# OPINION OF ADVOCATE GENERAL ALBER

delivered on 28 September 2000 [1]

## I — Introduction

1. This reference for a preliminary ruling from the Tribunal du Travail (Labour Court), Nivelles (hereinafter 'the referring court'), concerns the question whether a non-Belgian Community national who studies in Belgium may rely on Community law, in particular the provisions on citizenship of the Union and the principle of equal treatment, in order to claim the minimum means of subsistence guaranteed by Belgian law.

## II — Facts and procedure

2. The plaintiff in the main proceedings (hereinafter 'the plaintiff') is a French national. He was born on 9 December 1974. He lived in France until the end of his secondary education. He then began studying physical education at the Catholic University of Louvain (Louvain-la-Neuve) and has since lived in the Belgian municipality of Ottignies-Louvain-la-Neuve.

3. During the first three years of his studies, he met the costs of his upkeep, accommodation and studies by taking on various jobs and by arranging for credit facilities to cover the costs of his studies. At the beginning of his fourth and final year of study, during which he did not work to finance his studies, he applied to the Ottignies-Louvain-la-Neuve Centre public d'aide sociale (Public Social Assistance Agency), the defendant in the main proceedings (hereinafter 'the CPAS' or 'the defendant'), for payment of the minimum means of subsistence ('the minimex'). He stated that his parents, who lived in France, were unable to assume the cost of his studies, since his father was unemployed and his mother was seriously ill.

4. In her report, the CPAS social worker noted that the plaintiff had worked hard to finance his studies, but that, since the last academic year was more taxing than the others — he had to write a dissertation and complete a period of practical training — he had applied for benefit from the CPAS.

5. By decision of 16 October 1998, the CPAS granted the plaintiff the 'minimex' for the period from 5 October 1998 to 30 June 1999.

1 — Original language: German.

6. By decision of 29 January 1999, the CPAS withdrew his entitlement with effect from 1 January 1999, on the ground that 'the person concerned was an EEC national enrolled as a student'. The plaintiff instituted legal proceedings challenging that decision.

7. The defendant, the governments of Belgium, Denmark, France, Portugal and the United Kingdom, the Council and the Commission have taken part in the procedure before the Court. I shall return later to the pleas in law and arguments of the parties.

## III — Relevant legislation

(1) *The Community provisions*

(a) EC Treaty

8. The first paragraph of Article 6 of the EC Treaty (now, after amendment, the first paragraph of Article 12 EC) provides:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

9. Article 8 of the EC Treaty (now, after amendment, Article 17 EC) reads:

'(1) Citizenship of the Union is hereby established.

Every person holding the nationality of a Member State shall be a citizen of the Union.

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

10. Article 8a of the EC Treaty (now, after amendment, Article 18 EC) states:

'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.

2. ...'

11. The following are also relevant to this case:

(b) Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [2] (hereinafter 'Regulation No 1612/68)';

(c) Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students [3] (hereinafter 'Directive 93/96').

(2) *The Belgian domestic legislation*

(a) The Law of 7 August 1974

2 — OJ, English Special Edition 1968 (II), p. 475.
3 — OJ 1993 L 317, p. 59.

12. Article 1 of the Law of 7 August 1974 introducing entitlement to the 'minimex' provides:

'(1) Any Belgian having reached the age of majority, who is actually resident in Belgium and who does not have adequate resources and is not able to obtain them either by his own efforts or by other means, shall be entitled to a minimum means of subsistence.

The King shall determine the meaning of the words "actually resident".

The same entitlement is granted to minors treated as being of full age on account of marriage, and also to single persons who are responsible for one or more children.

(2) The King may, by decree deliberated by the Council of Ministers, extend the application of this law, subject to such conditions as he shall set, to other categories of minors, and also to persons not possessing Belgian nationality.'

(b) The Royal Decree of 27 March 1987

13. Under Belgian law, the right conferred by that provision constitutes an entitlement to a guaranteed income under a non-contributory social security system.

14. Article 1 of the Royal Decree of 27 March 1987, which extends the scope of the Law of 7 August 1974 introducing entitlement to the 'minimex' to persons not possessing Belgian nationality, provides that:

'The scope of the Law of 7 August 1974 establishing a right to a minimum means of subsistence shall be extended to the following persons:

(i) those to whom Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community applies;

(ii) (iii) ...'.

(c) The Royal Decree of 8 October 1981

15. Article 55(1) of the Royal Decree of 8 October 1981 implementing the Law of 15 December 1980 on foreigners' entry into, residence and establishment in, and expulsion from Belgian territory provides, in essence, that:

16. A Community national who comes to Belgium to study is entitled to reside there for more than three months provided that:

1. he is enrolled in an educational establishment organised, recognised or subsidised by the public authorities for the primary purpose of following a vocational training course there;

2. he gives an assurance, by means of a declaration or such other means as he may choose, that he has sufficient resources to avoid becoming a burden on the public authorities;

3. he is covered by health insurance in respect of all risks in Belgium.

17. The first sentence of Article 55(3) states, in essence, that:

Within three months following the application for a residence permit, the Community national must prove that he fulfils the conditions listed in paragraph 1.

18. Article 55(4) provides, in essence, that:

The residence permit issued to a national of a Member State of the European Communities is valid for the duration of his training, but may not exceed one year. It is renewable for the same period provided that the Community national continues to satisfy the conditions contained in paragraph 1.

During the period of validity of the residence permit or upon its renewal, the Minister or his representative may terminate the residence of a Community national and, if appropriate, order him to leave the country, if he finds that:

1. The Community national no longer meets the conditions set out in paragraph 1(1) and (3);

2. The Community national (or a member of his family...) has been granted financial assistance by a CPAS the total amount of which, calculated over a period of 12 months preceding the month in which the order to terminate the residence was made, is more than three times the monthly amount of the guaranteed minimum means of subsistence (calculated in accordance with the Law of 7 August 1974...), and the assistance has not been not paid back within six months of the last monthly instalment thereof.

## IV — The reference for a preliminary ruling

19. The referring court is uncertain whether the aforementioned national provisions are compatible with Community law, in particular Articles 6 and 8 of the EC Treaty (now, after amendment, Articles 12 EC and 17 EC), in so far as the latter establish the principle of non-discrimination on grounds of nationality, citizenship of the Union and recognition of the rights conferred by the Treaty on citizens of the Union.

20. The referring court proceeds from the following premisses:

— in its judgments in *Hoeckx* [4] and *Scrivner*, [5] the Court held that the Belgian 'minimex' constitutes a 'social advantage' within the meaning of Council Regulation (EEC) No 1612/68 [6] from which a migrant worker who is a national of another Member State residing in the territory of the State paying the benefit may not be excluded;

— on the entry into force of the Maastricht Treaty, the rights recognised under the Treaty were extended to all citizens of the European Union and were no longer confined to 'workers' only;

— in its judgment in *Martínez Sala*, [7] the Court of Justice held, *inter alia*, that a citizen of the Union lawfully resident in the territory of a host Member State can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law.

21. The referring court therefore wishes to ascertain whether the principles laid down in Articles 6 and 8 of the EC Treaty are to be interpreted as precluding national legislation which restricts the right to a non-contributory social benefit, such as the 'minimex', to nationals of another Member State who are covered by Regulation No 1612/68, and as requiring the right to such benefits to be extended to all citizens of the Union.

