without its being necessary to define whether the payment is made by virtue of an option or of an obligation, either statutory or contractual.

3. The rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result. The taking into consideration, as a criterion for the grant of a separation allowance, of the fact that a worker has his residence in another Member State may, according to the circumstances, constitute a forbidden discrimination. This is not the case if the scheme relating to such an allowance takes account of objective differences in the situations of workers according to whether their residence at the time when they take up their employment is within the territory of the State concerned or abroad.

In Case 152/73

Reference to the Court under Article 177 of the EEC Treaty by the Bundesarbeitsgericht (Federal Labour Court) for a preliminary ruling in the action pending before that court between

GIOVANNI MARIA SOTGIU, skilled postal worker, residing in Stuttgart,

and

DEUTSCHE BUNDESPOST (German Federal Post Office), Directorate-General, Stuttgart,

on the interpretation of Article 48 (4) of the EEC Treaty and of Article 7 (1) and (4) of Regulation No 1612/68 of the Council of 15 October 1968, on freedom of movement for workers within the Community

THE COURT

composed of: R. Lecourt, President, A. M. Donner and M. Sørensen, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore (Rapporteur), H. Kutscher, C. Ó Dálaigh and Lord Mackenzie Stuart, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

Giovanni Maria Sotgiu, of Italian nationality, was engaged as a skilled worker by the Deutsche Bundespost, Stuttgart, under a written contract of employment made on 23 March 1965.

Mr Sotgiu, whose contract of employment was extended for an indefinite period on 27 August 1965, is paid in accordance with the collective wages agreement for Federal Post Office workers (Tarifvertrag für die Arbeiter der Deutschen Bundespost) of 6 January 1955.

Mr Sotgiu's family is still living in Italy.

From the beginning of his employment Mr Sotgiu received a separation allowance of 7·50 DM per day, on the same basis as workers of German nationality employed away from home.

In pursuance of a circular of the Federal Ministry of the Interior of 31 March 1965, the separation allowance for workers employed away from their place of residence within the Federal Republic was increased to 10 DM per day with effect from 1 April 1965, but for workers whose residence at the time of their initial employment was situated abroad the amount of the separation allowance remained at 7·50 DM per day.

Mr Sotgiu, who continued to receive the allowance at the lower rate, brought an action before the Arbeitsgericht (Labour Court), Stuttgart; in support of his action he claimed in particular that he was the victim of discrimination which was forbidden by Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ L 257, p. 2).

The Arbeitsgericht dismissed the action by a judgment of 21 August 1970. Mr Sotgiu's appeal, brought before the Landesarbeitsgericht (the 'Land' Labour Court) for Baden-Württemberg, was rejected by a judgment of 21 April 1972.

On 18 May 1972 Mr Sotgiu lodged a further appeal before the Bundesarbeitsgericht (Federal Labour Court), Stuttgart.

The Fourth Chamber of this court, by Order of 28 March 1973, decided in pursuance of Article 177 of the EEC Treaty to stay the proceedings pending a preliminary ruling by the Court of Justice on the following questions:

1. Is Article 48 (4) of the EEC Treaty to be interpreted as meaning that Article 7 (1) and (4) of Regulation No 1612/68 does not apply to employees of the Deutsche Bundespost working under a contract of employment governed by private law?

2. In the case of a negative answer to the first question:

   Is Article 7 (1) and (4) of Regulation No 1612/68 to be interpreted as meaning that the separation allowance granted in addition to wages comes within the concept of 'conditions of employment and work'?

3. In the case of an affirmative answer to the second question:

   Is Article 7 (1) and (4) of Regulation No 1612/68 to be interpreted as containing a prohibition not only against treating a worker differently because he is a national of another Member State of the EEC, but also against treating him differently because he is resident in another Member State?

The Order of the Bundesarbeitsgericht was lodged at the Court Registry on 20 July 1973.

In pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 1 October 1973 by the Government of the Federal Republic of Germany, on 2 October by the Commission of the European Communities and on 11 October by the Government of the Italian Republic.

The Court, after hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, decided to open the oral procedure without a preparatory inquiry.

At the hearing on 21 November 1973 the Government of the Federal Republic of Germany and the Commission put forward their oral observations and answered questions put by the Court.

The Advocate-General delivered his opinion at the hearing on 5 December 1973.

