Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 10 July 2003

Brian Francis Collins v Secretary of State for Work and Pensions

Reference for a preliminary ruling: Social Security Commissioner - United Kingdom

Freedom of movement for persons - Article 48 of the EC Treaty (now, after amendment, Article 39 EC) - Concept of 'worker' - Social security allowance paid to jobseekers - Residence requirement - Citizenship of the European Union

Case C-138/02

European Court reports 2004 Page I-02703

1. One of the United Kingdom Social Security Commissioners has referred to the Court of Justice, under Article 234 EC, three questions seeking the interpretation of Regulation (EEC) No 1612/68 (2)and Directive 68/360. (3)
Essentially, in issue is whether a citizen of the Union, where he is not considered to be a 'worker' within the meaning of Regulation No 1612/68 and does not have a right, pursuant to Directive No 68/360/EEC, to reside in the Member State in which he is seeking work, may rely on any other provision of Community law in order to obtain the income-based jobseeker's allowance, the granting of which is subject to a condition of habitual residence in the State.

I – United Kingdom legislation

2. The jobseeker's allowance is a social security benefit provided under the Jobseekers Act 1995 ('the 1995 Act'), which became operative from 7 October 1996. It replaced two previous forms of benefit for unemployed persons: unemployment benefit (a contributory benefit) and income support (a means-tested benefit). There are two routes to entitlement to it: through contribution-based conditions and through income-based conditions.
3. In order to qualify for the benefit, the claimant, in addition to being available for and actively seeking employment, having entered into a jobseeker's agreement and not engaging in remunerative work, must not have earnings in excess of the applicable amount and his capital must not exceed a specified amount. According to section 4(3) of the 1995 Act, the benefit payable consists of a fixed amount, (4)if the claimant has no income, or otherwise the amount by which that amount exceeds the claimant's income. Under section l(2)(i), the only condition relating to residence is that the claimant 'is in Great Britain'.
4. Section 4(5) of the 1995 Act provides for regulations to prescribe how applicable amounts are to be determined. According to the Jobseeker's Allowance Regulations 1996, the applicable amount for a person from abroad who is a single claimant is nil. The definition for 'person from abroad' set out in Regulation 85(4), applicable in the main proceedings, is as follows:
'a claimant who is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, but for this purpose, no claimant shall be treated as not habitually resident in the United Kingdom who is
(a)
a worker for the purposes of Council Regulation (EEC) No 1612/68 or (EEC) No 1251/70 (5) or a person with a right to reside in the United Kingdom pursuant to Council Directive 68/360/EEC or 73/148/EEC; (6)
...'.

II – Facts

5. Mr Collins was born in the United States of America and holds American nationality. He was brought up and studied there, graduating from university in 1980. As part of his studies, he spent one semester in the United Kingdom in 1978. Between 1980 and 1981, during which time he also acquired Irish nationality, he spent approximately 10 months in London doing casual and part-time work. Although it seems he would have preferred remaining longer in the United Kingdom, he returned to his country of origin in 1981 because he was unemployed, had to claim benefits and the economic downturn made it more difficult for him to find work.
6. He stayed in the United States until 1985, in employment. Then he joined the Peace Corps as an aid worker in central Africa for two years. He returned to his native country for six months in 1987 and in 1988 moved to South Africa, where he studied history and worked as a teacher. Upon being refused the right of permanent residence in South Africa, he returned to the United States of America, where he worked for six months part-time in sales and for six months as a history teacher. He then decided to settle in the United Kingdom. In February 1998 he obtained a new Irish passport.
7. He arrived in the United Kingdom on 31 May 1998 travelling on a return air ticket as it was cheaper than a single ticket, bringing his personal possessions with him, with the intention of finding work in the social services sector. On 8 June he claimed jobseeker's allowance on the ground that he lacked financial resources. Following investigations, including an interview with the claimant on 1 July 1998, the competent authorities refused to grant him the allowance because he was not habitually resident in the United Kingdom.

8. The appeal which he brought before the Leeds social security appeal tribunal was dismissed on the same ground since, in order for habitual residence to be established, residence needs to have continued for an appreciable time. (7)

III – The questions referred for a preliminary ruling

9. Mr Collins appealed to the Social Security Commissioner who, before making a decision on the substance of the case, decided to refer the following questions to the Court of Justice for a preliminary ruling:

'1.

Is a person in the circumstances of the claimant in the present case a worker for the purposes of Regulation No 1612/68 ...?

2.

If the answer to question 1 is not in the affirmative, does a person in the circumstances of the claimant in the present case have a right to reside in the United Kingdom pursuant to Directive 68/360/EEC ...?

3.

If the answers to both questions 1 and 2 are not in the affirmative, do any provisions or principles of European Community law require the payment of a social security benefit with conditions of entitlement like those for income-based jobseeker's allowance to a person in the circumstances of the claimant in the present case?'

IV – Community legislation

10. The Social Security Commissioner in the United Kingdom has framed the questions in a general manner and does not seek the interpretation of any specific provision of Community law. In my view, in order to provide an answer, the Court must examine, in particular, the following provisions:

Article 10a of Regulation No 1408/71 8 –Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6). Article 10a was introduced by Council Regulation (EEC) No 1247/92 of 30 April 1992 (OJ 1992 L 136, p. 1).

'1.

Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.

...'

Article 7 of Regulation No 1612/68

'1.

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

2.

He shall enjoy the same social and tax advantages as national workers.

...'

Article 18 EC

'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.

...'

V – Procedure before the Court of Justice

11. Written observations were submitted in these proceedings, within the period prescribed by Article 20 of the EC Statute of the Court of Justice, by the claimant in the main proceedings, the German Government, the United Kingdom and the Commission.

At the hearing on 17 June 2003, Mr Collins' representative and the Agents for the United Kingdom and the Commission presented their oral submissions.

VI – Arguments put forward

12. Mr Collins claims that, as a person actively seeking employment, he is a 'worker' within the scope of Regulation No 1612/68 and he has the right to stay in the United Kingdom pursuant to Directive 68/360. He is also resident in the United Kingdom for the purposes of Regulation No 1408/71, so that the requirement as to residence for a lengthy period in that State in order to be eligible for the abovementioned allowance constitutes discrimination based on nationality, prohibited by Article 39 EC. He also takes the view that Articles 12 EC and 17 EC preclude making it a condition for persons who do not have British nationality, but who are nationals of another Member State and intend to re-establish their links with the United Kingdom, that they be resident for a certain period before becoming eligible to receive a non-contributory benefit such as the jobseeker's allowance.

13. With regard to the first question, the German Government, the United Kingdom and the Commission acknowledge the claimant's right, under Article 39 EC, to stay in the United Kingdom for at least six months as a national of a Member State seeking employment. So far as concerns Regulation No 1612/68, a jobseeker falls

within the ambit of Part I of Title I rather than Title II, which exclusively concerns persons who are already in employment in a Member State or who, having lost it, have maintained close connections of long duration with the employment market of that country.

14. So far as concerns the second question, the two governments and the Commission are in agreement that it is under Article 39 EC that a national of a Member State may reside in another Member State while seeking employment for as long as the search continues, rather than under Directive 68/360, which applies only to persons who have found employment.

15. Opinion is divided with regard to the third question. The German Government and the United Kingdom submit that neither the prohibition of discrimination on grounds of nationality imposed by Article 12 EC, the rights of citizenship under Article 17 EC nor the right to move and reside freely within the territory of the European Union, referred to in Article 18 EC, obliges a Member State to grant the jobseeker's allowance to persons in Mr Collins' circumstances, who has not worked recently in that State, in which he has neither his habitual residence nor his centre of interests, and who lacks, moreover, any link with the domestic employment market.

16. The Commission, however, argues that Mr Collins, who is a citizen of the Union, was lawfully resident in the United Kingdom in his capacity as a work-seeker and, as such, was entitled to the protection of Article 12 EC against any discrimination on grounds of nationality in any situation governed by Community law. It maintains that the allowance at issue constitutes a financial benefit granted to those seeking work which must be regarded as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 falling within the material scope of Community law. But even if that should not be the case, the right to move freely in order to seek work contributes significantly towards ensuring the effectiveness of the fundamental right of freedom of movement for workers. The possibility of acceding to a form of financial benefit such as the allowance at issue, which is designed to help work-seekers with very limited income while they look for employment, is sufficiently closely linked to the exercise of the right to freedom of movement to fall within the material scope of Community law. It thus submits that Mr Collins may rely on Articles 12 EC and 17 EC in order to claim the jobseeker's allowance in the United Kingdom on the same basis as nationals of that State.

