3, the editors analyse the development of case-law in this field and conclude that the differences between individuals who are economically active and those who are not, or between purely domestic and Community situations, together with the systematic aim of the principle of non-discrimination in Article 12 EC, have become less marked. The concept of citizenship, enshrined in Articles 17 EC and 18 EC, has gradually emerged as the new force behind integration.

11 — Opinions in Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, point 34, and Case C-386/02 *Baldinger* [2004] ECR I-8411, point 25. See also points 56 to 74 of my Opinion in Case C-138/02 *Collins* [2004] ECR I-2703, and points 37 to 68 of my Opinion in *Morgan and Bucher* (cited in footnote 7).

12 — Opinion in Case C-168/91 *Konstantinidis* [1992] ECR I-1191, point 46.

13 — The Court did not follow the specific suggestion put forward by the Advocate General but it did adopt the logic on which that suggestion was based, and, in points 16 to 22 of the Opinion in Case C-380/05 *Centro Europa 7* [2008] ECR I-349, Advocate General Poiares Maduro attempted to expand on all the arguments put forward by Advocate General Jacobs.

14 — Cited in footnote 9.

15 — Cited in footnote 9.

16 — Cited in footnote 7.

17 — Cited in footnote 8.

18 — Cited in footnote 7.

tory, transforming it into a freedom akin to the dynamics of the fundamental rights.[19]

18. In the light of that approach in case-law, it is no surprise that decisions of the Court concerning the free movement of workers are increasingly based on Articles 17 EC and 18 EC. A number of Advocates General employ a more orthodox approach to maintain that only Article 39 EC is applicable for the purposes of resolving disputes relating to employed persons. However, the Court has raised the possibility of applying the provisions on citizenship and the provisions on the free movement of workers simultaneously. To my mind, that approach is consistent with the case-law formulated in that area of the law but the outcome reached is not always clear or convincing. That shortcoming is evident in an analysis of a number of recent judgments of the Court.

19. *Commission* v *Germany*[20] concerned a subsidy for real property granted to persons liable to unlimited taxation on income, provided that the property was situated on German territory. The Court held that there had been a breach of Community law and explained that that breach was twofold: on the one hand, there was an infringement of Articles 39 EC and 43 EC, where the persons liable to unlimited taxation pursued an economic activity; on the other hand, there was an infringement of Article 17 EC where such persons were not economically active.[21] In his Opinion in those proceedings, Advocate General Bot merely concluded that there had been an infringement of Articles 39 EC and 43 EC. The Advocate General took the view that it was not necessary to consider the effects which the provisions on citizenship would have in a similar situation.[22] The Court did not share that view.

20. In *Gaumain-Cerri and Barth*,[23] the Court analysed a residence requirement for entitlement to a social security benefit for persons caring for a reliant person and found that Regulation No 1408/71 and accordingly the secondary legislation in the field of social security were applicable. However, in view of the uncertainties concerning the status of the persons concerned, whose provision of services to reliant persons did not fall exactly within the Community definition of 'worker', the Court had to extend the provisions material to the case. Before embarking on a classification which would have an effect on the resolution of the case, the Court held that the residence requirement was unlawful, '… without it being necessary to take a position … on the issue of whether the third parties concerned are to be regarded as workers

19 — Spaventa, E., 'Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects', *Common Market Law Review*, 45, 2008, p. 40, describes that approach to the cases on citizenship and points out that 'the national authorities must take into due consideration the personal situation of the claimant so that even when the rule in the abstract is compatible with Community law, its application to that particular claimant might be contrary to the requirements of proportionality or fundamental rights protection. … This qualitative change is of constitutional relevance both in relation to the Community's own system, and in relation to the domestic constitutional systems'.

20 — Case C-152/05 [2008] ECR I-39.

21 — *Commission* v *Germany* (cited in footnote 20), paragraphs 29 and 30.

22 — Opinion in *Commission* v *Germany* (cited in footnote 20).

23 — Joined Cases C-502/01 and C-31/02 [2004] ECR I-6483.

within the meaning of Article 39 EC or of Regulation No 1408/71. It is not disputed that, in the main proceedings, those third parties possess Union citizenship conferred by Article 17 EC'.[24]

21. It is immaterial, therefore, whether those who provide services to reliant persons are 'workers', since protection under Community law flows from Article 39 EC (and from the provisions of secondary law which implement it) or from Article 17 EC. As in *Commission* v *Germany*, the Court did not accept the view of the Advocate General, who, after a detailed discussion of the employment status of persons who provide care services, concluded that they are 'workers' within the meaning of Community law.[25]

22. The cases cited concerned individuals who invoked provisions of Community law against their States of nationality, thereby justifying the application of Article 17 EC, which merely provides that '[c]itizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby'. Article 18 EC, which enshrines the right to move and reside freely within the territory of the Member States, is drafted in similarly broad terms. That article, which is aimed essentially at individuals who assert rights against Member States other than their State of nationality, has gradually become entwined with Articles 39 EC, 43 EC and 49 EC.