In the proceedings before the Court the Government of the Federal Republic of Germany was represented by Martin Seidel, 'Regierungsdirektor' at the Bundesministerium für Wirtschaft (Federal Ministry of Economics), acting as agent, the Government of the Italian Republic by Adolfo Maresca, acting as agent, assisted by Giorgio Zagari, Sostituto Avvocato generale dello Stato, and the Commission by its Legal Adviser, Peter Karpenstein, acting as agent, assisted by Meinhard Hilf, a member of its Legal Department.

II — Observations submitted to the Court

The written and oral observations submitted to the Court may be summarized as follows:

According to the Government of the Federal Republic of Germany the regulations governing the separation allowance, upon which the main action is based, do not involve any difference in treatment, on grounds of nationality, between workers whose residence at the time of their initial employment with the Federal German Post Office was within the country: foreign workers are entitled, like German workers, to the higher separation allowance. The reason for the difference in treatment of foreign workers whose residence is abroad, in comparison with workers residing in the country, is based on different factual circumstances:

A German or foreign worker living in the country at the time of his recruitment receives the separation allowance only if he is prepared to transfer his residence to his place of work, whilst a foreign worker whose home is abroad does not have to fulfil this condition. Workers whose home is within the country or German workers whose home is abroad receive the separation allowance only on a temporary basis: they lose it from the time of their removal or when they are no longer prepared to remove; on the other hand, foreign workers whose home is abroad receive the separation allowance for an unlimited period. In view of this advantage the lower rate of the separation allowance is justified.

(a) With regard to the first question, it should be realized that the rules of the EEC Treaty on freedom of movement, and consequently the provisions of Regulation No 1612/68, do not apply to the employees of the Federal Post Office, since the latter forms part of the public service; the position is the same even when the employees work on the basis of an employment contract under private law.

The free movement of workers constitutes one of the fundamental principles of the Community. In excluding the sector of the public service Article 48 (4) of the Treaty has taken account of the fact that the Community is not a unitary state organization but is

based upon the state organization of its Member States.

The Treaty does not define what is to be understood by 'the public service': the objectives of Article 48 (4) require an interpretation based on the national concept and idea of the public service. This provision is justified by the need to be able to rely upon the special loyalties of the nationals of a country at the time of the recruitment of employees in the public service. Accordingly, the field of application of Article 48 (4) *ratione personae* must take account of the different structures of the public services of Member States. These are the limits of the objectives pursued by Article 48 (4); in particular, it is not the task of the latter to harmonize national administrative structures, nor consequently to standardize the exception which it lays down with regard to the principle of free movement of workers. This view is shared by the European Parliament, which, in a resolution of 17 January 1972, regarding the definition of the concepts of public service and public authority in Member States and the consequences of this definition in connexion with the application of Articles 48 (4) and 55 of the EEC Treaty (OJ C 10, p. 4) stated that: 'Article 48 (4) may be applied to any employment considered by a Member State as coming within its public service, regardless of the nature of the activities carried on within the framework of such employment', whilst stating the express wish that Member States would as far as possible limit the application of Article 48 (4) to occupations which involve the exercise of public authority.

With more specific reference to the Federal Republic of Germany, the activities of the Federal Post Office undoubtedly fall within the public service: according to Article 87 of the Basic Law (Grundgesetz) it is part of the administration pertaining to the Federation and in accordance with the view which is generally accepted in the Federal Republic it exercises attributes of sovereignty. Employment in the Federal German Post Office indisputably constitutes employment in the public service within the meaning of Article 48 (4) of the EEC Treaty.

Article 48 (4) contains no element of discrimination with regard to the legal status of the employee; it refers to the activity carried out by the employer and not to the legal status of the employee. The fact that the employee was engaged on the basis of a contract of employment under private law does not preclude his integration into the public service, to which he belongs on the same lines as an official. The fact is of particular relevance to the Federal Republic of Germany, where activities involving the exercise of public authority may be carried out not only by officials enjoying a status under public law, but also by employees of the state or by workers.

The answer to the first question put by the Bundesarbeitsgericht should therefore be that Article 48 (4) of the EEC Treaty is to be interpreted as meaning that Article 7 (1) and (4) of Regulation No 1612/68 is not applicable to workers in the Deutsche Bundespost employed within the framework of a contract of employment under private law.

(b) Having regard to the answer given to the first question, the second and third questions lose their purpose.

The *Government of the Italian Republic* emphasizes the scope of the questions of principle raised by the Bundesarbeitsgericht.