22. Should those questions be answered in the negative, a further question occurs to the referring court, which it submits to the Court in the alternative. Since the present case concerns a student, reference must be had to Directive 93/96 [8] on the right of residence for students. Article 1 of that directive recognises the right of residence for any student who, by means of a declaration or by such alternative means as he may choose that are at least equivalent, provides an assurance that he has sufficient resources to enable him and his family to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

## V — The questions referred for a preliminary ruling

23. The referring court therefore inquires about a situation such as that in this case,

4 — Case 249/83 [1985] ECR 973.
5 — Case 122/84 [1985] ECR 1027.
6 — See footnote 2.
7 — Case C-85/96 [1998] ECR I-2691.
8 — See footnote 3.

where, after he has been recognised as having a right of residence, it becomes apparent that, contrary to his declaration, the student is not able to meet the costs of his upkeep. Do the provisions of Community law allow a student whose right of residence has been recognised to be excluded subsequently from entitlement to a non-contributory social benefit such as the 'minimex' payable by the host State? If so, the referring court submits, it must also be ascertained whether the same provisions are to be interpreted as meaning that that exclusion is of a general and definitive nature, that is to say that the entitlement in question could not be recognised in any circumstances, not even where the person concerned had acted in good faith or where a new factor had emerged or there had been a change in circumstances beyond the control of the student concerned.

24. The referring court submits the following questions to the Court for a preliminary ruling:

'1. Does Community law — more particularly the principles of European citizenship and of non-discrimination enshrined in Articles 6 and 8 of the Treaty establishing the European Community — preclude entitlement to a non-contributory social benefit, such as that introduced by the Belgian Law of 7 August 1974 on the minimum means of subsistence, from being granted only to nationals of the Member States to whom Regulation (EEC) No 1612/68 of 15 October 1968 applies and not to all citizens of the Union?

2. In the alternative, are Articles 6 and 8a of the Treaty and Directive 93/96 of 29 October 1993 on the right of residence for students to be interpreted to the effect that, after a student's right of residence has been acknowledged, they allow him to be subsequently barred from entitlement to non-contributory social benefits, such as the minimum means of subsistence, payable by the host country, and, if so, is that exclusion general and definitive in nature?'

## VI — Pleas in law and arguments of the parties

25. The plaintiff in the main proceedings has not submitted any observations.

(1) *The defendant*

26. In order further to clarify the facts, the *defendant* points out that, after issuing the notice of entitlement on 16 October 1998, it submitted the file to the relevant ministry in order to recoup the assistance granted. However, the ministry refused to repay the assistance on the ground that, as a European Community student, the plaintiff is not entitled to the 'minimex'. The defendant then reconsidered its decision and issued the notice of withdrawal of entitle-

ment. At the same time, however, the CPAS granted the plaintiff non-refundable social assistance of BEF 7 000 per month for the period from 1 January 1999 to 30 June 1999, that is to say to the end of his course of study. The CPAS contends that its refusal to grant the 'minimex' is based on the position adopted by the Belgian State.

27. On the first question, the defendant takes the view that, as Community law stands at present, Articles 6 and 8 of the EC Treaty cannot be interpreted as meaning that a citizen of the Union may claim such a social benefit. The Belgian rules are therefore consistent with Articles 6 and 8a of the EC Treaty. Article 8a provides that every citizen of the Union has 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'*. That phrase shows that Article 8a does not have direct effect and that it must be given effect in such a way as to observe the limitations laid down in the Treaty and in secondary legislation. Those limitations include Directives 90/364/EEC,[9] 90/365/EEC[10] and 90/366/EEC,[11] now Directive 93/96. Those three directives qualified and limited freedom of movement by means of the requirement that a person prove that he has sufficient resources and that he is covered by social insurance. It follows from Article 1 of, and the preamble to, Directive 93/96 that beneficiaries 'must not become an unreasonable burden on the public finances of the host Member State'.[12] Accordingly, persons possessing a 'general right of residence' cannot claim the same advantages as migrant workers and their dependants, since the economic *quid pro quo* offered by a worker is lacking in their case.

28. As regards the judgment in *Martínez Sala*,[13] referred to by the national court, the defendant argues that the circumstances in that case were fundamentally different, so that the principles established there cannot be applied to this case. The plaintiff, who has been residing in Belgium for four years for the sole purpose of pursuing his studies there, does not fall within the scope of the provisions on workers.

29. On the second question, the defendant takes the view that a student is excluded from non-contributory social benefits throughout the period of his residence in that capacity. The phrase 'during his period of residence' in the directive implies, for a student, that the condition of sufficient resources applies throughout the entire period of his residence.

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

10 — Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28).

11 — This directive was annulled by judgment of the Court in Case C-295/90 *Parliament* v *Commission* [1992] ECR I-4193 and was readopted, on a different legal basis, in the form of Directive 93/96.

12 — See the sixth recital in the preamble to Directive 93/96.

13 — Cited in footnote 7 above.

30. It is the defendant's submission that the Belgian legislature transposed the directive to that effect by adopting Article 55 of the Royal Decree of 8 October 1981, which allows the competent minister to terminate residence by means of an order to leave the country if one of the conditions of residence ceases to be fulfilled, namely that laid down in Article 55(4)(2), under which a student's right of residence may be withdrawn if he has received over a period of 12 months financial assistance equal to the amount of the 'minimex' payable over three months.

31. Finally, the plaintiff declared as late as 21 January 1999 that he had sufficient resources, when in fact he no longer possessed such resources and had applied for assistance from the CPAS. To that extent, the plaintiff acted deceitfully.

(2) *The Belgian Government*

32. In order to further clarify the facts, the *Belgian Government* submits that the plaintiff did not apply for a residence permit until 25 October 1998 and that the permit was issued to him on 21 January 1999. Prior to that date, he was therefore residing unlawfully in Belgian territory. Also on 21 January 1999, the plaintiff applied for a certificate of residence as a student and, on that occasion, made a declaration that he had sufficient resources.

33. Moreover, the CPAS did not submit a formal request to the competent ministry for a refund of the benefits paid. There is therefore no written evidence of a refusal to grant the 'minimex'.

34. The Belgian Government explains that the relevant Belgian provisions mean that a person applying for the 'minimex' must prove that he is in a state of need. In that connection, he must, in principle, prove that he is willing to work. He may be exempted from that requirement on grounds of particular circumstances or on health grounds. The fact that an applicant is undertaking a course of study has been recognised by some Belgian courts as constituting particular circumstances.

35. As for the nature of the benefit, the Belgian Government submits that it is a social benefit which is granted only in the last resort. All other sources available under maintenance and social security legislation must have been exhausted first. Only a student who fulfils those conditions is eligible for the benefit.

36. With regard to the reference for a preliminary ruling, the Belgian Government argues that the principle of equal treatment is applicable to facts which fall within the scope of the Treaty. The Court has accordingly held that access to voca-

tional training must be granted without discrimination, but that the position is different as regards maintenance grants. [14] Indeed, that finding forms the basis of Directive 93/96. The benefit at issue, however, is an instrument of social policy which bears no relation to vocational training and does not therefore fall within the scope of Article 6 of the EC Treaty.

37. The grant of the 'minimex', it contends, is a social advantage which can be granted to a worker but not to a 'migrant student', who cannot be regarded as a worker. Furthermore, the right of residence is not an absolute right even under the Maastricht Treaty. It is limited by, and subject to, the provisions of the Treaty and of secondary legislation. The answer to the first question from the referring court must therefore be that the right of residence may lawfully be made subject to conditions, such as the payment of maintenance costs and sickness insurance, which serve the legitimate interests of the Member State.

38. As regards the referring court's second question, the Belgian Government takes the view that the general exclusion of a Community student from access to non-contributory social benefits must apply for the duration of his residence as a student. Article 2 of Directive 93/96 allows the right of residence to be restricted to the duration of the course of study in question. Article 3 of the directive lays down that the directive does not establish any entitlement to the payment of maintenance grants by the host Member State. Under Article 4 of the directive, the right of residence is to remain for as long as the beneficiaries of that right fulfil the conditions laid down in Article 1. Conversely, it must be assumed that the right of residence comes to an end if the student becomes a burden on the social assistance system of the host Member State. Article 55 of the Royal Decree of 8 October 1981, which transposes the directive into national law, observes those principles.

