OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 11 November 2004 [1]

I — Introduction

1. In its judgments of 21 June 1988 in *Lair* and *Brown*, the Court ruled that at the stage of development of Community law at the material time, financial assistance granted to students for maintenance costs and training, as opposed to assistance to cover costs related to access to education, fell in principle outside the scope of the EEC Treaty. [2] In view of the evolution of Community law since that time, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), in this preliminary reference essentially asks the Court whether such assistance with maintenance costs for students, in either the form of grants or loans, continues to fall outside the scope of the EC Treaty for the purposes of the application of Article 12 EC and if not, under which conditions the Member States may restrict eligibility for such assistance.

II — Relevant provisions

A — *Community law*

2. The relevant provisions of Community law in this case are Articles 12 and 18(1) of the EC Treaty and Article 3 of Directive 93/96 on the right of residence for students [3] (hereinafter: Directive 93/96):

'Article 12

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

...

1 — Original language: English.

2 — Case 39/86 *Lair* [1988] ECR 3161, at paragraph 15 of the judgment, and Case 197/86 *Brown* [1988] ECR 3205, at paragraph 18 of the judgment.

3 — Directive 93/96/EEC of 29 October 1993 on the right of residence for students, OJ 1993 L 317, p. 59.

Article 18(1)

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.'

Preamble to Directive 93/96, seventh recital

'Whereas, in the present state of Community law, as established by the case law of the Court of Justice, assistance granted to students, does not fall within the scope of the [EEC] Treaty within the meaning of Article 7 thereof [now Article 12 EC].'

Article 3 of Directive 93/96

'This Directive shall not establish any entitlement to the payment of maintenance grants by the host MemberState on the part of students benefiting from the right of residence.'

B — *National law*

3. The national provisions concerned are laid down in the Education (Student Support) Regulations 2001 (hereinafter: the Student Support Regulations). Under the Student Support Regulations, assistance with maintenance costs for students is provided by way of loans for living costs. The amount of the loan depends upon a number of factors such as whether the student lives at home with his or her parents and whether the student lives in London or elsewhere. A student is eligible automatically for 75% of the maximum amount of the loan available and the eligibility to receive the 25% depends upon the financial position of the student and the student's parents or partner. The loan is provided at an interest rate which is linked to the rate of inflation and the rate of interest is, therefore, below the rate which would normally be payable on a commercial loan. The loan is repayable after the student completes his or her course and providing that the student is earning in excess of GBP 10 000. If that is the case, the student pays 9% per annum of the income earned above GBP 10 000 until the loan is paid.

4. Nationals of a Member State are only eligible to receive a loan under the Regulations if:

(1) they are settled in the United Kingdom within the meaning of the domestic law (the Immigration Act 1971), that is

— that they are ordinarily resident in the United Kingdom and are not subject to restrictions as to the period for which they may remain in the United Kingdom;

— and they are resident in England or Wales on the first day of the first academic year of the course

— and they have been resident in the United Kingdom for the three years prior to the first day of the course;

or

(2) the student is an EEA migrant worker entitled to support by virtue of Article 7 (2) or (3) of Council Regulation (EEC) No 1612/68 as extended by the EEA Agreement signed at Oporto on 2 May 1992.

A person is only regarded as being settled if he has resided in the United Kingdom for four years. Time spent for the purpose of receiving full-time education is not taken into consideration in calculating the period of residence.

III — Facts, procedure and preliminary questions

5. Mr Dany Bidar is a French national, born in Paris in August 1983. It appears from the documents in the case-file that in August 1998 he moved to the United Kingdom with his sister and mother, who was seriously ill at the time, to stay with Bidar's grandmother. Following the decease of his mother in December 1999, Bidar's grandmother became his legal guardian. Bidar attended a High School in London where he completed his secondary education in June 2001 and acquired the necessary qualifications to gain access to university in the United Kingdom. During that period he was supported financially by his grandmother and he never applied for social assistance. As he intended to begin a course of university studies in the academic year beginning in September 2001, Bidar applied to the London Borough of Ealing for funding for these studies. He was granted assistance with his tuition fees, but was refused a loan for maintenance costs as he was not 'settled' in the United Kingdom, not yet having fulfilled a period of residence of four years as required by the domestic provisions. In fact, as a student he would not be able to acquire that status given that the

period spent attending full-time education is not recognised for that purpose. Bidar began his studies in economics in September 2001 at University College London.