23. In *Baumbast and R*, the Court held that a German national who had exercised the right of freedom of movement in the United Kingdom was entitled to maintain his residence in that State under Article 18 EC.[26] In *Trojani*, the Court found that if a French national residing temporarily in Belgium was not economically active (a matter which it left in the hands of the national court), he was still entitled to the protection afforded by Article 18 EC.[27] The judgment in *Schwarz and Gootjes-Schwarz* went further in that regard and held that the application of Article 49 EC or Article 18 EC was the responsibility of the national court, although the Court ruled that there had been an infringement of both provisions.[28] In short, although there is a certain amount of conceptual sterility when it comes to differentiating between the scope of the articles on citizenship and the articles on freedom of

24 — *Gaumain-Cerri and Barth* (cited in footnote 23), paragraphs 32 and 33.

25 — Opinion of Advocate General Tizzano in *Gaumain-Cerri and Barth* (cited in footnote 23).

26 — Judgment in *Baumbast and R* (cited in footnote 9).

27 — Case C-456/02 *Trojani* [2004] ECR I-7573.

28 — Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849.

movement, the distinction does not give rise to significant practical differences. The Court is advancing steadily towards achieving a uniform level of protection in the field of the free movement of persons, using the provisions on citizenship as a helpful tool.

24. In those circumstances, it is appropriate to summarise a number of considerations with a view to formulating a theoretical basis which will enable the resolution of this case and provide clear guidelines for future ones. The preliminary ruling proceedings combine the specific features of a particular case with the requirements of case-law which has been laid down for a Community of 500 million citizens who seek responses that are both individual and universal. With that aim in mind, I shall present to the Court a methodology for the provisions on citizenship which will resolve Mr Petersen's case and provide guidance for many of the cases which will arise in the Union over the coming years.

2. The movement of free citizens in a Union governed by the rule of law

25. The Court has prompted a significant change in the definition of citizenship which the Member States inserted into the founding Treaties in 1992. There are two driving forces behind that evolution, which provide criteria for endowing the case-law with coherence and pragmatic authority: on the one hand, the emergence of the fundamental rights and, on the other, the creation of a democratic identity in the European political community.

26. At the outset, the concept of citizenship of the Union, as it is framed in Part Two of the EC Treaty, provided a basis for the provisions guaranteeing freedom of movement which was more symbolic than real. The creation of procedures for participating in local democratic processes and for diplomatic and consular protection provided a status with a tendency to be confined to Articles 17 EC to 22 EC.[29] However, the Court noticed that the freedoms of movement suffered from serious restrictions. Frequently, those shortcomings were reflected in clear injustices for the beneficiaries of the rights conferred by Community law. Such well-known cases as *Martínez Sala*, *Baumbast and R*, and *Carpenter* placed the Court in a difficult situation: if the Court applied strictly the provisions on freedom of movement, it would achieve an outcome that

29 — Closa, C., 'The Concept of Citizenship in the Treaty on European Union', *Common Market Law Review*, No 29, 1992, pp. 1140 to 1146.

would be untenable for those seeking justice; however, if the Court increased the protection beyond those freedoms, it would extend the scope of the Treaties towards an uncertain destination. To avoid both possibilities, the Court relied on the concept of citizenship in Articles 17 EC and 18 EC, in order to give the freedoms a more sophisticated subject-matter.[30]

27. I believe that that new dialectic must be interpreted as follows: the concept of citizenship, which entails a *legal status for individuals*, means that the Member States must pay *particular attention to individual legal situations*. The fundamental rights play a vital role in the performance of that task. As an integral part of the status of citizenship, the fundamental rights strengthen the legal position of the individual by introducing a decisive aspect for the purposes of substantive justice in the case concerned. Holding their fundamental rights as prerogatives of freedom, citizens of the Union afford their claims greater legitimacy. Moreover, in some cases, where a fundamental right is not at stake but a clear injustice has been committed, a stringent review of proportionality may be carried out.[31] That definition calls for the freedoms of movement to be reinterpreted where the individuals who are entitled to those freedoms hold the status conferred in Articles 17 EC and 18 EC.

28. Thus, the *free movement of persons* becomes the *movement of free citizens*. That change of perspective is not insignificant, because, rather than falling on the concept of movement, the focus of attention has shifted to the individual.

29. While the fundamental rights introduce an individual dimension, the democratic element provides greater protection

30 — Besselink, L., 'Dynamics of European and national citizenship: inclusive or exclusive?', *European Constitutional Law Review*, No 3, Vol. I, 2007, pp. 1 and 2; Castro Oliveira, Á., 'Workers and other persons: step-by-step from movement to citizenship — Case Law 1995-2001', *Common Market Law Review*, No 39, 2002; Dougan, M. and Spaventa, E., 'Educating Rudy and the (non-) English patient: A double-bill on residency rights under Article 18 EC', *European Law Review*, No 28, 2003, pp. 700 to 704; Martin, D., 'A Big Step Forward for Union Citizens, but a Step Backwards for Legal Coherence', *European Journal of Migration and Law*, Vol. 4, 2002, pp. 136 to 144; O'Leary, S., 'Putting flesh on the bones of European Union citizenship', *European Law Review*, No 24, 1999, pp. 75 to 79; Shaw, J. and Fries, S., 'Citizenship of the Union: First Steps in the European Court of Justice', *European Public Law*, No 4, 1998, p. 533.