39. In the alternative, the Belgian Government argues that a social benefit such as the 'minimex' can be granted to a Community student under Regulation No 1612/68 only in so far as the conditions to which it is subject are fulfilled. The right of residence for students under Directive 93/96 is accorded to students who do not already enjoy that right on the basis of another provision of Community law. [15] It is for the national court to ascertain whether the plaintiff is a worker within the meaning of Community law. None the less, according to the information available to the Belgian Government, the plaintiff has worked only intermittently as a student. He should therefore probably not be accorded the status of worker. The element of continuity between work and study, as required by the Court in the judgment in *Lair*, [16] is lacking in this case. The studies in question are not such as to improve the worker's prospects on the employment market in his sector of activity.

14 — See Case 197/86 *Brown* [1988] ECR 3205, in particular the Opinion of Advocate General Slynn at 3224, and Case C-357/89 *Raulin* [1992] ECR I-1027, in particular the Opinion of Advocate General van Gerven at I-1040.

15 — See Article 1 of Directive 93/96.

16 — Case 39/86 [1988] ECR 3161.

40. Should the Court of Justice find, however, that a student who is a Community national is, in his capacity as such, entitled to social benefits in the same way as students who are nationals of the host State, the Belgian Government asks that the effects of the Court's judgment be limited in time, for reasons of legal certainty and in order not to undermine the system for financing social benefits.

41. The Belgian Government contends, finally, as an entirely subsidiary point, that, ultimately, any right to equal treatment may not go further than the right of a national student to payment of the minimex. A student who is a Community national must at least satisfy the same stringent conditions.

(3) *The Danish Government*

42. The *Danish Government* takes the view that the 'minimex' under Belgian law is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 [17] which must be granted to workers without discrimination. The reference for a preliminary ruling does not make it clear, however, whether the plaintiff is a worker. As a student, he cannot claim benefits on the basis of Regulation No 1612/68. Neither Article 6 nor Article 8 of the EC Treaty supports a different conclusion and the Treaty of Amsterdam has done nothing to alter that fact. Citizenship of the Union carries no new rights. As is clear from their wording, those provisions have no independent meaning. [18] The Danish Government emphasises that it does not share the view expressed by the referring court that the Maastricht Treaty extended the rights provided for in the Treaty to all citizens of the Union.

43. With regard to the second question, the Danish Government submits that Directive 93/96 requires that a student have sufficient resources. Only then does he enjoy a right of residence. That right lapses when he no longer has sufficient resources. This follows from the sixth recital in the preamble to, and Article 1 of, the directive. Sufficient resources are therefore a condition of the right of residence.

44. Moreover, it is not clear whether the plaintiff is lawfully resident in Belgian territory within the meaning of the judgment in *Martínez Sala*. [19] And in any event, the circumstances of this case are otherwise incomparable with those of *Martínez Sala*.

17 — Article 7(2) provides that a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantage as national workers.

18 — See the qualification: '... subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

19 — Case C-85/96 (cited in footnote 7).

45. Even if the plaintiff falls within the scope *ratione materiae* of the Treaty, that does not affect payment of the 'minimex'. In this case, the 'minimex' is intended to be paid as a maintenance grant for students, which, in accordance with the case-law of the Court, does not fall within the ambit of the principle of equal treatment as regards access to vocational training. Nor does Article 8a of the Treaty change the legal position of students. This follows from the qualification contained in the wording of the provision itself. It does not afford students an independent legal status. It is perfectly consistent with Articles 6 and 8a of the Treaty, and with Directive 93/96, for students to be excluded from the social benefit at issue.

(4) *The French Government*

46. With respect to the first question, the *French Government* submits that Article 7(2) of Regulation No 1612/68 is a specific expression of the principle of equal treatment for migrant workers and their families laid down in Article 48 of the EC Treaty (now Article 39 EC). The question here is whether the principle of equal treatment with regard to social and tax advantages must be extended to all citizens of the Union. That would mean global equality of treatment as between citizens of the Union and Member State nationals.

47. On the other hand, such comprehensive equal treatment is not readily compatible with the rights attached to nationality. Furthermore, the French Government also refers to the reservation contained in Article 8a of the EC Treaty, the substance of which is given concrete expression in Directives 90/364,[20] 90/365[21] and 93/96[22] on the right of residence. Moreover, Directive 93/96, in the form of Directive 90/366, was annulled by the Court on the ground that it had been adopted on a defective legal basis.[23] It was then adopted on the basis of the second paragraph of Article 7a of the EC Treaty (now Article 14(2) EC), which defines the internal market by reference to the *provisions of the Treaty*. This does not imply absolute equal treatment. In the view of the French Government, the plaintiff in the main proceedings cannot claim equal treatment within the meaning of Regulation No 1612/68.

48. The French Government answers the second question by reference to Article 1 of Directive 93/96, which, it submits, provides for a qualified right of residence as previously established by the judgments in *Gravier*,[24] *Blaizot*[25] and *Brown*.[26] However, Community law makes no provision as to how to proceed where the original financial situation of a student in another Member State deteriorates while he is resident there, as is the case in the main proceedings. This is therefore a matter for

20 — See footnote 9.
21 — See footnote 10.
22 — See footnote 3.
23 — See Case C-295/90, cited at footnote 11.
24 — Case 293/83 [1985] ECR 593.
25 — Case 24/86 *Blaizot* v *University of Liège and Others* [1988] ECR 379.
26 — Case 197/86, cited at footnote 14.

the Member States to resolve, as indeed the Member State in question did in the circumstances which gave rise to the main proceedings. The right of a student to a non-contributory social benefit cannot be asserted on the basis of Articles 6 and 8 of the EC Treaty and Directive 93/96.

(5) *The Portuguese Government*

49. The *Portuguese Government* first of all examines in detail the question whether the grant of the 'minimex' under Belgian law constitutes a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and concludes that it does. It then addresses the question whether the plaintiff had the status of worker originally and, if so, whether he has retained it. The correct meaning of 'worker' in Community law, it contends, depends on the subject-matter in question. The Portuguese Government uses the term as it was defined in the judgments in *Lawrie-Blum*, [27] *Lair*, [28] *Raulin* [29] and *Martínez Sala*. [30]

50. The Portuguese Government submits that, as it is not absolutely clear whether the plaintiff abandoned his occupational activity altogether in his fourth year of study, it has proceeded from the assumption that he stopped working in order to obtain a vocational qualification. It is true that Community law does not give a clear answer to the question whether the status of worker is retained in such circumstances. There is, however, some evidence which points towards an affirmative answer to that question. The Portuguese Government refers to the judgment in *Lair*, [31] according to which the status of worker is not necessarily linked to the continued existence of an employment relationship. If the plaintiff was a worker for three years, he must retain his status as such, since the contrary situation would constitute unequal treatment in relation to unemployed persons, who, in accordance with Regulation No 1612/68, [32] are to enjoy the same social advantages as national workers. The judgment in *Lair* is to be construed to that effect also.

51. As regards the criterion of continuity between occupational activity and study, the Portuguese Government examines two alternatives: if there is substantive continuity between the two, the plaintiff is entitled to the social advantage at issue. If, on the other hand, no such continuity can be established and the plaintiff has studied in order to acquire a qualification in another sector of activity, he must none the less be regarded as a worker by virtue of the judgment in *Lair*, [33] which states that the element of continuity is not essential where the worker has involuntarily become unem-

27 — Case 66/85 [1986] ECR 2121.

28 — Case 39/86, cited at footnote 16.

29 — Case C-357/89, cited at footnote 14.

30 — Case C-85/96, cited at footnote 7.

31 — Case 39/86, cited at footnote 16.

32 — The Portuguese government is probably referring to Articles 5 and Article 7(1) and (2) of Regulation No 1612/68.

33 — Case 39/86, cited at footnote 16.

ployed and is obliged by the situation on the job market to undertake occupational retraining.