6. Bidar challenged the decision refusing him a student loan for maintenance costs claiming that the settlement requirement in the Regulations constitutes a discrimination within the meaning of Article 12 EC in conjunction with Article 18 EC. The defendant in the main proceedings contends that assistance with maintenance costs falls outside the scope of Article 12 EC, as was confirmed by the Court in *Lair* and *Brown*. However, in view of the fact that Community law has developed since these judgments, most notably through the insertion of the provisions on citizenship and on education in the EC Treaty by the Treaty of Maastricht, which entered into force on 1 November 1993, the High Court decided to stay the proceedings and refer the following preliminary questions to the Court under Article 234 EC:

'1. Whether, given the decisions of the Court of Justice of the European Communities in Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161, and Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] ECR 3205, and developments in the law of the European Union, including the adoption of Article 18 EC and developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses, such assistance being given by way of either (a) subsidised loans or (b) grants, continues to fall outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition of discrimination on grounds of nationality.

2. If either part of question 1 is answered in the negative, and if assistance with maintenance costs for students in the form of grants or loans do now fall within the scope of Article 12 EC, what criteria should the national court apply in determining whether the conditions governing eligibility for such assistance are based on objectively justifiable considerations not dependent on nationality?

3. If either part of question 1 is answered in the negative, whether Article 12 EC may be relied upon to claim entitlement to assistance with maintenance costs from a date prior to the date of the judgment of the Court of Justice in the present case and, if so, whether an exception should be made for those who initiated legal proceedings before that date?'

7. Written submissions under Article 20 of the Statute of the Court of Justice were

presented by the applicant in the main proceedings, the Austrian, Danish, Finnish, French, German, Netherlands and United Kingdom Governments and by the Commission. Further observations were made by Bidar, by the United Kingdom and Netherlands Governments and by the Commission at the oral hearing on 28 September 2004.

8. On 16 June 2004, the Court addressed a series of written questions to the United Kingdom Government aimed at elucidating the requirement that, in order to be eligible for a student loan, a person must be 'ordinarily resident' within the United Kingdom or the European Economic Area depending on his status as a non-worker or a worker respectively. The answers to these questions were received by the Court on 21 July 2004.

IV — General context: the law as it stands

A — *Community law and assistance with study costs*

9. In order to place the questions raised by the High Court in a broader perspective, it is useful to view them against the background of how eligibility of students for financial support with study costs by the host Member State hitherto has been governed by Community law. In this respect two points of reference should be distinguished. The first of these is the object of the financial support, which concerns the scope *ratione materiae* of the EC Treaty. The second is the capacity in which persons may be eligible for financial support, the scope *ratione personae* of the EC Treaty.

10. The questions referred by the High Court focus mainly on whether grants or (subsidised) loans provided by the national authorities for covering students' maintenance costs, as distinct from assistance with tuition fees, now fall within the scope *ratione materiae* of the EC Treaty for the purposes of applying the prohibition of discrimination on grounds of nationality contained in Article 12 EC. Since the Court's judgment in *Gravier*, [4] it is well settled that, as access to education leading to professional qualifications is within the scope of the EC Treaty, nationals of the Member States are entitled to equal treatment in respect of all conditions governing such access. The implication of this is that not only may no distinction be made between national students and students from other Member States in respect of the level of enrolment fees and other access related costs, any assistance provided to cover these costs must also be made available under equal conditions to students

4 — Case 293/83 *Gravier* [1985] ECR 593.

from all Member States. [5] In accordance with this principle Bidar was indeed granted assistance with the tuition fees for his course of studies at University College London.