31 — Spaventa, E., op. cit., pp. 37 and 38, analyses the case-law of the Court on citizenship in purely domestic situations and states that 'either one argues that the Court has gone too far in say *Baumbast*, *Bidar*, and also *Carpenter*, or there is a challenging argument to be made as to why crossing a border should make such a difference to claimants' rights'. Indeed, the systematic aim of the principle of non-discrimination could lead, paradoxically, to unfair outcomes. It is precisely that situation which the Court has sought to avoid in its most recent case-law.

to the conditions for membership of a political community. Although the freedoms of movement were restricted to the removal of barriers and the prohibition of discrimination, it was understood that an individual who exercised freedom of movement belonged to a community of origin, in other words, the State of his nationality. That factor alone would be sufficient to justify responsibility for individuals falling on their respective States, thereby giving rise to policies of solidarity which are restricted to those who contribute resources and participate in the structure of the State.[32]

30. The Court has gone beyond that State perspective and incorporated into the *acquis communautaire* an approach more in keeping with the nature of citizenship of the Union.[33] In case-law, the importance of the responsibilities and obligations of States *of origin* is noticeably waning in favour of the responsibilities and obligations of *host* States.[34] Therefore, a Member State may not deprive a citizen of the Union of his rights on the ground that he does not officially reside on its territory if that individual carries on his personal and professional life inside that State's borders.[35] Similarly, even though it may become a burden on public funds, States

32 — An aspect which leaves its own mark on social policy, as a special force for the integration of individuals. Hantrais, L., *Social policy in the European Union*, St Martin's Press, New York, 1995, pp. 34 to 42, and Majone, G., 'The EC Between Social Policy and Social Regulation', *Journal of Common Market Studies* 31, No 2, 1993. The well-known Pintasilgo report, drafted in 1996 by a Comité des sages, and entitled 'For a Europe of Civil and Social Rights', deserves special mention and also has a bearing on the importance of social policies as vehicles for integration.

33 — The most representative example of that break with the elements of the State linked to democracy is supplied by the judgment in Case C-145/04 *Spain* v *United Kingdom* [2006] ECR I-7917, which concerned the lawfulness of United Kingdom electoral legislation pursuant to which nationals of third countries with ties of identity in the United Kingdom were entitled to vote in elections to the European Parliament. The Court upheld the lawfulness of that measure in broad terms, finding that the link between an individual and his State of nationality does not exclude other manifestations of democratic participation in other political communities. At paragraph 78 of the judgment, the Court made its position categorically clear: 'the definition of the persons entitled to vote and to stand as a candidate in elections to the European Parliament falls within the competence of each Member State in compliance with Community law, and … Articles 189 EC, 190 EC, 17 EC and 19 EC do not preclude the Member States from granting that right to vote and to stand as a candidate to certain persons who have close links to them, other than their own nationals or citizens of the Union resident in their territory.' On the state of the issue at national level, where the democratic process may include those who should not hold the right of representation and vice versa, see Presno Linera, M.A., *El derecho de voto*, Tecnos, Madrid, 2003, pp. 155 to 172.

34 — It is appropriate to point out that the United States Supreme Court took the same approach throughout a century of case-law, most notably after the adoption of the 14th amendment, which, as is well known, derives its subject-matter from *Dred Scott* v *Sandford* (60 U.S. (19 How.) 393 (1856)) and from the subsequent Civil War which bathed the young Federation of States in blood between 1861 and 1865. The 14th amendment declares that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States'. It is significant that even now, nearly a century and a half after the adoption of that provision, the United States Supreme Court is still fighting against State laws which provide that those who seek to enforce a right must satisfy residence requirements. In the recent judgment in *Saenz* v *Roe*, 526 U.S. 489 (1999), the Supreme Court declared that a Californian law which prohibited people who had not lived in the state for more than 12 months from claiming a social security benefit was unconstitutional. With two individual votes against, the Supreme Court took the view that the measure concerned was incompatible with the right of every citizen of the United States to freedom of movement. In that connection, although written before the judgment cited, see the authoritative view of Warren, E., 'Fourteenth Amendment: Retrospect and Prospect', in Schwartz, B. (ed.), *The Fourteenth Amendment*, New York University Press, New York, 1970, p. 216 et seq.