VII – Analysis of the questions referred to the Court

A – Legal nature of the allowance at issue in Community law

17. Before examining the questions referred by the Social Security Commissioner adjudicating on the substance, it is appropriate to define the legal nature of the allowance at issue in Community law.

18. According to the Court's case-law, whilst the fact that a national law or regulation has not been mentioned in the declarations referred to in Article 5 of Regulation No 1408/71 is not of itself proof that that law or regulation does not fall within the field of application of the regulation, the fact that a Member State has specified a law in its declaration must be accepted as proof that the benefits granted on the basis of that law are social security benefits within the meaning of Regulation No 1408/71. (9)

Income-based jobseeker's allowance is listed in Annex IIa(O)(United Kingdom)(h) 10 –Under Article 5 of Regulation No 1408/71, the Member States are to specify the legislation and schemes referred to in Article 4(1) and (2), the special non-contributory benefits referred to in Article 4(2a), the minimum benefits referred to in Article 50 and the benefits referred to in Articles 77 and 78 in declarations to be notified and published in accordance with Article 97. of Regulation No 1408/71. 11 –As worded in Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1997 L 28, p. 1). It must therefore be considered to be a social security benefit falling within the material scope thereof.

19. This does not preclude its falling within the scope, at the same time, of Article 7(2) of Regulation No 1612/68. The Court of Justice has defined as a social advantage within the meaning of that provision all the advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community. (12)

20. The allowance is granted to unemployed persons resident in the United Kingdom who are available for work, actively seeking employment, have entered into a jobseeker's agreement and whose earnings must not be in excess of a specified amount. Its characteristics thus correspond to the definition for social advantage laid down in Article 7(2) of Regulation No 1612/68, so that the State of employment must grant it to workers who are nationals of another Member State under the same conditions as for its own nationals, in view of the fact that the Court of Justice, in its case-law, has ruled out as discriminatory any requirement as to nationality, residence or duration of employment in order to be entitled to it. (13)

21. The allowance at issue therefore falls within the material scope of Community law since not only is it a special non-contributory benefit under Article 4(2a) of Regulation No 1408/71, it also constitutes a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.

In that connection, the Court of Justice has ruled that, since Regulation No 1612/68 is of general application regarding the freedom of movement for workers, Article 7(2) thereof may be applied to social advantages which at the same time fall specifically within the scope of Regulation No 1408/71. 14 –Case C-111/91 Commission v Luxembourg [1993] ECR I-817, paragraph 21, and Martínez Sala, paragraph 27.

B – The first question

22. The Social Security Commissioner seeks to ascertain, first, whether a national of a Member State who enters the territory of another Member State with the intention of seeking paid employment must be considered to be a worker for the purposes of Regulation No 1612/68.

23. I would start from the basis that the Social Security Commissioner takes it as proven that Mr Collins is an Irish national and that he travelled to the United Kingdom with the intention of living and working there. Other circumstances relating to him are irrelevant, according to the case-law of the Court, (15) when deciding whether the person concerned may rely on the principle of freedom of movement for workers. It is of little matter, then, that, as a United States citizen, he also acquired Irish nationality, never having lived nor worked in Ireland; (16) that he can only claim to have worked in one of the States of the European Union; and that it has been 17 years since he lived or pursued any activity in the United Kingdom, where he is intending to seek employment.

24. The Community legislature intended Part I of Title I of Regulation No 1612/68, which runs from Article 1 to Article 6, to regulate access of Community nationals to employment in the territory of any of the Member States. That provision, which applies to '[a]ny national of a Member State', confers on the citizens of the Union the right to take up any employment offered in any Member State under the same conditions as its own nationals and to receive the same assistance afforded by the employment offices.

Under those provisions, Mr Collins could claim the right to receive the same assistance as unemployed persons resident in the United Kingdom and to take up, under the same conditions, any of the available jobs which, it would appear, he managed to do after two months of looking for work.

25. That possibility does not, however, mean, as pointed out by the two Member States which have submitted observations in these proceedings and by the Commission, that Mr Collins can rely on Regulation No 1612/68 as a whole.

26. Title II, which runs from Article 7 to Article 9, concerns employment and equality of treatment and provides for the rights of 'workers' who are nationals of a Member State.

The Court has held that the concept of 'worker', within the meaning of Article 39 EC and Regulation No 1612/68, has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are effective and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'. The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration. 17 –Case 66/85 Lawrie-Blum v Land Baden-Württemberg [1986] ECR 2121, paragraphs 16 and 17; Case 344/87 Bettray v Staatssecretaris van Justitie [1989] ECR 1621, paragraphs 11 and 12; Case C-357/89 Raulin [1992] ECR I-1027, paragraph 10; Case C-3/90 Bernini [1992] ECR I-1071, paragraph 14; Martínez Sala, paragraph 32; and Case C-337/97 Meeusen [1999] ECR I-3289, paragraph 13.

27. When Mr Collins applied for the jobseeker's allowance he was not pursuing any activity which matches that definition nor had he just become unemployed in the United Kingdom. Accordingly, Article 7(2) of Regulation No 1612/68, which confers on workers of any Member State the right to receive in another Member State the same treatment as its own nationals as regards entitlement to social and tax advantages, does not apply to him.

28. That view was taken by the Court in *Lebon*, (18) in which the question raised was as to whether equal treatment with regard to social and tax advantages, laid down by Article 7(2) of Regulation No 1612/68, also applies to persons who move in search of employment. The Court considered that the right to equal treatment applies only to workers since those who move in search of employment qualify for equal treatment only in accordance with Article 39 EC and Articles 2 and 5 of Regulation No 1612/68.

29. At issue in the present case is whether that analysis, which dates from 1987, still holds true, given that in 1998 the Court of Justice, in paragraph 32 of *Martínez Sala*, (19) declared that, once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended, and *a person who is genuinely seeking work must also be classified as a worker*. (20)

I share the view of the Commission in that that phrase must not be taken out of context and that it was not intended to overrule earlier decisions. 21 –Not a view shared by some learned writers. See, among others, O'Leary, S.: 'Putting Flesh on the Bones of European Union Citizenship' in European Law Review 1999, pp. 68 to 79, especially p. 76: 'The definition of who qualifies as a worker in Martínez Sala either has overruled Lebon in this respect, by classifying job-seekers as workers or, at the very least, allows job-seekers to claim equal treatment as regards social and tax advantages pursuant to Article 7(2) of the Regulation [1612/68]'; Jacqueson, C.: 'Union citizenship and the Court of Justice: something new under the sun? Towards social citizenship', in European Law Review 2002, pp. 260 to 281, especially p. 267: 'The origin of the right of residence in national law, Community law or international law was irrelevant. In sum, the rights granted to workers by Regulations 1408/71 and 1612/68 are available to all Union citizens lawfully resident in the host Member State. It follows that the Court's ruling in Lair and Lebon are old history.'; Whelan, A., in Revue des affaires européennes 1999, pp. 228 to 238, especially p. 232: '... the Court appears to have considerably enhanced the position of job-seekers ...'. It must also be borne in mind that just about a year ago the Court pointed out that it had consistently held that the application of Community law on freedom of movement for workers in relation to national rules concerning unemployment benefits requires that a person invoking that freedom must have already participated in the employment market by pursuing an effective and genuine occupational activity which has conferred on him the status of a worker within the Community meaning of that term. 22 –Case C-278/94 Commission v Belgium [1996] ECR I-4307, paragraph 40, and Case C-224/98 D'Hoop [2002] ECR I-6191, paragraph 18. Castro Oliveira, Á.: 'Workers and other persons: step-by-step from movement to citizenship – Case Law 1995-2001' in Common Market Law Review 39, pp. 77-127, especially p. 95: 'Unemployment policy is not as such within the scope of EC law. At least not yet. The relatively vague and non-binding character of the coordination measures adopted in the field of employment policy, pursuant to the new provisions introduced by the Amsterdam Treaty, confirms this assertion. This case [C-278/94] is a good example of the moderate character of the Court's case law on free movement of workers. The Court is not willing to impose on a Member State the duty to finance the integration in its labour market of unemployed EU citizens (or their children) who are resident in another Member State'.