11. In the case-law dealing explicitly with this issue, assistance with maintenance costs, by contrast, was considered as falling outside the scope *ratione materiae* of the E(E)C Treaty for persons who did not qualify as workers within the meaning of Article 39 EC. On the one hand, this subject was considered to be 'a matter of educational policy, which is not as such included in the spheres entrusted to the Community institutions' and, on the other, it was regarded as 'a matter of social policy, which falls within the competence of the Member States in so far as it is not covered by specific provisions of the EEC Treaty'. [6]

12. As the status enjoyed by a person under Community law, therefore, determines his entitlement to benefits and other social advantages in the host Member State, it is necessary to distinguish between the various capacities in which nationals of Member States intending to pursue a course of studies in another Member State than their state of origin, may be resident in that Member State. In this respect a broad distinction must be made between economically active persons (workers and self-employed persons) and their children, on the one hand, and economically inactive persons, on the other hand.

13. Where a student enjoys the status of a worker within the meaning of Article 39 EC, he is entitled under Article 7(2) of Regulation No 1612/68 [7] to social benefits provided by the host Member State on an equal footing with nationals of that Member State. The Court has confirmed on various occasions that grants awarded for maintenance and training with the view to the pursuit of university studies leading to a professional qualification constitutes a social advantage within the meaning of Article 7(2) of that regulation. [8]

14. The cases in this field generally involved marking out what might be called the outer limits of the concept of a Community worker given the often rather marginal character of the work performed. [9] The Court also considered the situation of a person who had terminated an employment relationship in order to take up a course of studies. Here

5 — E.g. Case C-357/89 *Raulin* [1992] ECR I-1027, at paragraph 28 of the judgment.

6 — E.g. *Lair*, cited in footnote 2, at paragraph 15 of the judgment.

7 — 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.

8 — *Lair*, cited in footnote 2, at paragraphs 23, 24 and 28 of the judgment; *Brown*, cited in footnote 2, at paragraph 25 of the judgment, and Case C-3/90 *Bernini* [1992] ECR I-1071, at paragraph 23 of the judgment.

9 — See e.g. *Brown*, cited in footnote 2; *Raulin*, cited in footnote 5, and C-3/90 *Bernini* [1992] ECR I-1071.

the Court ruled that a worker retains this status on taking up full-time education where there is continuity between the previous occupational activity and the course of study, unless the migrant worker has become involuntarily unemployed. [10]

15. Under Article 12 of Regulation No 1612/68, the children of migrant workers similarly are entitled to equal treatment in respect of the social advantages accorded to nationals aimed at facilitating following education. [11] This applies even where the parent worker has returned to his country of origin and the child cannot continue his studies there because of a lack of coordination of school diplomas [12] and where the child intends to follow a course of studies in his home state if nationals of the host Member State are eligible for financial support for studies outside that state. [13]

16. As is apparent from the Court's judgment in *Meeusen*, [14] these considerations apply *mutatis mutandis* to self-employed persons and their children.

17. Within the category of economically inactive students, a subdivision must be made between persons who move to another Member State for the sole or primary purpose of following education in that Member State and persons who move to a Member State for other reasons and subsequently decide to take up their studies in the host Member State.

18. The position of students of the first group who move to another Member State in order to pursue a full course of studies has been regulated in Directive 93/96. This directive ensures that these students have a right of residence for the duration of their studies in accordance with the Court's case-law. [15] It also provides that Member States may require of students who are nationals of a different Member State and who wish to exercise the right of residence on their territory, first, that they satisfy the relevant national authority 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, next, that they be enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there and, lastly, that they be covered by sickness insurance in respect of all risks in the host Member State. [16] Furthermore, in what may be regarded as a codification of the Court's judgments in *Lair* and *Brown*, Article 3 of Directive 93/96 lays down

10 — *Lair*, cited in footnote 2, at paragraph 37 of the judgment.