(a) It maintains, as far as the first question is concerned, that Article 48 (4) of the EEC Treaty is intended by virtue of its wording and legislative background to limit the non-applicability of Community rules concerning migrant workers to employment within the public service, that is to say, only to relationships whereby the employee is either engaged in or becomes part of the public service. This is not the case with an employee engaged by a public organization on the basis of a contract

under private law; such an employee remains a stranger to the organization, to which he is not integrated by any organic bond. The reasons on which Article 48 (4) is based are not applicable to him.

This provision is intended to allow Member States the opportunity of maintaining special rules for their public service; such a need obviously does not exist when the public organization is satisfied to avail itself of the services of employees engaged on the basis of contracts of employment under private law. The first question therefore requires a negative answer.

(b) With regard to the second question, it is indisputable that the expression 'other conditions of work' used in Article 7 (4) of Regulation No 1612/68 may be interpreted as applying to any allowance paid to the employee. In this case the separation allowance is linked with the concept of 'conditions of work' and indeed with that of remuneration, since it is not dependent upon some temporary or occasional disadvantage but is linked to a situation which is likely to remain the same throughout the period of employment.

(c) With reference to the third question it should be realized that the spirit and aim of Article 7 of Regulation No 1612/68 involve a prohibition on treating workers differently according to the place of recruitment if the latter is situated within the Community. The criterion of the place of recruitment might make it possible to circumvent the prohibition on discrimination based on nationality: in fact workers recruited abroad are normally of foreign nationality and a criterion of differentiation based on place of recruitment of the worker would lead substantially to discrimination against non-national Community workers. Such a criterion is contrary to the principle of freedom of movement. In this respect it is necessary to recall that in a different sphere the same Regulation No 1612/68 provides, in Article 3 thereof, that: 'Provisions laid down by law, regulation or administrative action or administrative practices of a Member State shall not apply:

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

The answer to the third question should therefore be in the affirmative.

The *Commission of the European Communities* states that the present case gives rise essentially to the question whether or not there is an exception to the prohibition on discrimination laid down by Article 48 (2) of the EEC Treaty and Article 7 of Regulation No 1612/68 in view of the fact that the plaintiff in the main action is employed in the public service within the meaning of Article 48 (4). It is therefore mainly a question of interpreting the concept of 'employment in the public service'.

(a) This concept amounts to a concept of Community law. To a considerable extent, no doubt, it cannot be defined except by reference to the national legal situation, but this is a matter of an independent definition, created by the Treaty, the content of which must be determined in the first place according to the requirements of Community law and only in the second instance be based upon national criteria. If it were left to the Member States to define independently the scope of the public service, this would result in giving to the duties which flow for them from the principle of freedom of movement, that is, from one of the fundamental liberties provided for by the Treaty, a very different scope from one State to another; the concept of 'employment in the public service' can thus be defined and understood only in a uniform manner and within the context of Community law.

In its resolution of 17 February 1972 the European Parliament considered that

Article 48 (4) is essentially concerned with allowing Member States to reserve to their own nationals the effective exercise of public authority. It was for this reason that it expressed the hope that Member States would limit its application, as far as possible, to posts involving the exercise of such authority.

Such a limitation would be in accordance with the principles and objectives of the Treaty.

Since the actual wording of Article 48 (4), the preparatory work for the EEC Treaty and a comparison with the first paragraph of Article 55 and with Article 66 provide no conclusive criteria for interpretation, it is as well to bear in mind in view of its nature and objective that Article 48 (4) constitutes an exception to the fundamental principle of the free movement of workers and of the general abolition of discrimination based on nationality. It cannot therefore be interpreted in a broad sense.

In answer to the arguments advanced under both domestic and international law to justify the fact that appointments within the service, no matter what type of activities they entail, are reserved exclusively for nationals of the Member State concerned, it is appropriate, within the framework of the EEC Treaty and, in particular, after more than twenty years of European integration, to put forward the following considerations:

— In the EEC Treaty, in contrast to traditional bilateral or multilateral treaties, freedom of movement constitutes a fundamental guarantee of a right which, for the integration of economic and social orders, is of a genuinely formative nature;

— Article 48 (4) constitutes an exception to the principle of integration, which, in accordance with general principles, must be restrictively interpreted;

— the EEC Treaty is based upon the principle of equivalence and equality of treatment of the nationals of the various Member States; the traditional mistrust of non-nationals, which stems from classical international law, constitutes an aspect of the process of integration set in train by the Treaty which is fundamentally alien and antagonistic to that process;

— In view of the expansion of the public service in Member States, the fundamental principle of free movement of workers would be in danger of being deprived of all meaning if Member States were free to prevent its application to all appointments which they themselves could classify by virtue of provisions of their national law as being within the sphere of the public service in the widest sense.