35 — Judgment in *Grzelczyk* (cited in footnote 8).

must provide the same services to all citizens of the Union, irrespective of their nationality and residence, if they prove that they carry out activities comparable to those carried out by persons who do have a link with the political community of that State.[36] That principle is strengthened where a citizen of the Union proves that he is not a financial burden on the host State, regardless of his source of income or the method used to obtain citizenship.[37]

31. It is, therefore, the notion of *belonging* in a material sense, aside from any administrative requirements, which justifies the inclusion of citizens of the Union in the political community.[38] When the ties of identity with a single State are broken so that they may be shared with others, a connection is woven in a wider sphere. As a result, the notion of *European belonging* is created, which the Treaties seek to strengthen. Justice Benjamin Cardozo expressed it superbly in *Baldwin* v *G.A.F. Seelig*, in connection with the Constitution of the United States of America, when he pointed out that the Constitution 'was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division'.[39]

36 — Judgment in *Bidar* (cited in footnote 7).

37 — Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

38 — Which excludes, conversely, the right to belong of anyone who attempts to rely on the provisions on citizenship without demonstrating any link with a political community, as occurred in Case C-138/02 *Collins* [2004] ECR I-2703.

39 — *Baldwin* v *G.A.F. Seelig, Inc.*, 294 U.S. 522, 523 (1935).

32. Accordingly, the emergence of the fundamental rights, on the one hand, and the link with the State of which the individual concerned effectively is part, on the other, imbue the case-law with a constitutional dimension. That serves to protect the status of the free citizen in the democratic sphere of the Union, an aspect which is enshrined in the reality of a Union governed by the rule of law in which legal provisions, especially the ones in the Treaties, guarantee individual freedom and democratic equality.[40]

3. Freedoms and citizenship: criteria for coexistence

33. In the light of that discussion, I suggest that the Court should continue to strengthen the concept of citizenship but that it should refine the legal methods of protection, because, occasionally, the application of the Treaties is incorrect. To avoid that, I believe that it is essential to identify the precise scope of Articles 17 EC and 18 EC in order to define the status of citizen of the Union, particularly where the facts relate to the free movement of persons, whether they are workers or employers.

40 — I have taken the term 'Union governed by the rule of law' from Rideau, J., 'L'incertaine montée vers l'Union de droit', *De la Communauté de droit à l'Union de droit. Continuités et avatars européens*, LGDJ, Paris, 2000, p. 1.

34. The Court has described in detail the scope of freedom of movement for workers (Article 39 EC), freedom of establishment (Article 43 EC) and freedom to provide services (Article 49 EC). Despite the progress made in case-law, there are uncertainties surrounding whether those provisions of the Treaty may be invoked, either because the individual concerned is not a worker within the meaning of the Treaty or because he does not pursue an economic activity. In those circumstances, Articles 17 EC and 18 EC come into play as provisions of last resort in the system, which protect individuals who exercise freedom of movement when they are not protected by other provisions or when the protection provided is subject to restrictions either because of a lack of harmonisation in the field concerned or because of the particular features of the cases arising in that context.

35. At the same time, there appears to be a certain amount of redundancy in the case-law, which tends to analyse the facts by distinguishing between the provisions governing citizenship and the provisions governing the freedoms but then goes on to treat them identically. That is clear in *Schwarz and Gootjes-Schwarz* and *Commission* v *Germany*, where it is possible to see both a distinction and a similarity between the subject-matters and the outcomes. If that identity is more substantive than procedural, then to my mind there is no point retaining separate spheres of application.

36. Therefore, I propose that the Court should examine this case in the light of the freedoms of movement for employed and self-employed persons (Articles 39 EC, 43 EC and 49 EC), having regard to the prevailing circumstances. If there is a link to the fundamental rights or to the democratic factors of belonging to a political community, the freedoms should be interpreted *in the light of Articles 17 EC and 18 EC*, in order to afford the citizen of the Union in question the maximum protection.

37. However, in the event that the freedoms laid down in Articles 39 EC, 43 EC and 49 EC are not applicable to the present case, I propose that the Court should find two levels of protection in Articles 17 EC and 18 EC: where the conditions of freedom and democracy referred to above are present, the highest level of protection is afforded to individuals; where those conditions are not present, the margin of discretion of the Community legislature and the national authorities must be increased.

38. That approach would endow the spirit which infuses the case-law with a more refined legal method. At the same time, Articles 17 EC and 18 EC would acquire their full meaning, including when they touch on the definitions of the traditional freedoms of movement. Finally, the Court would strengthen the position of citizens of the Union, in terms of both their rights and their integration.

39. Having made those preliminary points, it is necessary to analyse the questions referred for a preliminary ruling by the Austrian Verwaltungsgerichtshof.

VI — The first question: the advance unemployment benefit granted to applicants for incapacity benefit and its classification

A — *The question posed*

40. Mr Petersen has received a social security benefit which has elements peculiar to both unemployment benefit and incapacity benefit. Although it is beyond doubt that it must be regarded as a benefit under Regulation No 1408/71, [41] it is necessary to choose one of those classifications because the regulation provides for different rules to apply to national measures for suspension and modification where the beneficiary transfers his residence. While the regulation prohibits the suspension or modification of invalidity benefits on that ground, [42] Member States are granted a wider freedom of action when the benefit at issue is unemployment benefit. [43]

41. Using the reasoning put forward in this Opinion, I believe that choosing either classification will lead to the same outcome. If the Court decides it is an invalidity benefit, the prohibition in the regulation will provide a categorical reply to the Verwaltungsgerichtshof. On the other hand, if the Court decides it is an unemployment benefit, Mr Petersen satisfies one of the conditions set out in points 25 to 38 of this Opinion, which means that he is entitled to the maximum level of Community protection under Articles 18 EC and 39 EC.