52. In view of that assessment, further examination of citizenship of the Union is purely academic. The Portuguese Government submits in this respect that, in the EEC Treaty, free movement of persons was established on economic grounds. That right was further developed by the directives on the right of residence. [34] The right of residence, it contends, was linked only to certain economic conditions, such as the existence of sufficient financial resources. Under the Maastricht Treaty, the right of residence evolved yet further, and, under Article 8a of the EC Treaty, brought about a qualitative change in the status of citizens of the Union under Community law. Citizenship of the Union took on greater significance, in contrast to the perception of individuals as purely economic factors which had underlain the EC Treaty. The conditions on which freedom of movement may depend are now no longer economic in nature, as they still were in the 1990 directives. [35] The only 'limitations and conditions' attached to freedom of movement now are those imposed on grounds of public policy, public security and public health. Regulation No 1612/68 is therefore applicable to all citizens of the Union residing in the territory of a Member State, whether or not they are bound by a contract of employment.

34 — Directives 90/364 (cited at footnote 9), 90/365 (cited at footnote 10) and 93/96 (cited at footnote 11).

35 — Directives 90/364 (cited at footnote 9), 90/365 (cited at footnote 10) and 90/366 (cited at footnote 11).

53. There is therefore no need to answer the second question from the referring court.

(6) *The United Kingdom Government*

54. The *United Kingdom Government* takes the view that any discrimination against the plaintiff does not pose a problem since it does not fall within the scope of the Treaty. Article 6 of the EC Treaty is subordinate to the specific prohibition of discrimination laid down in Article 48 of the EC Treaty and to the regulation adopted in implementation of that article, Regulation No 1612/68. Article 8 of the EC Treaty does not extend the scope of Article 6. Even if Article 6 were to be applied independently, it could not be extended to facts which are excluded from the scope *ratione personae* of the Treaty. That, moreover, is consistent with the judgment in *Martínez Sala*. [36] In that case, the appellant was already entitled to the benefit in question under national law. Article 6 merely permitted her to fulfil the additional requirement of producing a residence permit. It was indisputable that she was lawfully resident in Germany, even though the German authorities failed to issue her with the document she had requested.

55. The plaintiff in these proceedings, on the other hand, has no entitlement under

36 — Case C-85/96, cited at footnote 7.

national law to the benefit claimed. Both the CPAS and the referring court have deemed the plaintiff to be a student, not a worker. There is no reason to call that assessment into question. The status of student within the meaning of Directive 93/96 and the status of worker are mutually exclusive and remain so for the entire duration of the training. A part-time job to finance study is not capable of establishing a person's status as a worker. In such circumstances, the occupational activity is purely ancillary to the studies. Its irregularity and limited duration make it difficult to regard the occupational activity in question as 'effective and genuine' within the meaning of case-law. [37]

56. The right of residence for a student under Directive 93/96 is, in accordance with Article 1 thereof, subject to conditions, such as, for example, the requirement to have sufficient resources to finance his studies. A student who has to work in order to finance his studies by definition does not have sufficient resources. In any event, the plaintiff lost his status of worker once he ceased his employment and applied for the 'minimex'. In concluding its examination of the first question, the United Kingdom Government points out that assistance granted to students likewise does not fall within the scope of the Treaty, by virtue of both the case-law of the Court [38] and Directive 93/96, [39] and — without reaching a final conclusion as to the nature of the 'minimex' — it submits that the plaintiff has no claim to equal treatment on that ground either.

57. In answering the second question, the United Kingdom Government points out that the wording and meaning of Directive 93/96 [40] expressly show that a student has no entitlement to maintenance allowances. In the view of the United Kingdom Government, Article 8a of the EC Treaty is not capable of creating for students an independent right of residence the limits of which go beyond those laid down in Directive 93/96. Even if Article 8a of the EC Treaty did support an independent right of residence, however, an entitlement to social benefits could not accrue on that basis alone. Moreover, Article 8a of the EC Treaty is not directly applicable. The right of residence is subject to a reservation and the Council may, under Article 8a(2), adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1.

(7) *The Council*

58. In its brief written observations, the *Council* submits that the benefit sought by the plaintiff cannot be claimed under Regulation No 1612/68. That regulation applies exclusively to workers. The plaintiff, however, is a student. Moreover, there is no reason to call into question the validity of Regulation No 1612/68.

37 — See Case C-357/89, cited at footnote 14, paragraph 14.

38 — See Case 39/86, cited at footnote 16, and Case 197/86, cited at footnote 14.

39 — See the seventh recital in the preamble to the directive.

40 — See Article 3 of, and the seventh recital in the preamble to, the directive

(8) *The Commission*

59. In its submissions, the *Commission* proceeds from the premiss that the plaintiff would have received the benefit claimed if he had been a Belgian national. The application of the principle of equal treatment under Article 6 therefore depends on whether the contested benefit falls within the scope of the Treaty. There is no doubt that it falls within the scope *ratione materiae* of the Treaty, since it is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68. As regards the scope *ratione personae* of the Treaty, it is necessary first of all to examine the specific areas in which Community law applies, such as freedom of movement for workers and students' rights, before the general provisions on European citizenship can be considered.

60. Even though it is ultimately a matter for the referring court to decide whether the plaintiff was a worker, the Commission proceeds on the assumption that, on the basis of the criteria established by the case-law of the Court,[41] the plaintiff must be regarded as a worker within the meaning of Community law. An occupational activity which for three years enabled the plaintiff to pay for his accommodation, upkeep and studies can hardly be regarded as 'purely marginal and ancillary' within the meaning of the judgment in *Levin*.[42] Even if the occupational activity is interrupted for the purposes of study, the status of worker may still be retained; indeed it can even take precedence over the right of residence as a student.

61. As regards the rights attached to the status of student, the Commission submits that the right of residence as a student does not necessarily carry with it any other rights, such as entitlement to social benefits. As defined by the case-law of the Court, the right of residence for students is the expression of the principle of equal treatment in the context of access to vocational training. However, it does not seem entirely out of the question that a student in the plaintiff's situation should have at least partial access to 'minimex' benefits. The case-law of the Court states that, in principle, students from another Member State are to have access to assistance accorded to national students in so far as the assistance granted is intended to cover enrolment fees and other costs of access to the course.[43] In that context, partial entitlement to the 'minimex' is conceivable.

62. The Commission submits that Article 8 of the EC Treaty is not directly applicable since it refers to rights 'conferred by this Treaty'. It does not in itself confer entitlement to social benefits. However, nor does any such right accrue even when Article 8 is read in conjunction with Article 8a or Article 6 of the EC Treaty. Article 8a of the

41 — See Case 53/81 *Levin* [1982] ECR 1035, paragraphs 16, 17 and 21; Case 139/85 *Kempf* [1986] ECR 1741, paragraph 14; *Raulin*, cited at footnote 14 above, paragraph 10; and *Lair*, cited at footnote 16 above, paragraph 29 et seq.

42 — Case 53/81, cited at footnote 41, paragraph 16.

43 — See *Raulin*, cited at footnote 14 above, paragraph 28.

EC Treaty grants a right of residence which is in itself subject to the condition of possession of sufficient resources.

## VII — Assessment

63. Even though the referring court expressly requests only an interpretation of Articles 6 and 8 of the EC Treaty and, in the alternative, of Article 8a of the EC Treaty and Directive 93/96, in referring to citizenship of the Union and the plaintiff's status as a student, it is none the less appropriate to examine whether the plaintiff has the status of worker. It is true that the referring court has implicitly proceeded from the assumption that the plaintiff is not a worker. However, it is not clear whether it has deliberately ruled out that possibility.

64. For reasons of organisation, it is appropriate to consider first whether the plaintiff has the legal status of worker, since residence by reason of paid employment and the attached rights and obligations involve a special set of rules as distinct from the general right of residence for citizens of the Union under Article 8a of the EC Treaty. There is also a special set of rules governing the right of residence for students referred to in the second question. This follows expressly from Article 1 of Directive 93/96, which states that the right of residence is to be recognised for any student who is a national of a Member State and 'who does not enjoy that right under other provisions of Community law'.