The provisions derogating from Article 48 (4) must thus be interpreted restrictively and the concept of 'employment in the public service' must be understood more narrowly than in classical international conventions concerning free movement of workers and the right of establishment.

The exclusion clause of Article 48 (4) must in the first place be limited to the functions of the public service which are concerned with the genuine interests of the State; this would no doubt include such functions as authorize the exercise of sovereign activity with regard to individuals and thus make possible, in certain circumstances, the infringement of rights; this is a matter of public functions in the classical sense of the term.

In view of the fact that Article 48 (4) is wider than the first paragraph of Article 55, it is even possible to admit that Member States are entitled to legislate independently not only with regard to the actual exercise of the powers of the public authority, but also with regard to all the functions of the public service which are indirectly affected in any way whatever by the decision-making process of the State; however, the exception contained in Article 48 (4) must be

applied only to those of their servants who, in their activities within the service, have to take account of the national interests with regard to secret matters or matters of public security.

In this respect it is of little consequence whether the function is carried out within the framework of a commitment under public law or on the basis of a contract of employment under private law. The exception made by Article 48 (4) is no doubt as a general rule applicable to 'officials' [fonctionnaires or Beamte] whose special status is justified by the very fact that they are usually entrusted with powers involving the exercise of public authority; however, contractual employees [agents contractuels or Angestellte], that is employees without special status under public law, may also be entrusted with such functions. It is particularly difficult to define the field of application of Article 48 (4) with regard to services which, whilst forming part of the public service, do not touch upon national interests; this might be the case with appointments in public institutions of an industrial or commercial nature or in nationalized enterprises.

In the last analysis it is thus essential to have recourse also to factual criteria in order to interpret the concept of 'employment in the public service' from the point of view of Community law.

In conclusion it is necessary, according to the Commission to realize that the concept of 'employment in the public service' as it appears in Article 48 (4) of the EEC Treaty is a concept of Community law which has no reference to the law of Member States. It is to be interpreted as meaning that the only activities to be excluded from the field of application or indirectly, with the exercise of public authority; this is always the case when such activities involve state secrets or national security. The legal nature of the relationship of master and servant might provide valuable evidence in this context but could not of itself constitute a decisive criterion. It is not possible to decide, on the basis of these criteria, whether workers in the Deutsche Bundespost are engaged in 'employment in the public service' since the order making the reference does not show clearly to what extent their activity is connected with the exercise of public authority in the factual sense.

(b) With regard to the second question, it is necessary to refer to the prohibition of all discrimination which is mentioned in Article 48 (2) of the EEC Treaty and in Article 7 (1) and (4) of Regulation No 1612/68, and which is applicable to all conditions of work and employment. In this respect it is of little consequence whether the separation allowance paid by the Deutsche Bundespost constitutes part of the remuneration. In so far as it is paid on a permanent basis to workers whose home is abroad, regardless of the possibility of a later removal, it is equivalent to supplementary, remuneration.

In any case the separation allowance falls within 'other conditions of work', a concept which must be interpreted in a wide sense by virtue of the wording and the objective of the provision in question as well as of the case law of the Court. It is of little consequence whether the separation allowance is the subject of a contractual agreement or is paid voluntarily or determined by a provision of public law.

The answer to the second question should therefore be in the affirmative.

(c) The third question poses the problem of hidden or indirect discrimination.

Article 48 (2) of the Treaty and Article 7 (1) and (4) of Regulation No 1612/68 puts into a concrete form the general prohibition of any discrimination on the grounds of nationality which is laid down by Article 7 of the Treaty. The concepts of discrimination and of nationality must be interpreted on the basis of factual criteria. A purely theoretical idea is not sufficient. Rules

based on other criteria such as residence abroad, language, place of birth, descent or performance of military service in the country may in fact conceal discrimination on the basis of nationality. Such would be the case in particular if the application of certain criteria of differentiation were to result, in all cases or in the vast majority of cases, in foreigners alone being affected without any objective justification.