42. Notwithstanding the similarity in the outcomes, it is appropriate to examine the issue of the classification of the benefit, since the questions referred for a preliminary ruling turn first and foremost on that point.

41 — It meets all the conditions of the regulation and of case-law, in that a benefit will be a social security benefit 'if, first, it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and, second, it relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71' (Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14, and Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 14).

42 — Article 10 of Regulation No 1408/71.

43 — Article 69 of Regulation No 1408/71.

B — *Arguments of the governments, the Commission and Mr Petersen*

43. The German, Austrian and Italian Governments and the Commission have maintained in their observations that the disputed benefit is an unemployment benefit, which comes under Article 4(1)(g) of Regulation No 1408/71. They all refer to the *De Cuyper* judgment,[44] which found that the purpose and the basis of calculation of the benefit are criteria for reaching the correct classification.[45]

44. Thus, the German and Austrian Governments state that the advance at issue is intended to cover a situation of unemployment, because that status is necessary for the grant of the benefit. Those governments also point out that there is always a risk of unemployment but that the risk inherent in invalidity benefit is based on facts which are unknown until the time of the administrative decision awarding the benefit. Finally, the German and Austrian Governments argue that the benefit is calculated in accordance with the rules governing unemployment benefit, with the addition of a corrective coefficient to avoid imbalances where invalidity benefit is granted.

45. The Commission essentially agrees with those arguments, although it points out that, where invalidity benefit is granted, the authority with responsibility for administering the benefit must reimburse to the body responsible for unemployment benefit the sums paid during the period of the advance; where the benefit is not awarded, the amounts paid out are set off against the unemployment benefit to which the applicant for the advance was originally entitled (because it was a requirement that the applicant must be unemployed).

46. Finally, the German, Austrian and Italian Governments and the Commission do not regard as important the fact that, in order to receive the advance, the applicant is not required to be seeking employment, since that would distort the nature of a benefit designed to assist individuals who have applied for incapacity benefit but do not know the outcome of their claim and are also unemployed. To alleviate such a situation, a third category was created in Austria, which has all the elements of an unemployment benefit but with one logical exception, because it would be difficult to require a person who has applied for an invalidity benefit to seek work.

44 — Case C-406/04 [2006] ECR I-6947.

45 — *De Cuyper* (cited in footnote 44), paragraph 25: '… in order to be categorised as social security benefits, benefits must be regarded, irrespective of the characteristics peculiar to different national legal systems, as being of the same kind when their purpose and object as well as the basis on which they are calculated and the conditions for granting them are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of the benefits.'

47. Mr Petersen and the Spanish Government disagree with the German, Austrian and Italian Governments and the Commission, and take the view that the benefit at issue is an invalidity benefit under Article 4(1)(b) of Regulation No 1408/71.

48. The Kingdom of Spain, relying on a literal interpretation of the *De Cuyper* judgment, argues that, because he lacks the capacity for work, the benefit is intended to cover the possible invalidity of Mr Petersen. The purpose of unemployment benefit is 'enabling the workers concerned to provide for themselves following an involuntary loss of employment when they still have the capacity for work'.[46] The latter condition, which requires anyone applying for unemployment benefit to be available for work, would exclude Mr Petersen and convert his advance into an invalidity benefit.

49. Mr Petersen's representative has not referred to the *De Cuyper* judgment and the applicant's position is based on the classification of the benefit as a social security benefit, relying on the judgments in *Jauch*[47] and *Offermanns*.[48]

C — *Appraisal*

50. The arguments put forward reflect the dilemma faced by the Court, since there are reasons for and against both categories. In principle, the benefit concerned is a sui generis benefit which is difficult to fit into the Community classification and is aimed at resolving the difficulties of those who claim entitlement to certain social security benefits.

51. However, there are compelling reasons why the benefit should be classified as an unemployment benefit rather than as an invalidity benefit.

52. It is not a condition of the disputed advance that the applicant must have the capacity for work[49] or be available to the employment authorities.[50] If the incapacity benefit is granted, the decision acquires a kind of retroactivity vis-à-vis the advance and consequently transforms it into a benefit provided for in Article 4(1)(b) of Regulation No 1408/71; the body responsible for invalidity benefit must reimburse the authority

46 — *De Cuyper* (cited in footnote 44), paragraph 27.

47 — Case C-215/99 [2001] ECR I-1901.

48 — Case C-85/99 [2001] ECR I-2261.

49 — Paragraph 23(2)(1) of the AlVG.

50 — A logical consequence of the foregoing exception.

responsible for the payment of unemployment benefit for the grant of the advance.[51] Finally, in *De Cuyper* the Court defined unemployment benefit in strict terms, emphasising that the applicant must have the capacity for work.[52]

53. On that premiss, it would be possible to regard the disputed advance as an invalidity benefit, but there are important reasons for eschewing such a hasty conclusion.