11 — See e.g. Joined Cases 389/87 and 390/87 *Echternach* and *Moritz* [1989] ECR 723 and Case C-337/97 *Meeusen* [1999] ECR I-3289.

12 — *Echternach & Moritz*, ibid., at paragraph 21 of the judgment.

13 — Case C-308/89 *Di Leo* [1990] ECR I-4185, at paragraph 15 of the judgment.

14 — Cited in footnote 11, at paragraphs 27 to 29 of the judgment.

15 — *Raulin*, cited in footnote 5, at paragraphs 33 and 34 of the judgment.

16 — Article 1 of the directive, as reproduced by the Court in Case C-184/99 *Grzelczyk* [2001] ECR I-6193 at paragraph 38 of the judgment.

explicitly that the directive shall not establish any entitlement to the payment of maintenance grants on the part of students benefiting from the right of residence.

19. The second group of economically inactive persons consists of persons who have arrived in a MemberState, not as a worker or as a student intending to take up vocational training, but as an EU citizen making use of the right to move and reside guaranteed by Article 18 EC and regulated in more detail in Directive 90/364.[17] Unlike persons coming within the ambit of Directive 93/96, EU citizens making use of their right to move to another MemberState and to stay there retain their right of residence as long as they fulfil the conditions laid down in Directive 90/364. Their motives are immaterial in this respect.

20. Where persons in this second category decide to pursue their studies in the host MemberState, it is clear that, under the *Gravier* and *Raulin* case-law, they are entitled to assistance with the costs of access to education. This is not disputed in the present case and, as was mentioned earlier, Bidar did receive financial support for this purpose. However, in the absence of a provision equivalent to Article 3 of Directive 93/96 in Directive 90/364, the situation as to the entitlement of students, who are already resident in the host Member State as EU citizens, to assistance with maintenance costs remains uncharted territory. In order to obtain some guidance for filling this gap in Directive 90/364 in respect of the legal position of EU citizens in this situation, it is necessary to have regard to the Court's case-law on EU citizenship under Articles 17 and 18 EC and social benefits.

B — *Citizenship and social benefits: case-law*

21. In various cases the Court has had occasion to consider whether EU citizens could derive entitlement to social benefits of various kinds from Article 18(1) EC. I refer in particular to *Martínez Sala*, *Grzelczyk*, *D'Hoop*, *Collins* and *Trojani*.[18]

22. In its judgments in cases concerning Article 18(1) EC, the Court has repeatedly emphasised that Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same

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

18 — Case C-85/96 *Martínez Sala* [1998] ECR I-2691; Case C-184/99 *Grzelczyk*, cited in footnote 16; Case C-224/98 *D'Hoop* [2002] ECR I-6191; Case C-138/02 *Collins* [2004] ECR I-2203 and Case C-456/02 *Trojani* judgment of 7 September 2004 [2004] ECR I-7573.

situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[19] Citizens lawfully resident in the territory of a Member State can rely on Article 12 EC in all situations which fall within the scope *ratione materiae* of Community law.[20] Those situations include those involving the exercise of the fundamental freedoms guaranteed by the EC Treaty and those involving the exercise of the right to move and reside freely in another Member State as conferred by Article 18(1) EC. This right to reside is, moreover, conferred directly on every citizen of the Union by a clear and precise provision of the EC Treaty, as the Court held in *Baumbast.*[21] It can therefore be invoked by individuals in proceedings before the national courts.

23. In its first judgment in this field, *Martínez Sala*, the Court ruled 'that a citizen of the European Union, ..., lawfully resident in the territory of the host Member State, can rely on Article [12] of the Treaty 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.'[22] As the child-raising allowance at issue in that case was covered by both Regulation No 1408/71[23] and Regulation No 1612/68 and was therefore within the scope *ratione materiae* of the EC Treaty, Mrs Martínez Sala was entitled to that benefit on the same conditions as German nationals.