In this case only the Bundesarbeitsgericht is in a position to decide whether the rules at issue in the main action and the different treatment which they prescribe almost exclusively for foreigners can be objectively justified. The criterion of residence abroad might not appear to be discriminatory in a case in which, unlike workers recruited within the country, workers recruited abroad receive a separation allowance without having to find a home in the country of employment or to remove, and in which they receive the allowance at the lower rate for a practically unlimited period throughout the whole of their period of employment. The question whether this scheme gives rise to discrimination either in intention or in effect, or whether it is only intended to control one particular situation in an objective way, should be settled in terms of national law.

Grounds of judgment

1 By Order of 28 March 1973, received at the Court Registry on 20 July 1973, the Bundesarbeitsgericht, in pursuance of Article 177 of the EEC Treaty, asked three questions relating to the interpretation of Article 48 (4) of the Treaty establishing the European Economic Community and Article 7 (1) and (4) of Regulation No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ 1968, L 257, p. 2).

These questions were raised within the framework of an action brought against the Federal Post Office by an Italian national employed as a worker by the above organization regarding the payment of a 'separation allowance' which is granted on certain conditions to workers allocated to posts away from their place of residence.

On the first question

2 The first question asks whether, having regard to the exception provided for in Article 48 (4) of the EEC Treaty, workers employed in the public service of a Member State — in this case the postal service — by virtue of a contract of employment under private law, may be excluded from the rule of non-discrimination set out in Article 7 (1) and (4) of Regulation No 1612/68.

3 Article 48 of the Treaty secures freedom of movement for workers within the Community and to this end provides in paragraph (2) for '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'.

Article 7 (1) of Regulation No 1612/68 stipulates in this respect that: 'A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration . . .'

Paragraph (4) of the same Article reads: 'Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of the other Member States.'

By virtue of Article 48 (4) of the Treaty, however, these provisions are not applicable to 'employment in the public service'.

The extent of this exception must therefore be defined.

4 Taking account of the fundamental nature, in the scheme of the Treaty, of the principles of freedom of movement and equality of treatment of workers within the Community, the exceptions made by Article 48 (4) cannot have a scope going beyond the aim in view of which this derogation was included.

The interests which this derogation allows Member States to protect are satisfied by the opportunity of restricting admission of foreign nationals to certain activities in the public service.

On the other hand this provision cannot justify discriminatory measures with regard to remuneration or other conditions of employment against workers once they have been admitted to the public service.

The very fact that they have been admitted shows indeed that those interests which justify the exceptions to the principle of non-discrimination permitted by Article 48 (4) are not at issue.

5 It is necessary to establish further whether the extent of the exception provided for by Article 48 (4) can be determined in terms of the designation of the legal relationship between the employee and the employing administration.

In the absence of any distinction in the provision referred to, it is of no interest whether a worker is engaged as a workman [ouvrier], a clerk [employé] or an official [fonctionnaire] or even whether the terms on which he is employed come under public or private law.

These legal designations can be varied at the whim of national legislatures and cannot therefore provide a criterion for interpretation appropriate to the requirements of Community law.

6 The answer to the question put to the Court should therefore be that Article 48 (4) of the Treaty is to be interpreted as meaning that the exception made by this provision concerns only access to posts forming part of the public services and that the nature of the legal relationship between the employee and the employing administration is of no consequence in this respect.

On the second question

7 The second question asks whether Article 7 (1) and (4) of Regulation No 1612/68 is to be interpreted as meaning that the separation allowance paid in addition to wages falls within the concept of 'conditions of employment and work'.

This question is raised both in view of the nature of this payment and having regard to the fact that according to the relevant national provisions it is a matter of an optional payment.

8 The aim of Article 7 of Regulation No 1612/68 is to ensure equality of treatment of workers who are nationals of Member States with regard to all statutory or contractual provisions determining their position and in particular their financial rights.

The separation allowance, in so far as it constitutes compensation for the inconveniences suffered by a worker who is separated from his home, represents supplementary remuneration and is thus one of the 'conditions of employment and work' within the meaning of the Regulation.

In this respect it is of little consequence whether the allowance is paid by reason of a statutory or contractual obligation or merely at the option of the State in its capacity as employer.

As soon as the State avails itself of this option on behalf of its own nationals it is obliged to extend the advantage to workers who are nationals of other Member States in the same situation.

9 It is therefore appropriate to reply that Article 7 (1) and (4) of Regulation No 1612/68 is to be interpreted as meaning that a separation allowance, paid in addition to wages, falls within the concept of 'conditions of employment and work' without its being necessary to define whether the payment is made by virtue of an option or of an obligation, either statutory or contractual.