### *The status of worker*

65. Ultimately, it will be for the referring court to decide whether or not the plaintiff has the status of worker. It is none the less necessary to mention here the relevant criteria for making that assessment. The meaning of 'worker' in Community law varies according to the legal area in question. The criteria for determining its meaning in a case involving the freedom of movement for workers guaranteed by the Treaty are different from those that would apply in the field of social security, for example. The present case concerns freedom of movement, since the legal positions established by Regulation No 1612/68 on freedom of movement for workers may be at issue.

66. The Court has consistently held [44] that freedom of movement for workers forms one of the foundations of the Community. The provisions laying down that fundamental freedom and, more particularly, the terms 'worker' and 'activity as an employed person' defining the sphere of application of those freedoms must be given a broad interpretation in that regard. [45] In order to be classified as a worker, a person must

44 — See Case 139/85 *Kempf*, cited at footnote 41, and Case C-3/90 *Bernini* [1992] ECR I-1071.

45 — See *Kempf*, cited at footnote 41, paragraph 13.

pursue an activity which is effective and genuine to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary. The essential characteristic of the employment relationship is that for a certain period a person performs services for and under the direction of another person in return for which he receives remuneration. [46]

67. Despite a written question from the Court, it has not been possible to clarify what the nature, duration and regularity of the plaintiff's activities actually were. However, we know from the CPAS report cited in the order for reference that the plaintiff 'worked very hard'. It can at least be inferred from this that, for three years, he financed all his own living expenses, that is to say food, clothing, accommodation and studies. As regards the costs of his studies, the referring court stated that the plaintiff obtained credit facilities. The agent for the Belgian Government explained at the hearing that tuition fees (the 'minerval') in Belgium are generally reduced for disadvantaged students. The fact remains, however, that, even if the normal tuition fees were reduced, funds still had to be found for the studies themselves. In view of the fact that the plaintiff defrayed all those costs by his own efforts, using the income from his occupational activity, there is some *prima facie* evidence in support of the proposition that he has the status of worker.

68. The Belgian Government pointed out that the plaintiff undertook a number of 'student jobs' (*petits travaux d'étudiant*). Student work, the Belgian Government submits, is one of a number of special employment relationships under Belgian law which are not to be regarded as normal employment relationships. It did not specify which jobs are covered by such special relationships.

69. The question is therefore whether the plaintiff's status as a worker may be precluded by the fact that his work fell within that special legal framework. The statutory regulation of short-term employment relationships is not unique to Belgium. Such rules can also be found in the legal systems of other Member States. The national legislature thus satisfies an economic need, on the one hand, and serves the interests of people who are prepared to work reduced hours, on the other. A common feature of such employment relationships, which are defined and limited by law, is that they take account of the special position, in terms of insurance and, in some cases, taxation, in which potential employees find themselves. This can apply to both students and spouses. Both those groups are, for example, normally insured against sickness. A characteristic of the kind of 'minor employment relationship' described above may therefore be partial exemption from the obligation to provide social insurance.

70. The social insurance aspect of student employment regulated by law in Belgium does not form part of the subject-matter of these proceedings. It is to that extent unclear whether and, if so, what social

46 — See *Lawrie-Blum*, cited at footnote 27 above, paragraph 17, and *Bernini*, cited at footnote 44 above, paragraph 14.

insurance provision was made. It must be stated, however, that the obligation to provide social insurance is not a decisive criterion for or against the plaintiff's status as a worker, since this case concerns the status of worker in the context of freedom of movement and not the meaning of 'worker' in the context of Regulation (EEC) No 1408/71.[47] Consequently, the fact that, as the Belgian Government observes, the plaintiff did in any event undertake 'student jobs' regulated by law cannot preclude his having the status of worker. The deciding factor is that, for a certain period, he performed for and under the direction of another person services in return for which he received remuneration and which do not appear to have been 'purely marginal and ancillary'.[48]

71. An activity or a succession of individual employment relationships which enable a worker to support himself without external assistance for a period of three years cannot under any circumstances be regarded as 'purely marginal and ancillary'.

72. In a different context, the Court has recognised or deemed it possible that a person may have the status of worker[49] in cases where there was no long-term full-time employment relationship. In *Levin*,[50] for example, the Court, in assessing whether the activity in question was effective and genuine, recognised part-time employment as establishing a person's status as a worker, even though the objection had been raised in the proceedings that the income from that employment was less than the minimum guaranteed income in the sector concerned.[51]

73. Similarly, for the purpose of determining whether a particular activity was effective and genuine, the Court did not at any rate rule out the possibility, in *Kempf*,[52] that part-time work of 12 hours a week as a music teacher,[53] and, in *Meeusen*,[54] that two hours' employment a week, could establish a person's status as a worker. In *Brown*,[55] the Court held that 'pre-university vocational training' of approximately eight months was sufficient to confer on the person in question the status of worker.[56]

74. In the *Raulin* case,[57] in which the applicant had worked 60 hours over a

47 — Council Regulation (EEC) No 1408/71 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, in the version contained in Council Regulation (EEC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

48 — See *Bernini*, cited at footnote 44, paragraph 14.

49 — The task of classifying the activity in each particular case having been left to the referring court.

50 — Case 53/81 *Levin*, cited at footnote 41 above, paragraph 16.

51 — See *Levin*, cited above at footnote 41, paragraph 16.

52 — Case 139/85, cited above at footnote 41.

53 — Ultimately, the question did not need to be answered, since the referring court, the Raad van State, had proceeded from the premiss that the paid employment in question was on a sufficiently large scale (paragraph 12).

54 — Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraphs 7 and 13 et seq..

55 — Case 197/86, cited at footnote 14.

56 — See *Brown*, cited at footnote 14, paragraph 23.

57 — Case C-357/89, cited at footnote 14.

period of at least two weeks under an 'on-call' contract of employment,[58] the Court left to the national court[59] the final decision as to whether or not the person concerned had the status of worker. In any event, the 'on-call' contract was not in principle a bar to her being recognised as such.[60] Finally, in *Bernini*,[61] the Court readily accepted that a 10-week training course was sufficient to establish a person's status of worker.[62]

75. Against that background, the plaintiff can, on the face of it, be considered to fulfil the objective conditions for establishing the status of worker. I shall come back later to the possible consequences of the end of the employment relationship or the voluntary cessation of work.

76. It must now be examined whether a person in the plaintiff's situation also enjoys a right of residence in his capacity as a student.

*The right of residence as a student*

77. It is common ground that the plaintiff resides in Belgian territory in order, *inter alia*, or rather primarily, to study physical education there at the University of Louvain-la-Neuve. Directive 93/96 establishes a right of residence for students under Community law. That right of residence, which is ancillary to the right of residence on other grounds,[63] is subject, under Article 1 of the directive, to three conditions:

1. a person who avails himself of the right of residence as a student must be enrolled 'in a recognised educational establishment for the principal purpose of following a vocational training course there';

2. he must be covered by sickness insurance in respect of all risks in the host Member State;

3. he must assure the relevant national authority, by means of a declaration or by such alternative means as he may choose that are at least equivalent, that he has sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during his period of residence.

58 — An 'oproepcontract'.

59 — See *Raulin*, cited at footnote 14, paragraph 14.

60 — See *Raulin*, cited at footnote 14 above, paragraph 11.

61 — Case C-3/90, cited at footnote 44 above.

62 — See *Bernini*, cited at footnote 44, paragraph 17.

63 — See Article 1 of Directive 93/96: '... the Member States shall recognise the right of residence for any student who is a national of a Member State and who does not enjoy that right under other provisions of Community law...'