24. The case of *Grzelczyk* concerned a French student studying in Belgium who, after having managed to provide for himself in the first three years of his studies, in his fourth and final year applied for a minimum subsistence allowance (minimex), as the combination of work and studies would be too demanding at that stage of his course. This benefit was first granted and then withdrawn as he was not a worker, but a student, and he did not have Belgian nationality. Although recognising the conditions imposed by Article 1 of Directive 93/96 on a student's right to reside in another Member State and that under Article 3 of that directive students are not entitled to maintenance grants by the host Member

19 — E.g. *Grzelczyk*, cited in footnote 16 at paragraph 31 of the judgment.

20 — E.g. *Martínez Sala*, cited in footnote 18 at paragraph 63 of the judgment.

21 — Case C-413/99 *Baumbast* [2002] ECR I-7091 at paragraph 84 of the judgment.

22 — At paragraph 63 of the judgment.

23 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, OJ 1997 L 28, p. 1.

State, the Court observed that there are no provisions in the directive that preclude those to whom it applies from receiving social security benefits. [24] Where this implied Grzelczyk becoming a burden on the social assistance system, thus no longer fulfilling one of the conditions of residence, the Court pointed out that Directive 93/96 only requires students to make a declaration that they have sufficient resources at the beginning of their stay in the host Member State and that their financial position may change for reasons beyond their control. The fact that the directive aims at preventing students from becoming an 'unreasonable' burden on the public finances of the host Member State means that the directive 'accepts a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'. [25] As it had been established in earlier case-law that the minimex was within the scope *ratione materiae* of the EC Treaty and the conditions governing eligibility were contrary to Article 12 EC, Grzelczyk was entitled to this benefit.

25. In *D'Hoop*, a Belgian student was refused a tideover allowance (an unemployment benefit granted to young people who have just completed their studies and are seeking their first employment) by the Belgian authorities on the sole ground that she had completed her secondary education in France. Here, the Court considered that making eligibility for this allowance conditional on the school diploma having been obtained in Belgium places certain of its nationals at a disadvantage simply because they have exercised their freedom to move in order to pursue education in another Member State. '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'. [26] The Court did accept, however, that in view of the aim of the tideover allowance to facilitate for young people the transition from education to the employment market, it is legitimate for the national legislature to wish to ensure that there is a real link between the applicant for that allowance and the geographic employment market concerned. A single condition concerning the place where the diploma of completion of secondary education was obtained was, however, too general and exclusive in nature. [27]

26. The *Collins* Case arose from an Irish national, who had gone to the United Kingdom in order to find work there, being refused a jobseeker's allowance on the ground that he was not habitually resident in the United Kingdom. Although Articles 2 and 5 of Regulation No 1612/68 do not refer to financial benefits assisting persons seeking access to the employment market, the Court considered that these provisions [28] 'should be interpreted in the light of other provisions of Community law, in particular Article [12] of the Treaty'. [29] It went on to state that '[i]n

24 — *Grzelczyk*, cited in footnote 16, at paragraph 39 of the judgment.

25 — Ibid., at paragraph 44 of the judgment.

26 — *D'Hoop*, cited in footnote 18, at paragraph 35 of the judgment.

27 — Ibid. at paragraphs 38 and 39 of the judgment.

28 — The Court in paragraph 60 of its judgment uses the term 'this principle', though it appears from the context that Articles 2 and 5 are the subject of this consideration.