30. *Martínez Sala* concerned a Spanish national who had lived in Germany since May 1968, when she was 12 years old. She had various jobs there at intervals between 1976 and 1986. She was in employment again from 12 September 1989 to 24 October 1989 and, since then, was in receipt of social assistance benefits. Until May 1984, she obtained residence permits. Thereafter, she obtained only documents certifying that the extension of her residence permit had been applied for until, in April 1994, she was issued with a permit for one year, extended for a further year. In January 1993, during the period in which she did not possess a residence permit, Mrs Martínez Sala applied for child-raising allowance for her child born during that month, which was rejected on the ground that she did not have German nationality, a residence entitlement or a residence permit.

31. The question raised by the national court was whether a national of one Member State who resides in another Member State, where he is employed and subsequently receives social assistance benefits, has the status of worker within the meaning of Regulation No 1612/68.

In that context, the Court set out, in paragraph 32, the classic definition of 'worker' for the purpose of Article 39 EC and of Regulation No 1612/68 and proceeded to make the controversial statement, lending support, in the next paragraph, to the finding in *Lebon*, that migrant workers' descendants do not retain the right to equal treatment under Article 7(2) of Regulation No 1612/68 with regard to a social benefit provided for by the legislation of the host Member State if they have reached the age of 21 and do not have the status of workers.

32. The Court concluded by stating that it was unable to determine whether Mrs Martínez Sala was a worker within the meaning of Article 48 of the Treaty and Regulation No 1612/68 since it did not know whether, for example, she was seeking employment. (23) It therefore left the matter to the national court to resolve, pointing out, first, that the status of worker is not necessarily lost where an employment relationship has ended, and, secondly, that anyone genuinely seeking work must also be classified as a worker.

33. It may be supposed that, if it had been shown that the person concerned was seeking employment, she would have been considered to be a worker under Article 39 EC and Regulation No 1612/68 in view of the fact that, during the lengthy period in which she resided in Germany, she had held various posts, the host State's authorities had granted her successive residence permits, she had lost her job in that State and she had received social assistance benefits. As has been said, a migrant worker who becomes unemployed in the host State does not lose that status by reason of no longer performing services for and under the direction of another person in return for which he receives remuneration.

34. According to the order for reference, Mr Collins lived and worked in the United Kingdom some 10 months between 1980 and 1981, during which period he had Irish nationality and therefore enjoyed the status of a worker under Community law. However, this does not mean that he maintained that status during the 17 years which elapsed between leaving the country and 31 May 1998, when he returned with the intention of settling and seeking employment, without in the meantime having pursued any activity in any of the other Member States of the European Community.

35. In light of the above, I take the view that the answer to be given to the Social Security Commissioner is that a national of a Member State who enters the territory of another Member State with the intention of seeking paid employment, despite being covered by Articles 1 to 6 of Regulation No 1612/68, is not a worker for the purposes of Articles 7 et seq. thereof.

C – The second question

36. Next, the Social Security Commissioner seeks to ascertain, in the event that the answer to the first question is not in the affirmative, whether a person who arrives in the territory of a Member State with the intention of seeking employment has a right to reside within its territory pursuant to Directive 68/360/EEC.

37. That directive, which was adopted at the same time as Regulation No 1612/68, specifically governs the movement and residence within the territory of the Community of persons benefiting from the freedom of movement for workers.

38. According to the preamble to Directive 68/360, its purpose is the adoption of measures which conform to the rights and privileges accorded by Regulation No 1612/68 to nationals of any Member State who move in order to pursue activities as employed persons and to members of their families.

Article 1 requires the abolition of restrictions on the movement and residence of nationals of the Member States and of members of their families to whom Regulation No 1612/68 applies.

Under Article 2, all the States of the European Union are to grant Community nationals the right to leave their territory in order to take up activities as employed persons and to pursue such activities in the territory of another Member State. Article 3 requires the national authorities to allow such persons to enter their territory simply on production of a valid identity card or passport.

39. The rights of persons moving to another Member State in search of employment, to whom Part I of Title I of Regulation No 1612/68 applies, would appear to be restricted to those provided for in the first three articles of Directive 68/360.

40. Thus, Article 4, which lays down the obligations incumbent on the Member States with regard to the right of residence, allows them, for the purpose of issuing the document attesting to that right, to require the worker to produce a confirmation of engagement from the employer or a certificate of employment, documents which an unemployed person would be hard put to submit. The remainder of Directive 68/360 confirms that it is not intended for persons seeking employment. According to Article 6, the residence permit must be valid for at least five years from the date of issue and be automatically renewable, although, where a worker is employed for a period exceeding three months but not exceeding a year, a temporary residence permit may be issued, which may be limited to the expected period of the employment. The same type of document may be issued also to a seasonal worker employed for a period of more than three months. Finally, Article 8 requires Member States, without issuing a residence permit, to recognise the right of residence in their territory of persons pursuing an activity as an employed person, where the activity is not expected to last for more than three months, subject to a statement by the employer on the expected duration of the employment. (24)

As may be seen, the right of residence provides for all forms of contingencies as regards its duration, so long as it is connected with the pursuit of an economic activity, since the only right attaching to persons moving to a

Member State in search of employment, under Directive 68/360, is that of entry into its territory, while none of its provisions envisage, in addition, a right of residence in respect of the period prior to engagement.

41. The fact that Directive 68/360 does not grant specifically a right of residence does not mean, however, that Community nationals must abandon such a possibility. There is abundant case-law to that effect.

42. The Court has held that freedom of movement for workers forms one of the foundations of the Community; that the provisions laying down that freedom must be given a broad interpretation; (25) and that a strict interpretation of Article 39(3) EC would jeopardise the actual chances that a national of a Member State who is seeking employment will find it in another Member State, and would, as a result, make that provision ineffective. Accordingly, the abovementioned provision, which defines freedom of movement for workers as the right to accept offers of employment actually made, to move freely within the territory of Member States for this purpose, to stay in a Member State for the purpose of employment and to remain in the territory of a Member State after having been employed there, must be interpreted as enumerating, in a non-exhaustive way, certain rights benefiting nationals of Member States in the context of the freedom of movement for workers and that that freedom also entails the right for nationals of Member States to move freely within the territory of the other Member States and to stay there for the purposes of seeking employment. (26)

43. However, such right of residence is not of indefinite duration; it may be subject to a time-limit. The Court has found that a period of six months does not appear, in principle, to be insufficient to enable the persons concerned to apprise themselves, in the host Member State, of offers of employment corresponding to their occupational qualifications and to take, where appropriate, the necessary steps in order to be engaged and, therefore, does not jeopardise the effectiveness of the principle of freedom of movement. (27) However, if after the expiry of that period the person concerned provides evidence that he is continuing to seek employment and that he has genuine chances of being engaged, he cannot be required to leave the territory of the host Member State. (28)

44. Thus, according to the case-law of the Court of Justice, as a national of a Member State actively seeking employment, Mr Collins had the right to reside in the United Kingdom for that purpose, pursuant to Article 39 EC, for at least six months.

45. Consequently, the answer to the Social Security Commissioner should be that a Community national who moves to a Member State with the intention of seeking employment has the right to reside within its territory, pursuant to Article 39 EC, but that Directive 68/360 does not provide for such a possibility.

D – The third question

46. Finally, the Social Security Commissioner asks whether, in the event that the answers to both questions 1 and 2 are not in the affirmative, any provision of European Community law requires the payment of a social security benefit such as the income-based jobseeker's allowance to a citizen of the Union who enters the territory of a Member State with the purpose of seeking employment.