78. In this respect, the text of the directive reiterates the criteria for non-discriminatory access to vocational training previously established by the case-law of the Court. [64]

79. It can be assumed that the first condition is fulfilled in the present case. The plaintiff is enrolled as a fully-registered student at the University of Louvain-la-Neuve. He is following a full-time course in physical education there. Moreover, he appears to be completing the course within the prescribed time. It is for that purpose that he applied for the assistance in question.

80. The Belgian Government has argued that the plaintiff is not lawfully resident in Belgian territory. However, it based that argument on the fact that he did not apply for a residence permit until 1998. On the other hand, he must have enrolled at the university in the proper manner, since, otherwise, the university would not have accorded him 'credit facilities to pay his tuition fees'.

81. The second condition, requiring sickness insurance cover, also appears to be fulfilled. It has not been focused on in these proceedings, and probably does not pose any problems.

82. As regards the third condition, it can probably be assumed that the plaintiff did not in fact submit a declaration as required during the first three years of studies, in all likelihood because he was not asked for one. The plaintiff did not apply for a residence permit until near the end of the third year of his studies. The fact remains, however, that for three years he fulfilled the condition, if not formally at least substantively. He was able to obtain sufficient resources, by his own efforts, so as not to have to rely on the social assistance system of the host Member State.

83. It is true that the United Kingdom Government has raised the objection that the plaintiff could not have submitted such a declaration since he had been forced to work in order to support himself, which proves that he did not have sufficient resources.

84. The facts suggest the contrary, however. *For three years* the plaintiff had sufficient resources and did not have recourse to the social assistance system of the State of residence. Moreover, there is no reason why the pursuit of an activity in order to support oneself should not be recognised as an appropriate means of obtaining resources. It is clear that for three years the plaintiff successfully managed to combine study with occupational activity. Otherwise, he would not in fact have endeavoured to obtain the end-of-course qualification in his final year.

64 — See *Raulin*, cited above at footnote 14, paragraph 39.

85. I do not see why only 'external financing' from parents, State bursaries or grants should be recognised as evidence of means of subsistence. What matters is that the student does not need to rely on the social assistance system.

86. In that context, it must also be pointed out that, in Directive 93/96, unlike in Directives 90/364 [65] and 90/365, [66] the Community legislature dispensed with the criterion of 'sufficient' resources. [67] That difference is indicative of a more flexible approach to proof of existing resources. The reason for this may be that a student's right of residence is limited to the duration of the training, while the right of residence under Directives 90/364 and 90/365 is in principle unlimited in time. Another factor might be that it was the legislature's intention not to lay down a criterion, so as not to create a further obstacle to the right of residence for students. The fact that studies are 'self-financed', even by means of an occupational activity, should not therefore preclude recognition of the existence of means of subsistence.

87. However, in the first three years of his studies, the plaintiff did not make a *formal* declaration to that effect. It is, however, reasonable to assume that that declaration is declaratory in nature, so that, if the criterion is fulfilled in substance, the right of residence will not in itself be called into question. There is support for that view in the case-law of the Court. In *Raulin*, the Court held that the principle of non-discrimination with regard to conditions of access to vocational training implies that 'a national of a Member State who has been admitted to a vocational training course in another Member State enjoys, in this respect, a right of residence for the duration of the course'. [68] As regards the requirement of a residence permit, the Court further held that the issue of such a permit does not create the rights guaranteed by Community law and the lack of a permit cannot affect the exercise of those rights. [69] The judgment in *Martínez Sala* must also be construed in this way. The Court points out there that:

'For the purposes of recognition of the right of residence, a residence permit can only have declaratory and probative force.' [70]

88. In so far as the declaration as to available means of subsistence is a stage prior to the residence permit, the position here cannot in principle be any different. In

65 — See the first subparagraph of Article 1(1).

66 — See Article 1(1)(2).

67 — See in this respect the observations submitted by the Commission in Case C-424/98 *Commission* v *Italy* [2000] ECR I-4001, paragraph 39.

68 — See *Raulin*, cited at footnote 14, paragraph 34.

69 — See *Raulin*, cited at footnote 14, paragraph 36, which contains further references.

70 — See *Martinez Sala*, cited at footnote 7, paragraph 53.

Case C-424/98,[71] the Court held that Article 1 of Directive 93/96 provides only that the student must give an assurance that he has means of subsistence. However, recognition of the right of residence is made conditional 'on the student being enrolled in a recognised establishment for the principal purpose of following a vocational training course and being covered by sickness insurance in respect of all risks in the host Member State'.[72] In that case, the Court found against the Member State on the ground that it had disregarded the limits laid down by Community law by requiring in its legislation that students provide an assurance that they have resources *of a specific amount*, without leaving them to choose the means by which to provide that assurance.[73]

89. It can therefore be concluded that the plaintiff in the main proceedings also has a right of residence in his capacity as a student.

*Concurrent application of more than one right of residence*

90. The question now is what legal and factual consequences follow from that 'right of residence', which derives, on the one hand, from occupational activity and, on the other, from the pursuit of studies. The French Government has contended that the status of worker and that of student are mutually exclusive. Other parties have contended that the status of student takes precedence.

91. It is not entirely unusual in Community law for one and the same person to enjoy a right of residence deriving from different legal bases. For example, the child of a migrant worker, whose right of residence derives from his status as a family member, will, upon taking up an occupational activity, acquire his own right of residence in his capacity as a worker. Spouses may conceivably find themselves in a comparable situation where the spouse who has followed the migrant worker enjoys a right of residence by virtue of both his family status and any occupational activity which he pursues. It is therefore perfectly possible for rights to apply concurrently in this way. Indeed, in such circumstances, a person with a right of residence does not necessarily have to choose between the bases on which that right is founded. The fact that it is in principle possible for rights to run parallel in this way means that a person may enjoy a right of residence by virtue of both occupational activity and study at the same time.

92. A problem might arise from the fact that different rights and obligations are attached to each legal basis. In those circumstances, the interests of free movement dictate that the consequences more favourable to the holder of the right of residence should apply. The objections

71 — Case C-424/98 *Commission* v *Italy*, cited at footnote 67.
72 — See Case C-424/98, cited at footnote 67, paragraph 44.
73 — See Case C-424/98, cited at footnote 67, paragraph 46.

raised at the hearing by the French and United Kingdom Governments, to the effect that a foreign national who arrived in the host Member State as a student can, for the duration of his course, rely only on his right of residence as a student and cannot change his status as such without authorisation from the Member State, cannot be upheld. Where the legal and factual conditions for the enjoyment of a right of residence as a migrant worker are fulfilled, refusing to allow a person to rely on his status as such would amount to the unilateral introduction by a Member State of an obstacle to the free movement of workers.

93. Rights of residence founded on different legal bases can therefore be enjoyed both consecutively and simultaneously. In a case such as that of the plaintiff, the person with the right of residence, although enrolled at a university and a fully-registered student, could therefore at the same time rely on his status as a worker, if and in so far as he pursues an occupational activity which is not totally marginal and ancillary.

94. For the sake of clarity and completeness, I would point out that the holding of occasional 'student jobs' will scarcely satisfy those criteria. It is indeed conceivable that a degree of alternation between study and occupational activity might be taken into account in assessing the criteria 'marginal and ancillary'. In those circumstances, the criterion against which the occupational activity would have to be measured might be whether the vocational training was predominant. In a case such as this one, however, where the beneficiary has supported himself independently for a number of years, application of that criterion is unnecessary.

*Retaining the status of worker*

95. Assuming that the plaintiff was a worker within the meaning of Community law for a period of three years, under the case-law of the Court he could, during that period, have applied for the 'minimex' to supplement his income. [74] Moreover, the making of such an application would not have resulted in the termination of his right of residence. [75] If the plaintiff had continued to pursue an occupational activity during the fourth year of his residence in the host State, he probably would have been entitled to the 'minimex'. It will have to be assumed, however, that the plaintiff terminated his occupational activity in order to complete his studies.