On the third question

10 The third question asks whether Article 7 (1) and (4) of Regulation No 1612/68 is to be interpreted as containing a prohibition not only against treating a worker differently because he is a national of another Member State of the EEC, but also against treating him differently because he is resident in another Member State.

11 The rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

This interpretation, which is necessary to ensure the effective working of one of the fundamental principles of the Community, is explictly recognized by the fifth recital of the preamble to Regulation No 1612/68 which requires that equality of treatment of workers shall be ensured 'in fact and in law'.

It may therefore be that criteria such as place of origin or residence of a worker may, according to circumstances, be tantamount, as regards their practical effect, to discrimination on the grounds of nationality, such as is prohibited by the Treaty and the Regulation.

12 However, this would not be the case with a separation allowance the conditions of allotment and rules for the payment of which took account of objective differences which the situation of workers may involve according to whether their residence, at the time their taking up a given post, is within the territory of the State in question or abroad.

In this respect the fact that, for workers whose home is within the territory of the State concerned, payment of the separation allowance is only temporary and is bound up with an obligation to transfer the residence to the place of employment, whilst the same allowance is paid for an indefinite period and is not bound op with any such obligation in the case of workers whose residence is abroad, whatever their nationality, may be a valid reason for differentiating between the amounts paid.

In any case it is not possible to state that there is discrimination contrary to the Treaty and the Regulation, if it is apparent from a comparison between the two schemes of allowances taken as a whole that those workers who retain their residence abroad are not placed at a disadvantage by comparison with those whose residence is established within the territory of the State concerned.

13 The reply to the question put should be that the taking into consideration, as a criterion for the grant of a separation allowance, on the fact that a worker has his residence in the territory of another Member State may, according to the circumstances, constitute discrimination forbidden by Article 7 (1) and (4) of Regulation No 1612/68.

This is not the case however if the scheme relating to such an allowance takes account of objective differences in the situations of workers according to whether their residence at the time when they take up their employment is within the territory of the State concerned or abroad.

Costs

14 The costs incurred by the Government of the Federal Republic of Germany, by the Government of the Italian Republic and by the Commission of the European Communities, which have submitted observations to the Court, cannot be reimbursed.

As these proceedings are, so far as the parties to the main action are concerned, a step in the action pending before the Bundesarbeitsgericht it is for the latter to decide as to the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the Government of the Federal Republic of Germany and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 48 and 177;
Having regard to Regulation No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Bundesarbeitsgericht (Fourth Chamber) by Order of 28 March 1973, hereby rules:

1. **Article 48 (4) of the Treaty is to be interpreted as meaning that the exception made by this provision concerns only access to posts forming part of the public service. The nature of the legal relationship between the employee and the employing administration is of no consequence in this respect.**

2. **Article 7 (1) and (4) of Regulation No 1612/68 is to be interpreted as meaning that a separation allowance, paid in addition to wages, falls within the concept of 'conditions of employment and work', without its being necessary to define whether the payment is made by virtue of an option or of an obligation, either statutory or contractual.**

3. **The taking into consideration, as a criterion for the grant of a separation allowance, of the fact that a worker has his residence in the territory of another Member State may, according to the circumstances, constitute discrimination forbidden by Article 7 (1) and (4) of Regulation No 1612/68. This is not the case however if the**

scheme relating to such an allowance takes account of objective differences in the situations of workers according to whether their residence at the time when they take up employment is within the territory of the State concerned or abroad.

Lecourt Donner Sørensen Monaco Mertens de Wilmars
Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 12 February 1974.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 5 DECEMBER 1973 [1]

Mr President,
Members of the Court,

Introduction

Article 48 of the Treaty establishing the European Economic Community lays down the principle of freedom of movement for workers within the Common Market; as a consequence of this principle it goes on to state that all discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment is to be abolished.

However, an exception is made by paragraph (4) of this Article, the provisions of which 'shall not apply to employment in the public service'.

An examination of the preliminary questions put to you by the Bundesarbeitsgericht (Federal Labour Court), Kassel, in pursuance of Article 177 of the Treaty, will lead you — for the first time as far as I am aware — to define the scope of this exception by giving a ruling on the meaning of the term 'employment in the public service'.

The facts which gave rise to the action brought before the Bundesarbeitsgericht are simple.

An Italian national, Mr Sotgiu, has been employed as a skilled worker by the Deutsche Bundespost, Stuttgart, since 1955, although his family is still living in Italy.

In accordance with the collective wages agreement which applies to workers in the Federal Post Office, Mr Sotgiu's

1 — Translated from the French.