47. In the order for reference, the Social Security Commissioner discounted that Mr Collins was intending to establish himself in the United Kingdom as a provider of social services and declared himself satisfied that his intention was to find paid employment. (29) For that reason, his application for jobseeker's allowance could fall within the ambit of either Regulation No 1408/71 or Article 18 EC in relation to the principle prohibiting discrimination on the ground of nationality.

48. It is not clear from the information provided to the Court that Regulation No 1408/71 applies to the dispute in the main proceedings, although the Social Security Commissioner states that the claimant probably comes within the personal scope thereof.

Taking that as a starting point, then, I will examine whether that regulation grants someone in Mr Collins' circumstances the right to claim the allowance at issue.

49. As I have pointed out before, a benefit such as the jobseeker's allowance is, by reason of the fact that it is listed in Annex IIa(O)(United Kingdom)(h) of Regulation No 1408/71, governed by the coordination rules of Article 10a and constitutes a special non-contributory benefit within the meaning of Article 4(2a). (30)

Under Article 10a(1) of Regulation No 1408/71, payment of a benefit such as the allowance at issue is conditional upon the claimant residing in the territory of the Member State under whose legislation he is entitled to that benefit. 31 –By adopting that measure in 1992, by means of Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 (OJ 1992 L 136, p. 1), the Community legislature introduced an exception to the general principle enshrined in Article 10 which prohibits any requirement as to residence in a specific Member State as a condition for migrant workers to accede to social security benefits. In Snares, cited above, paragraph 49, the Court concluded that the system of coordination established in 1992 was not at variance with Article 42 EC. Where entitlement to that benefit is made subject to completion of a period of residence, Article 10a(2) requires periods of residence completed in the territory of any other Member State to be taken into account.

50. However, Article 10a(2) of Regulation No 1408/71 does not apply to Mr Collins since he cannot demonstrate that he has completed periods of residence in other Member States. It remains to consider whether, despite that fact, he must be granted the allowance.

51. The United Kingdom legislation not only complies with Article 10a of Regulation No 1408/71 in not granting the allowance to persons not resident in its territory, it also refuses to grant it to those who, even when they firmly intend to live in the country, cannot demonstrate completion of a period of habitual residence (32) before claiming the allowance. (33)

52. The Court has held that, pursuant to Article 1(h) of Regulation No 1408/71, the term 'residence' for the purposes of that regulation means habitual residence and therefore has a Community-wide meaning. It has also ruled that the phrase 'the Member State in which they reside' in Article 10a of Regulation No 1408/71 refers to the State in which the persons concerned habitually reside and where the habitual centre of their interests is to be found. In that context, account should be taken in particular of the person's family situation; the reasons which have led him to move; the length and continuity of his residence; the fact (where this is the case) that he is in stable employment; and his intention as it appears from all the circumstances, while the length of residence

in the Member State in which payment of a benefit is sought cannot be regarded as an intrinsic element of the concept of residence within the meaning of Article 10a of Regulation No 1408/71. (34)

53. I now need to consider the result of applying to Mr Collins those elements which, according to the Court, a Member State must employ when assessing whether a Community national is habitually resident in its territory.

In that connection, I would point out that, when the claimant applied for the jobseeker's allowance, he was living in the United Kingdom, since he had landed there eight days before, but it can hardly be claimed that his centre of interests was in that State at that time: his family was resident in the United States of America; he was away from the United Kingdom for more than 17 years, during which time he did not work in any Member State; and there is no evidence that he maintained any personal or economic link with the United Kingdom such as to demonstrate establishment in its territory. 35 –At the hearing, counsel for Mr Collins confirmed that his client had no family ties in the United Kingdom and that, in that period, he travelled to that country on four occasions with the intention of visiting friends, his longest stay being of one week.

54. In those circumstances I consider that, even if Regulation No 1408/71 were applicable in the main proceedings, in which case it would have been necessary for Mr Collins, when applying for the allowance, to have been insured, albeit against only one contingency, under the social security system in force in the United Kingdom for persons in paid employment, (36) the claimant could not rely on it when claiming entitlement to receive the income-based jobseeker's allowance.

55. It remains to consider whether the person concerned, as a citizen of the Union lawfully residing in the United Kingdom, is able to rely on Article 18 EC, in conjunction with Article 12 EC.

56. The Court has consistently held that, according to Article 12 EC, the principle of non-discrimination on grounds of nationality applies within the scope of application of the Treaty and without prejudice to any special provisions contained therein. By this latter expression, Article 12 EC refers in particular to other Treaty provisions in which the aforementioned general principle is given concrete form in respect of specific situations. (37) That provision is intended to apply independently only in situations governed by Community law in respect of which the Treaty lays down no specific prohibition of discrimination. (38)

In the matter of freedom of movement for workers the principle of non-discrimination has been developed by Articles 39 EC to 42 EC and by acts of the Community institutions adopted on the basis of those articles, and in particular by Regulation No 1612/68 and Regulation (EEC) No 1408/71. 39 –Case 1/78 Kenny v Insurance Officer [1978] ECR 1489, paragraph 9; and Case C-336/96 Gilly [1998] ECR I-2793, paragraph 38.

57. According to the recent case-law of the Court, Article 18 EC, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 39 EC in relation to the freedom of movement for workers, so that, where a case falls within the scope of the latter provision, it is not necessary to rule on the interpretation of Article 18 EC. (40) Strict observance of that rule would entail suggesting that the Court need not address this matter.

However, in view of the fact that Mr Collins and the Commission believe that Article 18 EC confers on unemployed jobseekers the right to obtain unemployment benefit in a Member State with whose labour market they have no connection and in which they have not put down roots, I shall analyse that possibility in detail.

58. The Court has recently held that the right to reside within the territory of the Member States under Article 18(1) EC is conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty, despite the fact that that right is recognised subject to the limitations and conditions laid down by that Treaty and by the measures adopted to give it effect, and that, since it is subject to judicial review, any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect. (41)

59. So far as freedom of movement for workers is concerned, those limitations are laid down in Article 39(3) EC and are justified on grounds of public policy, public security or public health. (42) The entitlement to social security which citizens of the Union enjoy depends on the legislation of the State in which they are insured, since Article 42 EC provides not for harmonisation but only for coordination of the schemes of the Member States. (43)

60. Among the provisions adopted for the application of the Treaty in this field are the abovementioned Regulations Nos 1612/68 and 1408/71. They both prohibit discrimination on grounds of nationality, the former in Articles 1 and 7 and the latter in Article 3. However, as I have said above, with regard to Regulation No 1612/68, the principle of equal treatment as regards access to employment benefits those who move in order to seek work, while the prohibition of discrimination in working conditions or return to work is restricted to those persons in employment or who have become unemployed. (44) For its part, Regulation No 1408/71 does not grant entitlement to benefits on equal terms to all Community nationals by the mere fact that they reside in a Member State either, but only to those who fall within its personal scope, for which they must be subject to the social security legislation of one of the Member States. (45)

61. I would point out, by way of illustration of the present state of secondary legislation, that Directive 68/360 requires the Member States to allow the family of workers who move in order to pursue activities as employed persons to enter their territory and that Directive 73/148 confers the same advantage to persons wishing to establish themselves in a Member State in order to pursue activities as self-employed persons. However, such a possibility is not conferred on a person who moves in search of employment.

With regard to Article 18(1) EC, the Court has held that, since the entry into force of the Treaty on European Union, the right of residence, conferred directly by the EC Treaty, is no longer subject to the condition that the person concerned carry on an economic activity within the meaning of Articles 39 EC, 43 EC and 49 EC, 46 –Baumbast and R, paragraph 81. so that the family of a worker seeking employment could join him provided that its members were capable of exercising that right in their own capacity, which would only be the case where they were Community nationals and fulfilled the requirements laid down by Directive 90/364/EEC, 47 –Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26). Directive 90/365/EEC 48 –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). or Directive 93/96/EEC, 49 –Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59). That

provision replaced Directive 90/366/EEC of 28 June 1990 (OJ 1990 L 180, p. 30), of identical aim, which was annulled by the Court of Justice in Case C-295/90 Parliament v Council [1992] ECR I-4193 for failing to be adopted on a proper legal basis. The Court decided to maintain in force provisionally the entire effects of the annulled directive until such time as the Council replaced it with a new one adopted on a proper legal basis. which include having comprehensive medical insurance and adequate financial resources in order to avoid becoming a burden on the social assistance system of the host Member State during their stay. 50 –Tomuschat, C., in Common Market Law Review 2000, pp. 449 to 457, especially p. 454: 'It is not without reason that the three directives which have extended freedom of movement to all other citizens of the Union ... have set forth that the groups of persons concerned may rely on that freedom only if they have adequate financial resources and are covered by sickness insurance. These conditions and limitations have been constitutionalised by Article 18. They indicate that Member States have not been willing to admit foreigners on their territory who, although they are citizens of the Union, may become a burden on the public welfare systems of a receiving State'.