54. The first reason is based on the sui generis nature of the advance, which is intended as a special allowance to provide assistance in a particular situation. As the Commission explained at the hearing, the advance at issue exists in a kind of legal 'limbo'. While it has characteristics peculiar to both categories, it also *lacks* certain elements inherent in both benefits, and it is impossible to classify it in such a way that it satisfies all the requirements of an invalidity benefit or of an unemployment benefit under Community law.

55. Bearing that point in mind, it is important not to overstate the fact that Mr Petersen, like any other recipient of the advance, is unable to work or to report to the employment authority during the period of unemployment. In the same way as the advance differs from unemployment benefit in those aspects (which are essential requirements in the light of Paragraph 7(1)(1) of the AlVG), it also fails to satisfy an essential condition of invalidity benefit, namely the financial element, which is calculated in accordance with the provisions on unemployment benefit.[53]

56. The second reason relates to the fact that incapacity benefit is granted retroactively so that it may be set off against the amount of the unemployment benefit. The nature of the advance changes if the application for incapacity benefit is granted but, where an application is refused, it becomes an unemployment benefit in the strict sense and there is no need for the reimbursement of any sums between the competent authorities.[54]

57. It is also appropriate not to overstate the importance of the *De Cuyper* judgment in order to understand its true scope. In that

51 — Paragraph 23(7) of the AlVG.

52 — *De Cuyper* (cited in footnote 44), paragraph 27.

53 — Paragraph 23(4) of the AlVG.

54 — Paragraph 23(5) and (6) of the AlVG.

case, a Belgian national was in receipt of an unemployment allowance a special feature of which was that it exempted him from registering as a job-seeker and, consequently, from the requirement of being available for work.[55] That exemption, which constituted a derogation from the statutory conditions laid down for the grant of unemployment benefits, did not prevent the Court from classifying the allowance as an unemployment benefit. At paragraph 27 of the judgment, the Court described such allowances as ones where the beneficiary still has the capacity to work, but found that a similar allowance must be regarded as an unemployment benefit, notwithstanding that it did not satisfy one of the conditions. The same finding could be applied to the present case, in that, although the Austrian advance does not satisfy an essential condition for classification as an unemployment benefit, it has a significant number of elements which make it similar to that type of benefit.

58. First of all, the advance is paid where a worker is unemployed and has also applied for incapacity benefit, which suggests that the individual concerned is particularly vulnerable.[56] In those circumstances, an unemployment allowance is provided out of the unemployment insurance funds and in accordance with the rules governing such allowances. Second, the advance is automatically terminated if the beneficiary accepts a job during the procedure for consideration of the application for incapacity benefit. Just as an unemployed person loses his entitlement to unemployment benefit when he takes up a job, so the beneficiary of the advance is subject to the same outcome. Third, the system for calculating the advance is drawn up in accordance with the rules governing unemployment benefits, but with the inclusion of a corrective criterion to avoid excessive payments where incapacity benefit is subsequently granted. Fourth, it is merely hypothetical that the beneficiary of the advance lacks the capacity to work and the only certainty is that he is unemployed, from which it follows that it is appropriate that the advance is based on that fact.

59. However, the fundamental factor which tips the balance in favour of classifying the advance as an unemployment benefit is its purpose.[57] It is clear from the letter and the spirit of the Austrian legislation that the advance is intended to replace income from employment for a temporary period which

55 — *De Cuyper* (cited in footnote 44), paragraph 30.

56 — For the purposes of granting the advance to those who have applied for incapacity benefit, Paragraph 23(2)(3) of the AlVG provides that the competent insurance body must confirm 'that it will probably be unable to give a definite decision on the benefit within two months of the date of entitlement to the pension', which shows that the advance is awarded to cover the time delay caused by a lengthy administrative procedure.

57 — *De Cuyper* (cited in footnote 44), paragraph 25.

is liable to conclude with the beneficiary returning to work or no longer being available for work, although this cannot be known for certain. Thus, the purpose of the advance is to keep the applicant economically active in the employment market but also, as the German Government has pointed out, to keep him in a positive frame of mind.

60. Therefore, the advance covers a twofold risk: that the application for incapacity benefit will be refused and that the applicant will decide to return to work and withdraw his original application.

61. It may be inferred from all of the foregoing that the advance provided for in Paragraph 23 of the AlVG is an unemployment benefit within the meaning of Article 4(1)(g) of Regulation No 1408/71. However, that classification is not conclusive for the purposes of the second question referred for a preliminary ruling which is, without doubt, the key to the resolution of the present proceedings.

VII — The second question: the residence requirement applied to the advance

A — *Introduction*

62. The second question referred by the Verwaltungsgerichtshof, which is a corollary of the first, concerns the residence requirement imposed on Mr Petersen for entitlement to the advance.