29 — *Collins*, cited in footnote 18, at paragraph 60 of the judgment.

view of the establishment of citizenship of the Union and the interpretation in the case-law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article [39(2)] of the Treaty – which expresses the fundamental principle of equal treatment, guaranteed by Article [12] of the Treaty — a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State'. [30] As in *D'Hoop*, the Court recognised that the Member States may lay down conditions in order to ensure that there is a genuine link between an applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographical employment market in question. A residence requirement could be considered to be appropriate for this purpose, but must not go beyond what is necessary to attain that objective. In particular, its application must rest on clear criteria which are made known in advance and provision must be made for judicial protection. [31]

27. Finally, in *Trojani*, a French national working at a Salvation Army hostel in Belgium in return for board and lodging and some pocket money was refused the Belgian minimex benefit on the same grounds as *Grzelczyk*: he did not have Belgian nationality and could not benefit from the application of Regulation No 1612/68. In this case the Court found, that the applicant could not derive a right of residence from Article 18(1) EC in conjunction with Directive 90/364 due to his lack of resources. However, as he was in possession of a residence permit and was lawfully resident in Belgium, he was entitled to benefit from the fundamental principle of equal treatment as laid down in Article 12 EC. The Court therefore concluded that, in so far as national legislation does not grant a social assistance benefit to EU citizens from other Member States, who reside lawfully within its territory even though they satisfy the conditions required of nationals of that Member State, this constitutes discrimination on grounds of nationality prohibited by Article 12 EC. [32]

C — Citizenship and social benefits: overall picture

28. If these judgments are viewed together, a number of principles emerge in relation to EU citizenship as such and, subsequently, to the entitlement of EU citizens to non-contributory benefits of a social nature. By placing emphasis on the fundamental character of EU citizenship, the Court makes clear that this is not merely a hollow or symbolic concept, but that it constitutes the basic status of all nationals of EU Member States, giving rise to certain rights and privileges in other Member States where

30 — Ibid., at paragraph 63 of the judgment.

31 — Ibid., at paragraphs 67 to 72 of the judgment.

32 — *Trojani*, cited in footnote 18, at paragraph 44 of the judgment.

they are resident. In particular, EU citizenship entitles nationals of other Member States to equal treatment with nationals of the host Member State in respect of situations coming within the substantive scope of Community law. Pursuing studies in another State than that of which the EU citizen is a national cannot of itself deprive him of the possibility of relying on Article 12 EC. [33] As the cases described above make clear, various social benefits which Member States previously granted to its nationals and to economically active persons under Regulations Nos 1612/68 or 1408/71 now have been extended to EU citizens who are lawfully resident in the host Member State. I refer to the child-raising benefit in *Martínez Sala*, the minimex benefit in *Grzelczyk* and *Trojani* and the tideover allowance in *D'Hoop*. In these cases the benefits were covered by existing Community regulations and therefore clearly were within the scope *ratione materiae* of the Treaty.

29. In contrast, it is interesting to note that in *Collins*, the Court did not place the jobseeking allowance claimed by the applicant explicitly within the scope *ratione materiae* of the Treaty. Rather, in the context of interpreting the provisions in Regulation No 1612/68 on access to employment in other Member States, it used the concept of citizenship to draw it within the scope of the Treaty: 'in view of the establishment of citizenship of the Union and the interpretation in the case law of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article [39(2)] EC ... a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State.' In other words, it would appear that citizenship itself may imply that certain benefits can be brought within the scope of the Treaty, if these allowances are provided for purposes which coincide with objectives pursued by the primary or secondary Community legislation.

30. It is also clear from the case-law that entitlement by lawfully resident EU citizens to social benefits in these situations is not absolute and that the Member States may subject eligibility to these benefits to certain objective, i.e. non-discriminatory, conditions in order to protect their legitimate interests. In the two cases involving benefits which were aimed at assisting the beneficiary to gain access to the employment market, *D'Hoop* and *Collins*, the Court recognised that the Member States may impose requirements to ensure that the applicant has a real link with the relevant geographical employment market. These requirements must be applied in such a way that they comply with

33 — *Grzelczyk*, cited in footnote 16, at paragraph 36 of the judgment.

the basic Community principle of proportionality.