62. The Court has, so far, not declared the provisions of secondary legislation in force, which develop the articles of the Treaty on freedom of movement and equal treatment, invalid for infringing the principle of the hierarchy of norms. I can cite, as a recent example, the judgment in *Givane*, (51) in which it was called upon to interpret Regulation No 1251/70, under which the right of a worker to remain in a Member State after having been employed in that State is subject to conditions as to length of residence and employment, so that the family members of a worker who died before acquiring that right were not able to remain in that State. (52) It ruled that the purpose of the first indent of Article 3(2) of Regulation No 1251/70 in requiring that the worker must, on the date of his decease, have resided continuously in the territory of the host Member State for at least two years is to establish a significant connection between, on the one hand, that Member State, and on the other hand, that worker and his family, and to ensure a certain level of their integration in the society of that State.

63. Following the judgment in *Martínez Sala*, many authors have taken the view that, as a result of the recognition in the Treaty of the right of citizenship, the Member States are required, in every case, to treat any Community national who is legally in their territories as they would any of their own nationals, including with respect to both social advantages under Article 7(2) of Regulation No 1612/68 and welfare benefits. (53)

Nevertheless, there are powerful reasons for arguing that, despite undoubted progress, that case-law does not go as far as is claimed by Mr Collins and the Commission, as well as by a proportion of the academic world. 54 – I am somewhat perplexed by the Commission's argument, in reply to the first question, that Mr Collins, as someone who has moved in search of work, is not entitled to a social advantage such as the income-based jobseeker's allowance whereas, when analysing the third question, it takes the view that he is entitled to it on the ground that access to a benefit of that type is sufficiently closely linked to the exercise of the right to freedom of movement as to be included within the material scope of Community law.

64. In *Martínez Sala*, (55) the Court stated that a citizen of the European Union lawfully resident in the territory of the host Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law, including the situation where that Member State delays or refuses to grant to that claimant a benefit that is provided to all persons lawfully resident in the territory of that State on the ground that the claimant is not in possession of a document which nationals of that same State are not required to have and the issue of which may be delayed or refused by the authorities of that State.

65. However, that statement must not be taken out of its context, which may be characterised as follows: (a) the benefit being claimed fulfilled simultaneously the conditions for granting as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and as a family benefit listed in Article 4(1)(h) of Regulation No 1408/71; (b) although it was apparent that the claimant had worked in the host State for several years, the Court did not have sufficient information to enable it to determine whether those two provisions were applicable; (c) Ms Martínez Sala had arrived in the country at the age of 12, resided 25 years in its territory, had two children and had been in receipt of social welfare benefits since the end of her last employment; (d) she was refused child-raising allowance on the ground that she did not possess the nationality of the host State, a residence entitlement or a residence permit; and (e) it was made clear, in the course of proceedings, that the national authorities required foreigners to produce a document which was constitutive of a right, issued by its own authorities, when no such document was required of nationals of the host State.

It is no wonder, then, that the Court should have resorted to Article 17(2) EC and Article 12 EC to preclude such discrimination on grounds of nationality against a Community national who had lived in the host State for almost all of her life.

66. *Grzelczyk* (56) was a similar case in which the Court ruled that Articles 12 EC and 17 EC preclude entitlement to a non-contributory social benefit, such as the minimex, from being made conditional, in the case of nationals of Member States other than the host State where they are legally resident, on their falling within the scope of Regulation No 1612/68 when no such condition applies to nationals of the host Member State.

67. That broad statement does not mean that, from then on, any Community national could settle in Belgium and, without any further ado, obtain the benefit. (57) In my view, that assessment must be kept within the bounds of the facts in the main proceedings: a French national moved to Belgium to pursue university studies; during the first three years of his studies, he defrayed his own costs of maintenance, accommodation and studies by taking on various minor jobs and by obtaining credit facilities; and at the beginning of his fourth and final year of study, he applied for payment of the minimex because, as a result of having to write a dissertation and complete a period of practical training, the final year of study would be more demanding than the previous years. The competent authority initially granted the benefit for the period from October 1998 to June 1999, but the ministry subsequently refused it on the ground that the claimant was a national of another Member State who was enrolled as a student. The Belgian court argued that he did not meet the criteria to be considered a worker within the meaning of Regulation No 1612/68.

68. The Court has acknowledged that Article 1 of Directive 93/96 allows Member States to require of students who are nationals of a different Member State and who wish to exercise the right of residence on their territory that they satisfy the relevant national authority, by means of a declaration, that they have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of

residence; furthermore, where a Member State takes the view that a student who has recourse to social assistance no longer fulfils the conditions of his right of residence, it may take measures, within the limits imposed by Community law, either to withdraw his residence permit or not to renew it. (58)

However, it overcame that difficulty 59 –Kessler, F., op. cit., p. 13: '... la Cour en fait trop: à force de vouloir à tout prix imposer une égalité de traitement sur la base des dispositions du traité relatives à la citoyenneté européenne, la cohérence de son raisonnement en souffre'; Martin, D.: 'A Big Step Forward for Union Citizens, but a Step Backwards for Legal Coherence' in European Journal of Migration and Law 2002, volume 4, pp. 136 to 144, especially p. 139: '... the Grzelczyk judgment can already be pinpointed as a landmark judgment, the conclusion of which is likely to please European Union citizens willing to exercise their right to free movement, and as likely to greatly displease most Member States. Whatever his/her personal feeling as to the conclusion reached by the Court, the lawyer's reaction might be of some perplexity as to the reasoning used'. by considering that: (a) a student's financial position may change with the passage of time for reasons beyond his control so that the truthfulness of a student's declaration is therefore to be assessed only as at the time when it is made; (b) any measures which a Member State adopts in order either to withdraw his residence permit or not to renew it can never be the automatic consequence of a student having recourse to the host Member State's social assistance system; (c) whilst Article 4 of Directive 93/96 provides that the right of residence is to exist for as long as beneficiaries of that right fulfil the conditions laid down in Article 1, the sixth recital in the directive's preamble envisages that beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State, which means that Directives 93/96, 90/364 and 90/365 thus accept a certain degree of financial solidarity, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary; and (d) the fact that the claimant was not of Belgian nationality was the only bar to its being granted to him and therefore the case was one of discrimination solely on the ground of nationality. 60 –Ibidem, paragraphs 29 and 43 to 45.

69. It therefore seems unlikely, in the context of that case-law, that Mr Collins is entitled to the income-based jobseeker's allowance, since Community secondary legislation, subject to which he may exercise his right of movement and residence, places him on the same footing as nationals of the relevant Member State as regards access to job vacancies and the assistance provided by employment offices but not as regards the unemployment benefits which the host State provides for persons who not only are actively seeking employment and have inadequate financial means but can also prove to have a certain connection with the State or some link with its employment market, as evidenced by prior residence during a reasonable period. (61)

I would point out that, on 29 June 2001, the Commission submitted a proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, 62 –COM (2001) 257 final – 2001/0111(COD). OJ 2001 C 270 E, p. 150. which has as its legal basis, among others, Articles 12 EC and 18 EC and which seeks to reconsider the sectorial and fragmented approach of the right of freedom of movement and residence, as governed by secondary legislation. 63 –Paragraph 5 in the explanatory memorandum. However, I would observe that Regulation No 1612/68 is not among the provisions which would be repealed with its entry into force and that, in Chapter V, Common provisions – Right of residence and right of permanent residence, Article 21(2), which deals with equal treatment, provides that, until permanent residence status is acquired, the host Member State is not required to accord entitlement either to any benefit by way of social assistance or sickness insurance to persons who are neither employed nor self-employed or to maintenance grants to persons enjoying the right of residence who have come to the country to study. 64 –Martin, D., op. cit., p. 143: 'If this provision is adopted without modification, it will mean that after the entry into force of the directive "another Mr. Grzelczyk" will legally be deprived, in the same factual situation, of the benefit of this judgment'. It is worth noting that it provides for the acquisition of the right of permanent residence after four years of lawful residence. 65 –The Council's internet page concerning the co-decision procedure, www.consilium.eu.int/codec/en/index.htm, indicates that the Commission will submit an amended proposal as a result of the first reading by the European Parliament. The Greek presidency had hoped to reach a political agreement in the Council held on 19 May 2003 which, it would appear, has not yet been achieved.