63. In the event that the advance is classified as unemployment benefit, Article 69 of Regulation No 1408/71 lays down three conditions for allowing an individual to reside in another Member State while receiving unemployment benefit: he must have registered with the employment services before his departure; he must subsequently register with the employment services in the host State; and he must start work within a period not exceeding three months.

64. Clearly, Mr Petersen does not satisfy any of those three conditions.

65. Unlike the Commission and the applicant, all the governments which have submitted observations in the present preliminary ruling proceedings have argued that that failure to satisfy the conditions justifies the suspension of the advance paid to Mr Petersen. However, that argument conceals a pitfall which must be avoided.

B — *Arguments of the governments, the Commission and Mr Petersen*

66. The German, Austrian, Spanish and Italian Governments have all put forward two arguments. First, they assert that Mr Petersen does not satisfy any of the conditions laid down in Regulation No 1408/71 for the transfer of his social security benefit. Second, they assert that the *De Cuyper* judgment is applicable.

67. The four governments take the view that it is not disproportionate to impose a residence requirement on a worker like Mr Petersen, since Articles 69 to 71 of Regulation No 1408/71 provide for a number of cases in which benefits may continue to be claimed in another Member State and the applicant does not come within any of them. Accordingly, there appears to be a consensus that Regulation No 1408/71 contains an exhaustive list of cases, outside which there is no entitlement to benefit when the claimant moves to another Member State.

68. Moreover, the *De Cuyper* judgment supports the view of the governments since, in that case, the Court ruled that a residence requirement was compatible with Article 18 EC. The Court found that, in a case such as the one before it, monitoring by the employment authorities would be effective only if the recipient of the benefits, who must be available for work, were resident in the State responsible for payment.

69. However, the Commission, also invoking *De Cuyper*, is of the opinion that a residence requirement infringes Article 39 EC. The Commission claims that there is a fundamental difference between the facts of that case and those of the present proceedings in that, while Mr De Cuyper was required to be available to the employment services, the advance paid to Mr Petersen entails a total exemption from that requirement. Where combating fraud takes a secondary position, a measure such as the one at issue in the present proceedings becomes disproportionate. Accordingly, although Regulation No 1408/71 does not include a case such as the one in the present proceedings, that does not mean that it falls outside the scope of the protection provided by the Treaties. On the contrary, Community law protects such a case and precludes a residence requirement such as the one currently before the Court.

70. Mr Petersen examines the unlawfulness of the residence requirement from two perspectives: the infringement of the fundamental right to property and the infringement of the principle of equal treatment. In the view of Mr Petersen, the excessive reduction of a financial asset together with the discriminatory treatment afforded to the applicant vis-à-vis Austrian nationals who do not move to another Member State are grounds for finding that the national decision is incompatible with Community law.

C — *Appraisal*

71. Neither the Verwaltungsgerichtshof nor the parties have called into question Mr Petersen's status as a 'worker'. The Commission has merely stated that, if Mr Petersen is regarded as an employee, he is covered by Article 39 EC; otherwise, he is covered by Article 18 EC.

72. I am inclined to regard the applicant as having the status of a worker, since the disputed entitlement is derived from an employment relationship. Although the *De Cuyper* judgment is ambiguous in that regard, I believe that the case-law of the Court has confirmed the application of Article 39 EC where the rights concerned flow directly from an employment relationship.[58] In the present case, the link between the benefit and the status of Mr Petersen as a worker is clear, since the advance concerned is dependent on two concurrent circumstances: unemployment and incapacity, both of which are connected to a prior employment relationship.

73. However, although Article 39 EC is particularly important for the resolution of the question referred for a preliminary ruling, it is also appropriate to take into account Article 18 EC. As I have pointed out, Mr Petersen is an example of the *movement of free citizens* which, in the terms set out in points 25 to 38 of this Opinion, accords a special legislative force to the individual and collective situation of the applicant.

1. The individual legal position of Mr Petersen

74. Mr Petersen is an unemployed person who, at the relevant time, as a result of his employment, completed an eligibility period which entitled him to receive incapacity benefit. When he became unemployed, he applied for an advance designed to assist

58 — *Martínez Sala* (cited in footnote 5), paragraph 32; Case C-57/96 *Meints* [1997] ECR I-6689, paragraphs 16 and 17; and Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187, paragraph 34.

unemployed persons who have also made a claim for incapacity benefit. The advance is granted provided that the conditions for the grant of unemployment benefit are satisfied, but the claimant is exempted from seeking employment. The national provisions on social security are therefore *relaxed* in that regard, but the governments which have participated in these preliminary ruling proceedings argue that the Court must give a *strict* interpretation of the Community provisions on social security, since Mr Petersen does not satisfy the requirements of Articles 69 to 71 of Regulation No 1408/71 which would enable him to claim the benefit in another Member State, from which it follows that the advance must be withdrawn if he transfers his residence to another Member State.