96. The question therefore arises whether the plaintiff may none the less be able to rely on his former status as a worker. In this respect, it must be assumed, in accordance with the case-law of the Court, that, in principle, a person loses his status of worker once the employment relationship has ended, whilst that status continues to

74 — See *Kempf*, cited at footnote 41.
75 — *Kempf*, cited at footnote 41.

produce certain effects after the employment relationship has ended. [76] And indeed, in those cases in which the Court has hitherto had occasion to rule on the relationship between occupational activity and subsequent vocational training or study, [77] it has unreservedly recognised the status of worker as continuing to produce effects. In *Lair*, it expressed this as follows: '... there is a basis in Community law for the view that the rights guaranteed to migrant workers do not necessarily depend on the actual or continuing existence of an employment relationship'. [78]

'Persons who have previously pursued in the host Member State an effective and genuine activity as an employed person (...), but who are no longer employed are nevertheless considered to be workers under certain provisions of Community law.' [79]

The Court of Justice then lists a number of provisions which grant rights to 'unemployed' migrant workers. [80] On balance, the Court finds that 'migrant workers are guaranteed certain rights linked to the status of worker even when they are no longer in an employment relationship'. [81]

In the field of grants for university education, the Court makes eligibility for assistance subject to there being an element of continuity between the previous occupational activity and the new course of study, in the sense that 'there must be a relationship between the purpose of the studies and the previous occupational activity'. [82] Such continuity is not, however, essential 'where a migrant has involuntarily become unemployed and is obliged by conditions on the job market to undertake occupational retraining in another field of activity'. [83]

In conclusion, the Court held that 'a national of another Member State who has undertaken university studies in the host State leading to a professional qualification, after having engaged in occupational activity in that State, must be regarded as having retained his status as a worker and is entitled as such to the benefit of Article 7(2) of Regulation No 1612/68, provided that there is a link between the previous occupational activity and the studies in question'. [84]

97. In those circumstances, the status of worker — as the Portuguese Government submits — could be regarded as being retained where there is a link between the occupational activity and the study. It would be for the national court to deter-

76 — See *Martínez Sala*, cited at footnote 7, paragraph 32.

77 — See *Lair*, cited at footnote 16; *Brown*, cited at footnote 14; and *Bernini*, cited at footnote 44.

78 — *Lair*, paragraph 31.

79 — *Lair*, paragraph 33.

80 — *Lair*, paragraphs 34 and 35.

81 — *Lair*, paragraph 36.

82 — *Lair*, paragraph 37.

83 — *Lair*, paragraph 37.

84 — *Lair*, paragraph 39.

mine whether such a substantive link existed.

98. In the absence of any kind of substantive link, however, the question arises whether the status of worker may be retained on other grounds. In order to answer that question, it is necessary, first of all, to examine the main differences and similarities between this dispute and the cases in which the Court has required there to be an element of 'continuity'. [85]

99. The cases dealt with by the Court thus far have all concerned occupational activity and study undertaken one after the other, in some instances with long, although variable, intervals between the occupational activity and the commencement of study. [86] The criterion of continuity is therefore capable of ensuring that there is a relationship between the occupational activity and the study. It also serves to prevent the mere fact of undertaking study from creating an entitlement to a study grant.

100. The present case is different inasmuch as it concerns study and occupational activity undertaken at the same time. In this instance, a connection between occupational activity and study results, on the one hand, from the time factor itself and, on the other, from the fact that the occupational activity was pursued for the purpose of completing the study. A connection of purpose of this kind cannot in itself call into question the status of worker. As long ago as its judgment in *Levin*, [87] the Court held that occupational activity does not necessarily have to be the only purpose of entry into the territory of a Member State. There is therefore no need for any further criterion to be fulfilled in order to establish a link between occupational activity and study. A person should therefore retain his status as a worker even if his occupational activity is interrupted for the duration of his training, and, therefore, for the duration of his right of residence.

101. The plaintiff could accordingly rely on Article 7(2) of Regulation No 1612/68 in his capacity as a worker.

102. The view that a working student may have the status of worker might also find support in the Portuguese Government's submission that such a student should not be in a worse position than an unemployed worker. Regard should also be had in this respect to Article 7(1) of Regulation No 1612/68, according to which a worker who is a national of a Member State and who becomes unemployed may not, in the territory of another Member State, be treated differently from national workers as regards reinstatement or re-employment.

85 — See *Lair*, cited at footnote 16; *Brown*, cited at footnote 14; and *Bernini*, cited at footnote 44.

86 — Two and half years in *Lair*, cited at footnote 16, and six months in *Bernini*, cited at footnote 44.

87 — Case 53/81, cited at footnote 41, paragraph 21.

Such a worker is also covered by Article 7(2), under which he is to enjoy the same social and tax advantages as are accorded to national workers.

103. A person such as the plaintiff may therefore rely on Article 7(2) of Regulation No 1612/68. Moreover, a social benefit such as that at issue in the present case has been recognised by the Court as being a social advantage within the meaning of that provision. [88]

104. While the status of worker does therefore continue to produce effects even after the end of the employment relationship, those effects are none the less not unlimited. Where the grant of a benefit is made subject to further conditions, these must be fulfilled. It is of course for the national court alone to verify whether the conditions laid down by national law, such as, for example, the requirement under Article 1(1) of the Belgian Law of 7 August 1974 (see point 12) that a claimant has to be unable 'by his own efforts' to obtain the resources applied for, are met, and whether that condition is fulfilled where the claimant voluntarily abandons an activity by which he could obtain such resources. When examining that question, the national court must, however, observe the principle of equal treatment and treat a Community national in the same way as a Belgian worker (or student) in a comparable situation.

*The status of student*

105. The question whether the plaintiff in the main proceedings may qualify for the 'minimex' in his capacity as a student must be examined only in the event that his status as a worker is not recognised. The status enjoyed by students under Community law in the context of access to social advantages has already been broadly defined by the case-law of the Court [89] and Directive 93/96 which codifies it. A Community national who wishes to study in another Member State enjoys equal treatment as regards access to vocational training, [90] which also comprises university studies leading to a professional qualification. [91] The right to equal treatment in principle includes the assistance granted to cover enrolment fees and other costs of access to the course, 'regardless of how such assistance is calculated or the underlying philosophy'. [92]

88 — *Hoeckx*, cited at footnote 4, and *Scrivner*, cited at footnote 5.

89 — *Gravier*, cited at footnote 24; *Blaizot*, cited at footnote 25; *Raulin*, cited at footnote 14; and *Lair*, cited at footnote 16.

90 — See *Gravier*, cited at footnote 24.

91 — See *Blaizot*, cited at footnote 25.

92 — *Raulin*, cited at footnote 14, paragraph 28.

106. If the contested benefit could also be classified at least partly as a payment to cover enrolment fees and other costs, in particular tuition fees,[93] a person in the same situation as the plaintiff could, in accordance with Article 6 of the EC Treaty, claim equal treatment with national students. This is a matter for the national court to consider.

107. In order for a more substantial subsistence allowance to be obtained under the principle of equal treatment, the facts of the case must fall within the scope of the Treaty, and the grant of assistance must not be precluded by specific provisions.

Under the Court's present case-law, which is based on the EEC and EC Treaties, a study grant in the form of a maintenance allowance does not fall within the scope of the Treaty. Education policy[94] and social security[95] have been deemed not to be covered by the Treaty, at least within the relevant limits.

108. The fact that the right of residence for students has since been provided for in secondary legislation could conceivably be taken as a basis for arguing that the status of students has thereby become a matter of Community law and is, as such, subject also to the general principle of equality.

109. It is true that Article 3 of the directive states that the directive does not establish entitlement to the payment of maintenance grants by the host Member State on the part of students benefiting from the right of residence. That does not mean, however, that such entitlement could not be founded on another legal basis.