70. The Court has confirmed in its case-law that the limitations and conditions which are referred to in Article 18 EC are based on the idea that the exercise of the right of residence of citizens of the Union can be subordinated to the legitimate interests of the Member States, (66) and that those limitations and conditions must be applied in compliance with the limits imposed by Community law and in accordance with the general principles of that law, in particular the principle of proportionality. That means that national measures adopted on that subject must be necessary and appropriate to attain the objective pursued. (67)

71. The Court has examined, on two occasions, the measures adopted by Member States relating to the exercise of the right of residence proper and access to unemployment benefits, in the light of the principle of proportionality.

72. The judgment in *D'Hoop* (68) concerned tideover allowances provided to young people who have just completed their studies and are seeking their first employment to give them access to special employment programmes – a young Belgian woman who had completed her secondary education in France was refused those allowances. The Court held that in that State there was a difference in treatment between Belgian nationals who have had all their secondary education in Belgium and those who, having availed themselves of their freedom to move, had obtained their diploma of completion of secondary education in another Member State; it pointed out that such different treatment placed at a disadvantage certain of its nationals simply because they have exercised their freedom to move in order to pursue education in another Member State; and held that such inequality of treatment is contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move. (69)

In view of the fact that tideover allowance aims to facilitate for young people the transition from education to the employment market, the Court considered that it was legitimate for the national legislature to wish to ensure that there is a real link between the claimant for that allowance and the geographic employment market concerned, but found that a single condition concerning the place where the diploma of completion of secondary

education was obtained was too general and exclusive in nature and went beyond what was necessary to attain the objective pursued. 70 –Ibidem, paragraphs 38 and 39.

73. In *Baumbast*, (71) the Court decided that it would amount to a disproportionate interference with the exercise of the right of residence conferred by Article 18(1) EC to be able to refuse the right to reside in the host Member State to a Community national who: had sufficient resources within the meaning of Directive 90/364; worked and lawfully resided in the host Member State for several years; during that period his family also resided in the host Member State and remained there even after his activities as an employed and self-employed person in that State came to an end; was never a burden on the public finances of the host Member State; and who, together with his family, was covered by comprehensive sickness insurance in another Member State of the Union, where the only reason for refusing him his right was that the sickness insurance, arranged in accordance with Directive 90/364, did not cover the emergency treatment given in the host Member State.

74. If it were to be considered that Article 18 EC, in conjunction with Article 12 EC, regardless of secondary legislation in the field of freedom of movement of workers, requires Member States to provide non-contributory unemployment benefits to work-seekers in the circumstances of Mr Collins, legislation such as that of the United Kingdom, which makes such benefits subject to a condition of habitual residence, would constitute indirect discrimination on grounds of nationality because, although it applies to all claimants irrespective of their nationality, in practice United Kingdom citizens are more easily able to fulfil that condition.

75. In the present case, however, I take the view that a condition as to residence, which is intended to ascertain the degree of connection with the State and the links which the claimant has with the domestic employment market, may be justified in order to avoid what has come to be known as 'benefit tourism', where persons move from State to State with the purpose of taking advantage of non-contributory benefits, and in order to prevent abuses. (72) I do not believe that that condition goes beyond what is necessary to attain the objective pursued since it is applied after examination of claimants' personal circumstances in each case.

76. Thus, Community law as it now stands does not require that an income-based social security benefit, intended for jobseekers, be provided to a citizen of the Union who enters the territory of a Member State with the purpose of seeking employment while lacking any connection with the State or link with the domestic employment market.

VIII – Conclusion

77. In view of the foregoing considerations, I suggest that the Court give the following answer to the questions from the Social Security Commissioner:

(1)A national of a Member State who enters the territory of another Member State with the intention of seeking paid employment, despite being covered by Articles 1 to 6 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, is not a worker for the purposes of Articles 7 et seq. thereof.

(2)A national of a Member State who moves to a Member State with the intention of seeking employment has the right to reside within its territory, pursuant to Article 39 EC, but Directive 68/360 does not provide for such a possibility.

(3)Community law as it now stands does not require that an income-based social security benefit, intended for jobseekers, be provided to a citizen of the Union who enters the territory of a Member State with the purpose of seeking employment while lacking any connection with the State or link with the domestic employment market.

---

1 –Original language: Spanish.

---

2 –Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

---

3 –Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485).

---

4 –In reply to the question I put to him at the hearing, the Agent for the United Kingdom said that, in 1998, the benefit amounted to GBP 50 per week. It seems that it is paid out until the beneficiary finds work.

---

5 –Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402).

---

6 –Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

---

7 –In accordance with paragraph 3(1) of Schedule 6 to the Social Security Act 1998, as the appeal was made after the date of the passing of that Act on 21 May 1998, the tribunal was prevented from taking into account any circumstances not obtaining on 1 July 1998. Thus it was considering the questions of whether or not the claimant was habitually resident in the UK for all or any of the period from 8 June 1998 to 1 July 1998 and how that affected his entitlement to unemployment allowance in that period.

---

8 –Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by

Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6). Article 10a was introduced by Council Regulation (EEC) No 1247/92 of 30 April 1992 (OJ 1992 L 136, p. 1).

9 –Case 35/77 *Beerens* [1977] ECR 2249, paragraph 9; Case C-251/89 *Athanasopoulos and Others* [1991] ECR I-2797, paragraph 28; Joined Cases C-88/95, C-102/95 and C-103/95 *Martínez Losada and Others* [1997] ECR I-869, paragraph 21.

10 –Under Article 5 of Regulation No 1408/71, the Member States are to specify the legislation and schemes referred to in Article 4(1) and (2), the special non-contributory benefits referred to in Article 4(2a), the minimum benefits referred to in Article 50 and the benefits referred to in Articles 77 and 78 in declarations to be notified and published in accordance with Article 97.

11 –As worded in Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1997 L 28, p. 1).

12 –Case 207/78 *Ministère Public* v *Even* [1979] ECR 2019, paragraph 22; Case 65/81 *Reina* v *Landeskreditbank Baden-Württemberg* [1982] ECR 33, paragraph 12; Case 261/83 *Castelli* v *ONTPS*[1984] ECR 3199, paragraph 11; Case 249/83 *Hoeckx* [1985] ECR 973, paragraph 20; Case 122/84 *Scrivner* v *Centre public d'aide sociale de Chastre* [1985] ECR 1027, paragraph 24; Case 94/84 *ONEM* v *Deak* [1985] ECR 1873, paragraph 21; Case C-310/91 *Schmid* [1993] ECR I-3011, paragraph 18; Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 25.

13 –See, among others, Case C-326/90 *Commission* v *Belgium* [1992] ECR I-5517, concerning the guaranteed income for old people and the minimum means of subsistence, Case C-185/96*Commission* v *Greece* [1998] ECR I-6601, concerning benefits for large families; and Case C-299/01 *Commission* v *Luxembourg* [2002] ECR I-5899, concerning the grant of a guaranteed minimum income.

14 –Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, paragraph 21, and *Martínez Sala*, paragraph 27.

15 –Case C-369/90 *Micheletti and Others* [1992] ECR I-4239, paragraph 10.

16 –In reply to a question put to him at the hearing, counsel for Mr Collins confirmed that his client had never lived in Ireland, a country which he had visited on three occasions for periods of, at most, 10 days.