75. That situation places Mr Petersen in an unfortunate dilemma, since whatever he does he loses. If he satisfies the requirements, he will not receive the advance. If he satisfies all the requirements apart from the one from which he is exempted, he will not receive the advance either on the ground that he has transferred his residence. Further, if he does not receive the advance, he runs the risk that subsequently he will not be granted incapacity benefit and he will not be available for work. All that remains is for him to claim ordinary unemployment benefit, although, in view of the difficulties he is experiencing (in that he is claiming incapacity benefit), perhaps he is not in the best position to secure a job in a rather competitive environment.

76. It is immaterial that the particular circumstances of Mr Petersen are not included in the cases set out in Regulation No 1408/71, since the aim of that legislation is not to exclude all the other cases but rather to implement Article 39 EC. All provisions of secondary law are interpreted and applied pursuant to primary law, a factor which means that a residence requirement such as the one in the present proceedings lacks objective and reasonable justification. In addition to that fact, it must also be pointed out that none of the parties in the present proceedings, including, notably, the Austrian Government, has managed to account for the refusal of the authorities to authorise Mr Petersen's transfer of residence.[59]

77. Despite the fact that the concept of citizenship of the Union calls for special attention to be paid to the status of the individual, it is clear that, even though there are no fundamental rights at stake, the Austrian decision would be unlikely to stand up to a Community review of proportionality.[60] Accordingly, in the light of Articles 39 EC and 18 EC, a measure such as the one at issue, which provides for different treatment based on the place of residence of the recipient of a social security benefit, is incompatible with Community law.

59 — Paragraphs 12 to 14 of the written observations of the Austrian Government merely repeat the subject-matter of Article 39 EC and of Articles 10 and 67 of Regulation No 1408/71. They do not provide any substantive arguments which would justify the refusal to allow Mr Petersen to continue to claim his advance after transferring his residence to another Member State.

60 — Point 27 of this Opinion.

2. The conditions for belonging to a political community

78. Mr Petersen is a German national who pursued a significant part of his professional activity in Austria. Having resided legally in that country for a number of years, he has returned to his country of birth after applying to the Austrian authorities for incapacity benefit and an advance on account. It is beyond doubt that the applicant is directly connected to the Austrian State, albeit only because he paid his social security contributions to the Austrian employment authorities until he completed the statutory eligibility period. The link which Mr Petersen has with Austria speaks for itself, especially in the light of the type of benefit which he has been refused.

79. Should the Court decide to classify the advance as an invalidity benefit, it must consider the fact that Regulation No 1408/71 precludes the suspension or modification of that type of benefit on the ground of residence.[61] There is a logic to that restriction, which is aimed at promoting the free movement of individuals whose working life has ended and who decide to reside in another Member State, whether for climatic, family or sentimental reasons.

80. However, should the Court conclude that Mr Petersen is in receipt of unemployment benefit, it is important to recall that the advance is a preliminary step towards receiving incapacity benefit, which, if it is not awarded, converts the advance into unemployment benefit, provided that the claimant satisfies the requirements of Articles 69 to 71 of Regulation No 1408/71 when he changes residence. However, one of those requirements is that 'on the basis of the existing circumstances it is likely that the [incapacity] benefit will be granted'.[62] Consequently, Mr Petersen may reside in Germany, exempt from the control procedures of the employment authorities, for a determinate period, namely the duration of the procedure for the grant of incapacity benefit.

81. Throughout that period, the Austrian authorities, which previously encouraged Mr Petersen to apply for an advance, entailing an implicit acknowledgement that, 'it is likely that the … benefit will be granted' must assume the financial burden of the disputed benefit. If he is refused incapacity benefit, the applicant will revert to his original situation. However, in the meantime, Mr Petersen's change of residence, which took place during a procedure which would probably grant him a benefit which would enable him to reside in any Member State, under no circumstances

61 — Article 10 of Regulation No 1408/71.

62 — To my mind, the fact that Mr Petersen was initially refused the benefit is not conclusive. As the expert of the Austrian Government explained at the hearing, 60% of applications for incapacity benefit are refused, which is evidence of a restrictive administrative policy when it comes to assessing the conditions which may give rise to entitlement to the benefit. Accordingly, it is my view that the initial refusal of Mr Petersen's application does not mean prima facie that he is unlikely to be awarded the benefit in the future.

places conditions on the capacity to act or the financial integrity of the Austrian authorities.

82. The link which Mr Petersen has proved he has demonstrates the disproportionate nature of the measure adopted by the Austrian employment authorities. When analysing whether Mr Petersen belongs to the community to which he has effectively been linked, it is necessary to interpret Article 39 EC in the light of Article 18 EC. Accordingly, applying a high standard of protection to a citizen of the Union, I conclude my Opinion by finding that both provisions have been infringed.

VIII — Conclusion

83. In the light of the foregoing considerations, I suggest that the Court should reply to the questions referred for a preliminary ruling by the Verwaltungsgerichtshof, declaring that:

A monetary unemployment benefit which is granted to unemployed persons who have applied for a benefit on the ground of incapacity to work is an unemployment benefit within the meaning of Article 4(1)(g) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

Articles 18 EC and 39 EC preclude a national provision which provides for the suspension of the entitlement to that benefit where the unemployed person resides in another Member State.