31. As indicated, an EU citizen must also be lawfully resident in the host Member State in order to be eligible for social benefits. Under Directives 90/364 and 93/96, the EU citizen or student must possess sufficient resources to avoid becoming a burden on the public finances of the host Member State and he must be adequately insured against sickness costs. Here, too, these limitations and conditions must be applied in compliance with the general principles of Community law, in particular the principle of proportionality. [34] In *Grzelczyk* the Court thus held that the condition that an EU citizen must not become an unreasonable burden on the public finances of the host Member State did not preclude him, in the given circumstances, from being entitled to a social benefit. Neither, for that matter, did the fact that Article 3 of Directive 93/96 excludes students from entitlement to maintenance grants preclude him from receiving the minimex benefit. The notion of 'unreasonable burden' is apparently flexible and, according to the Court, implies that Directive 93/96 accepts a degree of financial solidarity between the Member States in assisting each other's nationals residing lawfully on their territory. As the same principle is at the basis of the conditions imposed by Directive 90/364, there is no reason to presume that this same financial solidarity does not apply in that context, too.

32. The question arises as to what is meant by the term 'a degree' of financial solidarity. Clearly the Court does not envisage the Member States opening up the full range of their social assistance systems to EU citizens entering and residing within their territory. To accept such a proposition would amount to undermining one of the foundations of the residence directives. It would seem to me that this is a further reference to the observance of the principle of proportionality in applying the national requirements in respect of eligibility for social assistance. On the one hand, the Member States are entitled to ensure that the social benefits which they make available are granted for the purposes for which they are intended. On the other hand, they must accept that EU citizens, who have been lawfully resident within their territory for a relevant period of time, may equally be eligible for such assistance where they fulfil the objective conditions set for their own nationals. In this respect, they must ensure that the criteria and conditions for granting such assistance do not discriminate directly or indirectly between their own nationals and other EU citizens, that they are clear, suited to attaining the purpose of the assistance, are made known in advance and that the application is subject to judicial review. [35] To this I would add that it should also be possible to apply them with sufficient flexibility to take account of the particular individual circumstances of applicants,

34 — *Baumbast*, cited in footnote 21, at paragraph 91 of the judgment.

35 — *Collins*, cited in footnote 18, at paragraph 72 of the judgment.

where refusal of such assistance is likely to affect what is known in German constitutional law as the 'Kernbereich' or the substantive core of a fundamental right granted by the Treaty, such as the rights contained in Article 18(1) EC. It is interesting to note that this principle has been laid down in Article II-112 of the Charter of Fundamental Rights of the Union which is incorporated in the Draft Treaty establishing a Constitution for Europe. [36] This provides that any limitation on the exercise of the rights and freedoms recognised by the Charter must respect the essence of these rights and freedoms. Article II-105 of the Charter guarantees the freedom of EU citizens to move and reside within the territory of the Member States in terms which are essentially identical to Article 18 (1) EC.

33. There has, in other words, been a marked development in EU citizenship (Articles 17 and 18(1) EC) in conjunction with the prohibition of discrimination on grounds of nationality (Article 12 EC) in providing a basis for entitlement to certain social benefits in the Member States in which EU citizens are lawfully resident. As I observed in paragraph 29, where the benefits concerned were required to be explicitly within the scope *ratione materiae* of the EC Treaty, the Court in *Collins* apparently accepted that this is the case if the benefit concerned is provided for purposes which coincide with the objectives of primary or secondary Community law. Persons who have moved to another Member State and have, at least initially, complied with the residence conditions laid down in the residence directives, but have since found themselves in a situation in which they need to apply for financial assistance are, subject to the limitations and conditions laid down by the Community legislature, entitled to such assistance on an equal footing with nationals of the host Member State. These limitations and conditions must be applied in such a way that the final result is not disproportionate to the aims for which they are imposed. Neither may that result amount to a discrimination of the EU citizen which cannot be objectively justified, where that EU citizen finds himself in the same material circumstances as a national of the host Member State and is sufficiently socially integrated in that Member State. In this regard, depending on the nature of the benefits concerned, the Member States may lay down such objective conditions as are necessary to ensure that the benefit is provided to persons who have a sufficient link with its territory.