17 –Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraphs 16 and 17; Case 344/87 *Bettray* v *Staatssecretaris van Justitie* [1989] ECR 1621, paragraphs 11 and 12; Case C-357/89 *Raulin* [1992] ECR I-1027, paragraph 10; Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 14; *Martínez Sala*, paragraph 32; and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13.

18 –Case 316/85 *Lebon* [1987] ECR 2811.

19 –Cited above.

20 –My emphasis.

21 –Not a view shared by some learned writers. See, among others, O'Leary, S.: 'Putting Flesh on the Bones of European Union Citizenship' in *European Law Review* 1999, pp. 68 to 79, especially p. 76: 'The definition of who qualifies as a worker in *Martínez Sala* either has overruled *Lebon* in this respect, by classifying job-seekers as workers or, at the very least, allows job-seekers to claim equal treatment as regards social and tax advantages pursuant to Article 7(2) of the Regulation [1612/68]'; Jacqueson, C.: 'Union citizenship and the Court of Justice: something new under the sun? Towards social citizenship', in *European Law Review* 2002, pp. 260 to 281, especially p. 267: 'The origin of the right of residence in national law, Community law or international law was irrelevant. In sum, the rights granted to workers by Regulations 1408/71 and 1612/68 are available to all Union citizens lawfully resident in the host Member State. It follows that the Court's ruling in *Lair* and *Lebon* are old history.'; Whelan, A., in *Revue des affaires européennes* 1999, pp. 228 to 238, especially p. 232: '... the Court appears to have considerably enhanced the position of job-seekers ...'.

22 –Case C-278/94 *Commission* v *Belgium* [1996] ECR I-4307, paragraph 40, and Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 18. Castro Oliveira, Á.: 'Workers and other persons: step-by-step from movement to citizenship – Case Law 1995-2001' in *Common Market Law Review* 39, pp. 77-127, especially p. 95: 'Unemployment policy is not as such within the scope of EC law. At least not yet. The relatively vague and non-binding character of the coordination measures adopted in the field of employment policy, pursuant to the new provisions introduced by the Amsterdam Treaty, confirms this assertion. This case [C-278/94] is a good example of the moderate character of the Court's case law on free movement of workers. The Court is not willing to impose on a Member State the duty to finance the integration in its labour market of unemployed EU citizens (or their children) who are resident in another Member State'.

23 –The main proceedings were discontinued. See the Court's National Decisions database, Case QP/03161-P1.

24 –See Case C-344/95 *Commission* v *Belgium* [1997] ECR I-1035, in which the Court held that a Member State had failed to fulfil its obligations inasmuch as it issued, during the first six months of their residence, to persons holding employment for a period of at least one year, two successive registration certificates instead of a residence permit and issued to workers whose activity was not expected to last for more than three months a document relating to their residence against payment of a fee.

25 –Case 139/85 *Kempf* [1986] ECR 1741, paragraph 13.

26 –Case C-292/89 *Antonissen* [1991] ECR I-745, paragraphs 11 to 13.

27 –In *Commission* v *Belgium*, cited above, that Member State was held to have failed to fulfil its obligations on the ground that it systematically required nationals of other States who were seeking work to leave its territory after three months.

28 –.*Antonissen*, paragraph 21.

29 –None the less, in both the written and the oral observations, counsel for Mr Collins insisted that his client's desire to settle in the United Kingdom in order to pursue an activity as a self-employed person gave him the right to reside in that State, pursuant to Directive 73/148. In reply to a question put by me, counsel informed the Court that, in that case, he could also claim the allowance at issue, since its payment is not restricted to claimants who seek paid employment.

30 –Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 32; Case C-297/96 *Partridge* [1998] ECR I-3467, paragraph 33; and Case C-90/97 *Swaddling* [1999] ECR I-1075, paragraph 24.

31 –By adopting that measure in 1992, by means of Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 (OJ 1992 L 136, p. 1), the Community legislature introduced an exception to the general principle enshrined in Article 10 which prohibits any requirement as to residence in a specific Member State as a condition for migrant workers to accede to social security benefits. In *Snares*, cited above, paragraph 49, the Court concluded that the system of coordination established in 1992 was not at variance with Article 42 EC.

32 –The Social Security Commissioner has given no indication whatever regarding the duration of the period required of Mr Collins. At the hearing, the Agent for the United Kingdom stated that the requisite period varied from case to case, since the personal and family circumstances of the claimant and the links which tie him to the country are examined. According to paragraph 17 of*Swaddling*, the United Kingdom authorities considered that a British national who had returned to his country after working for several years in France and had claimed a benefit similar in nature to the income-based jobseeker's allowance had become habitually resident in the United Kingdom eight weeks after his return there.

33 –Fries, S. and Shaw, J.: 'Citizenship of the Union: First Steps in the European Court of Justice' *in European Public Law* 1988, pp. 533 to 559, especially pp. 550 and 551: 'Since 1994, the UK has applied an "habitual residence" test, to restrict a previous entitlement on the part of workseekers coming to the UK from other EU Member States to draw the basic subsistence-level non-contributory benefit, income support, for at least six months; the policy objective behind the change is to stop the hated "benefit tourism". The position of the UK is now – having previously been more generous – as it was envisaged in *Lebon,* ... In other words, no benefits are given to those falling outside the scope of the equal treatment principle as circumscribed by *Lebon* – whatever their residence rights.'

34 –.*Swaddling*, paragraphs 28 to 30. The Agent for the United Kingdom argued at the hearing that even that extremely flexible procedure, devised by the Court for deciding whether the claimant of the benefit resides in the Member State, is likely to benefit its own nationals, who are able to meet the conditions more easily than nationals of other Member States.

35 –At the hearing, counsel for Mr Collins confirmed that his client had no family ties in the United Kingdom and that, in that period, he travelled to that country on four occasions with the intention of visiting friends, his longest stay being of one week.

36 –Case C-71/93 *Van Poucke* [1994] ECR I-1101, paragraph 25; Case C-340/94 *De Jaeck* [1997] ECR I-461, paragraph 36; and *Martínez Sala*, paragraph 44.

37 –Case C-55/00 *Gottardo* [2002] ECR I-413, paragraph 21.

38 –Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 20; Case C-131/96 *Mora Romero* [1997] ECR I-3659, paragraph 10; Case C-100/01 *Oteiza Olazábal* [2002] ECR I-10981, paragraph 25.

39 –Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, paragraph 9; and Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph 38.

40 –*Oteiza Olazábal*, paragraph 26.

41 –Case C-413/99 *Baumbastand Others* [2002] ECR I-7091, paragraphs 84 to 86.

42 –The powers of Member States when applying such limitations are governed by Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117).

43 –Case 807/79 *Gravina* [1980] ECR 2205, paragraph 7; Case 41/84 *Pinna* [1986] ECR 1, paragraph 20; Case 313/86 *Lenoir* [1988] ECR 5391, paragraph 13; and Case C-68/99 *Commission* v*Germany* [2001] ECR I-1865, paragraph 22.

44 –Lhernould, J.-P.: 'L'accès aux prestations sociales des citoyens de l'Union Européenne' in *Droit Social* 2001, pp. 1103 to 1107, especially p. 1107: 'Élargir indirectement – à travers la citoyenneté de l'Union – le champ des bénéficiaires des avantages sociaux reviendrait ... à admettre que le contenu d'un texte de droit dérivé, pourtant explicite et de surcroît conforme à l'ex-article 48 du traité CE*(art. 39 CE)* dédié à la libre circulation des travailleurs, soit détourné par le recours à d'autres dispositions de droit primaire. On notera aussi que cette évolution affecterait profondément le sens de la définition des avantages sociaux, fondée sur un lien entre le bénéficiaire et l'exercice d'une activité professionnelle présente ou passée'.

45 –Lhernould, J.-P., op. cit., p. 1107: '... il convient de se demander si des personnes qui réclameraient des prestations de sécurité sociale au sens du règlement 1408/71 ... ne pourraient pas bénéficier de l'égalité de traitement ... en qualité de citoyens de l'Union résidant légalement sur le territoire d'un Etat membre .... La définition du champ personnel des bénéficiaires ... serait à nouveau bousculée. Le droit à certaines prestations (quel que soit le risque concerné – chômage, maladie, vieillesse ...), qui serait refusé à certains demandeurs sur le fondement des règles de coordination, pourrait ainsi être rétabli par le recours à la qualité de citoyen de l'Union ...'.