110. It is true that, in order to obtain a right of residence as a student, a person must be able to give an assurance as to the possession of means of subsistence.[96] It is legitimate to ask here whether proof of means of subsistence is a condition of the right of residence or whether recourse to the social assistance system of the host Member State constitutes a potential ground for terminating the right of residence. On the basis of the judgment in Case C-424/98,[97] the latter interpretation appears to be correct. If that were the case, the existence of means of subsistence would not be an essential condition of the right of residence. However, the possibility of terminating residence as a result of recourse to the social assistance system is also an instance of unequal treatment which is accepted by Community law and justified on grounds relating to the legitimate interests of the State.

93 — See *Lair*, cited at footnote 16, paragraph 16.

94 — *Gravier*, cited at footnote 24, paragraph 19.

95 — See Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 21; and Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 17.

96 — See Article 1 of Directive 93/96.

97 — Cited at footnote 67, paragraph 44.

111. Entitlement to equal treatment does not seem possible where the advantage obtained is a recognised ground for withdrawal of the right of residence when the latter is the very prerequisite for the applicability of the principle of equal treatment.

112. The only conceivable solution would be to conclude that, because it infringes a higher rule of law, the provision of secondary legislation is contrary to Community to law and must therefore be set aside. The question therefore arises whether a student may, on the basis of the Treaty alone, assert a right of residence and a further, ensuing right to equal treatment in respect of all the social advantages accorded in the host Member State.

113. Freedom to provide services and citizenship of the Union fall to be considered as possible bases for asserting such a right in this case.

(1) Freedom to provide services

114. As long ago as its judgment in *Cowan*,[98] the Court of Justice conferred on a Community national staying in another Member State as a tourist a right to victims' compensation under the general principle of equal treatment on the ground that he was a recipient of services. In that judgment, the Court held that 'persons in a situation governed by Community law must be placed on a completely equal footing with nationals of the Member State'.[99] The Court referred to that statement in its judgment in *Bickel and Franz*,[100] which concerned the principle of equal treatment in the context of the language rules applicable to criminal proceedings. In that judgment, the Court held that:

'Article 59 therefore covers all nationals of Member States who, independently of other freedoms guaranteed by the Treaty, visit another Member State where they intend or are likely to receive services.'[101]

115. In accordance with that broad interpretation, persons who 'exercise their right to move and reside freely in another Member State are in principle entitled to treatment no less favourable than that accorded to nationals of that State ...'.[102] In response to the objection that the rules at issue in that case fell within the powers of the Member States, the Court reiterated the limits which Community law sets to their powers in that respect, which consist in observance of the prohibition against discrimination and the prohibition against restricting fundamental freedoms.[103]

98 — Case 186/97 [1989] ECR 195.

99 — See *Cowan*, cited at footnote 98, paragraph 10.

100 — Case C-274/96 [1998] ECR I-7637.

101 — See *Bickel and Franz*, cited at footnote 100, paragraph 15.

102 — See *Bickel and Franz*, cited at footnote 100, paragraph 16.

103 — See *Bickel and Franz*, cited at footnote 100, paragraph 17.

116. A student could conceivably be regarded as a recipient of services within the meaning of that case-law. However, in *Humbel*, [104] when expressly asked about the nature of courses provided in a technical institute, the Court held 'that courses taught in a technical institute which form part of the secondary education provided under the national education system cannot be regarded as services'. [105] The Court based that conclusion on the economic characteristics of a service. The essential characteristic of remuneration, which determines whether or not there is a provision of services, is said to lie in the fact it constitutes consideration for the service in question, which consideration is normally agreed upon between the provider and recipient of the service. [106]

117. 'That characteristic is, however, absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents.

The nature of that activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system.' [107] Those considerations can be extended to university courses. It follows from this that a student cannot as such be regarded as a recipient of services within the meaning of Community law.

118. The only question, therefore, is whether he is entitled to equal treatment as a person residing lawfully in another Member State. This is where citizenship of the Union, to which the national court expressly refers in its question, enters consideration.

(2) Citizenship of the Union

119. Every person holding the nationality of a Member State [108] is a citizen of the Union and every citizen of the Union has the right to move and reside freely within the territory of the Member States. [109] In *Bickel and Franz*, the Court expressly referred to citizenship of the Union in examining the legal basis for the plaintiffs' residence. [110]

104 — Case 263/86 [1988] ECR 5365.

105 — See *Humbel*, cited at footnote 104, paragraph 20 and point 2 of the operative part.

106 — See *Humbel*, cited at footnote 104, paragraph 17.

107 — See *Humbel*, cited at footnote 104, paragraphs 18 and 19.

108 — See Article 8 of the EC Treaty.

109 — See Article 8a of the EC Treaty.

110 — See *Bickel and Franz*, cited at footnote 100, paragraph 15.

120. This citizenship affords a citizen of the Union an original right of residence under the Treaty. Since this individual legal status as such falls without any doubt within the scope of the Treaty, it must be subject to the general prohibition of discrimination on grounds of nationality. That would mean that a citizen of the Union with an unlimited right of residence could in principle also claim equal treatment in respect of social benefits.

121. However, the right of residence for citizens of the Union is not unlimited, but 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'. [111]

122. Those limits include Council Directives 90/364, 90/365 and 90/36 on the right of residence, all three of which state that beneficiaries of the right of residence must not become a burden on public finances. [112] That is why all three of them also provide that beneficiaries must have means of subsistence in order to exercise a right of residence. [113] The condition which the Community legislation imposes on the exercise of the right of residence, in conjunction with the requirement that public finances should not be unreasonably 'burdened' during residence, may be regarded as a limitation, tolerated by Community law, of the right to equal treatment in the field of social benefits. Recourse to the social assistance system could in that case constitute a ground for terminating the right of residence.

123. The precise circumstances under which public finances are to be regarded as being unreasonably 'burdened' are not to be ascertained directly from the relevant provisions of Community law themselves, particularly since, as I have argued here, recourse to public funds cannot lead automatically to termination of the right of residence. Member States therefore retain a certain discretion in determining what those circumstances are.

124. Article 55 of the Royal Decree of 8 October 1981 must be seen in that context. Under paragraph 4(2) thereof, the right of residence of a student who is a Community national and who is in principle entitled to reside in Belgium may be terminated where that student has received a certain amount of financial assistance for a specified period and is not able to repay that assistance within six months.

125. Within the context described, that legal situation does not conflict with Community law. It can therefore be concluded that a Community national who enjoys a right of residence by virtue of citizenship of

111 — See Article 8a of the EC Treaty.

112 — See the fourth recital in the preamble to Directive 90/364, cited at footnote 9, the fourth recital in the preamble to Directive 90/365, cited at footnote 10, and the sixth recital in the preamble to Directive 93/96, cited at footnote 3.

113 — See Article 1 of Directives 90/364, 90/365 and 93/96 respectively.

the Union may in principle assert a right to equal treatment even in respect of social benefits. Recourse to the social benefits available in the host State is exhausted, however, in circumstances which are capable of terminating the right of residence.

## VIII — Conclusion

126. In the light of the foregoing considerations, I propose that the questions referred for a preliminary ruling be answered as follows:

In order to answer the question whether a Community national is entitled to the 'minimex', it must first be determined whether he is a worker within the meaning of Community law and whether in that capacity he can claim equal treatment with nationals.

It is not in principle compatible with Community law, in particular with the principles of European citizenship and non-discrimination enshrined in Articles 6 and 8 of the Treaty establishing the European Community (now Articles 12 and 17 EC), for entitlement to a non-contributory social benefit, such as that introduced by Article 7 of the Belgian Law of 7 August 1974 on the 'minimex', not to be available to all citizens of the Union. However, reliance on the principle of equal treatment is subject to strict limitations which apply in any event where recourse to the social assistance system constitutes a ground for terminating the right of residence.