46 –.*Baumbast and R*, paragraph 81.

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

48 –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).

49 –Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59). That provision replaced Directive 90/366/EEC of 28 June 1990 (OJ 1990 L 180, p. 30), of identical aim, which was annulled by the Court of Justice in Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193 for failing to be adopted on a proper legal basis. The Court decided to maintain in force provisionally the entire effects of the annulled directive until such time as the Council replaced it with a new one adopted on a proper legal basis.

50 –Tomuschat, C., in *Common Market Law Review* 2000, pp. 449 to 457, especially p. 454: 'It is not without reason that the three directives which have extended freedom of movement to all other citizens of the Union ... have set forth that the groups of persons concerned may rely on that freedom only if they have adequate financial resources and are covered by sickness insurance. These conditions and limitations have been constitutionalised by Article 18. They indicate that Member States have not been willing to admit foreigners on their territory who, although they are citizens of the Union, may become a burden on the public welfare systems of a receiving State'.

51 –Case C-257/00 *Givane* [2003] ECR I-345.

52 –The case concerned Indian nationals who were family members of a worker of Portuguese nationality who had died in the United Kingdom. The judgment does not, however, draw a distinction between family members who are Community nationals and third-country nationals.

53 –Fries, S. and Shaw, J., op. cit., p. 552: 'In fact, by employing a novel combination of the principles of *ratione materiae* and *ratione personae* to bring the type of humanitarian issue which *Martínez Sala*itself in reality involves, the ECJ has ended up also restricting another freedom which the Member States still thought they had: to identify, define and deal with a mischief conventionally known as "benefit tourism"'. Jacqueson, C., op. cit., p. 267: 'The [*Martínez*] *Sala* ruling entrenched "something close to a universal non-discrimination right including access to all welfare benefits ... as a consequence of the creation of the figure of the Union citizen". Thereby the Court removed an important barrier to what has been called "welfare tourism"' and at p. 277: 'Therefore, it seems that as long as they are lawfully residing in the host State, they can claim all advantages granted to workers by Community law, relying either on their status as worker ... or, at least, on their status of citizens on the Union according to the [*Martínez*] *Sala* ruling.'; Whelan, A., op. cit., p. 232: '... constitutes a considerable broadening of the rights of free movement of the unemployed which, combined with Regulation No 1612/68, could substantially reduce the effect of the restrictive conditions for residence rights under Directive 90/364/EEC by enabling those who are genuinely, if fruitlessly, seeking work to have recourse in the host State to social advantages such as a minimum subsistence allowance without fear of deportation'. Writing against that trend, Tomuschat, C., op. cit., p. 453: 'The non-discrimination clause of Article 12 constitutes an instrument designed to strengthen the legal position of a citizen of the Union who, by virtue of the EC Treaty, lawfully resides or stays in a country of the Union outside his or her State of nationality. ... There is, possibly, just one field where equality may be lacking, namely where financial benefits are at stake'.

54 –I am somewhat perplexed by the Commission's argument, in reply to the first question, that Mr Collins, as someone who has moved in search of work, is not entitled to a social advantage such as the income-based jobseeker's allowance whereas, when analysing the third question, it takes the view that he is entitled to it on the ground that access to a benefit of that type is sufficiently closely linked to the exercise of the right to freedom of movement as to be included within the material scope of Community law.

55 –Cited above.

56 –Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 46.

57 –Kessler, F.: 'Conditions d'attribution d'un revenu minimum à un étudiant européen' in *Revue de jurisprudence sociale* 2002, pp. 11 to 13, especially p. 12: '... la Cour s'oblige ... à des contorsions juridiques et notamment à des déductions à contrario des silences de l'article 3 de la directive 93/96, afin de faire entrer le cas soumis dans le champ d'application de la règle de non-discrimination'.

58 –Ibidem, paragraphs 38 and 42.

59 –Kessler, F., op. cit., p. 13: '... la Cour en fait trop: à force de vouloir à tout prix imposer une égalité de traitement sur la base des dispositions du traité relatives à la citoyenneté européenne, la cohérence de son raisonnement en souffre'; Martin, D.: 'A Big Step Forward for Union Citizens, but a Step Backwards for Legal Coherence' in *European Journal of Migration and Law* 2002, volume 4, pp. 136 to 144, especially p. 139: '... the *Grzelczyk* judgment can already be pinpointed as a landmark judgment, the conclusion of which is likely to please European Union citizens willing to exercise their right to free movement, and as likely to greatly displease most Member States. Whatever his/her personal feeling as to the conclusion reached by the Court, the lawyer's reaction might be of some perplexity as to the reasoning used'.

60 –Ibidem, paragraphs 29 and 43 to 45.

61 –None the less, the Agent for the Commission stated at the hearing, in reply to a question I put to him, that workers who, pursuant to Article 69 of Regulation No 1408/71, are entitled to move to other Member States in search of work and receive unemployment benefit from them for a maximum of three months could claim, in the United Kingdom, payment of the difference between the amount of such unemployment benefit and the allowance at issue, where the latter is greater.

62 –COM (2001) 257 final – 2001/0111(COD). OJ 2001 C 270 E, p. 150.

63 –Paragraph 5 in the explanatory memorandum.

64 –Martin, D., op. cit., p. 143: 'If this provision is adopted without modification, it will mean that after the entry into force of the directive "another Mr. Grzelczyk" will legally be deprived, in the same factual situation, of the benefit of this judgment'.

65 –The Council's internet page concerning the co-decision procedure, www.consilium.eu.int/codec/en/index.htm, indicates that the Commission will submit an amended proposal as a result of the first reading by the European Parliament. The Greek presidency had hoped to reach a political agreement in the Council held on 19 May 2003 which, it would appear, has not yet been achieved.

66 –Bonnechère, M.: 'Citoyenneté européenne et Europe Sociale' in *Europe,* July 2002, pp. 6 to 10, especially p. 8: 'La doctrine s'est interrogée sur l'apparente dissociation de la citoyenneté et de la nationalité dans le traité de Maastricht: la citoyenneté européenne se définit par rapport à un cadre de référence supra-national ..., mais les citoyens de l'Union Européenne établis dans un état membre dont ils ne sont pas ressortissants demeurent dans une situation spécifique (obligation de solliciter un titre de séjour, exposition à des mesures d'éloignement pour des raisons d'ordre public, de sécurité publique ou de santé publique, droit de vote limité au niveau municipal, absence d'accès aux emplois comportant une "participation directe ou indirecte à l'exercice de la puissance publique et aux fonctions qui ont pour objet la sauvegarde de l'état ou des autres collectivités publiques")'.

67 –.*Baumbast*, cited above, paragraphs 90 and 91.

68 –Cited above.

69 –Ibidem, paragraphs 33 to 35.

70 –Ibidem, paragraphs 38 and 39.

71 –Cited above, paragraphs 92 and 93.

72 –Closa, C.: 'The Concept of Citizenship in the Treaty on European Union' in *Common Market Law Review* 1992, pp. 1137 to 1169, especially p. 1162: 'Two provisions of this article [18 CE, § 2] are relevant. Firstly, these are not unlimited rights ... Secondly, the remission to secondary legislation is based on a preoccupation to ensure an equitable distribution of charges particularly regarding social protection. This reflected the fears of eventual pressures on the more generous social systems which appeared in the wording of

the initial draft. Although this reference was eliminated afterwards, this concern underlies the final wording'; and Tomuschat, C., op. cit., p. 455: 'Social welfare benefits are indeed the crux of the matter, benefits which have not been earned by the claimant on account of his or her participation in the collective work process of a given society, albeit sometimes under a tenuous linkage ... A person who is not actively involved in economic life must take care of his or her vital necessities in a manner congruent with taking his or her own responsibility, without enjoying the right to rely on public funds of the State of residence. In this regard, the Treaty itself establishes that non-discrimination does not apply'.