V — The preliminary questions

A — *The first question: citizenship and maintenance assistance*

34. The first question referred by the High Court is aimed at ascertaining whether

36 — CIG 87/04 of 29 October 2004, REV 2.

financial support provided by the Member States to students to assist them with maintenance costs continues to fall outside the scope of the application of the EC Treaty for the purposes of Article 12 EC, in view of the addition of Article 18 EC to the EC Treaty and in view of the developments in the field of education, since the Court gave its judgments in *Lair* and *Brown*.

35. Bidar observes, first, that he should be regarded as an EU citizen student who resided lawfully in the United Kingdom for more than three years before his courses commenced. Consequently, he is not in the position of an EU national falling within the ambit of Directive 93/96. As Community competence has been extended to the field of education, the material scope of the Treaty is not restricted to matters related to access to education, but also covers matters related to the encouragement of student mobility, including the provision of assistance with maintenance costs. He states that *Grzelczyk* confirms that the Court's judgment in *Brown* has been overtaken by these developments in Community law. Even if he is considered as falling within the scope of Directive 93/96, Bidar observes that the conditions imposed by that directive are not absolute and must be applied in accordance with the general principles of Community law, in particular the principle of proportionality. In this respect he points out that his education is already very much bound up with the United Kingdom education system. Finally, he submits that it is artificial to make a distinction between assistance with tuition fees on the one hand and maintenance grants and subsidised loans on the other, as denial of access to either constitutes an obstacle for students to the enjoyment of free movement.

36. As to Bidar's personal status the United Kingdom Government points out that, before the national court, he relied on Directive 93/96 and as such he cannot be regarded as being 'settled' within the United Kingdom. The German Government adds that by applying for a loan even before commencing his studies, Bidar deprived himself of the possibility of acquiring the right of residence under Directive 93/96 and of invoking Article 18 EC in conjunction with Article 12 EC.

37. All Member State Governments having submitted written observations and the Commission consider that financial assistance with maintenance costs provided to students continues to fall outside the scope of application of the EC Treaty. Various arguments were advanced in support of this assertion, e.g. the introduction of Article 149 EC which recognises the responsibility of the Member States for the content of teaching and the organisation of education systems. According to them this includes systems of student support. They point out that the right of residence provided for in Article 18 (1) EC is subject to limitations and condi-

tions laid down in the Treaty and the measures adopted to give it effect. Article 3 of Directive 93/96 excludes a right of migrant students to maintenance grants which, in their view, was confirmed by the Court in *Grzelczyk*. Reference was also made to Directive 2004/38 on free movement and residence within the territory of the Member States [37] which must be transposed by the Member States by 30 April 2006. Article 24 (2) of this directive explicitly provides that prior to acquisition of permanent residence, a right which is obtained after a continued period of five years of legal residence in the host Member State, that State is not obliged to grant maintenance aid for studies consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

38. More generally, the Austrian Government points out that the European Agreement on Continued Payment of Scholarships to Students Studying Abroad, adopted in the framework of the Council of Europe in 1969, is based on the principle that the home state is responsible for the payment of scholarships and that if the host state also were to become responsible in this regard, there would be danger of duplicate payments. Similarly, the Netherlands Government observes that as there is no coordination in this field at Community level, intermingling the home state and host state principles could have disruptive effects. The Danish and Finnish Governments also refer to the possible effects of a negative answer to the first question on their rules for granting maintenance assistance to students.

39. Firstly, I would observe that the answer to the first question of the High Court depends on the factual situation of the case. Although it focuses on whether or not assistance with maintenance costs for students now comes within the ambit of the EC Treaty, it is essential to establish under which set of rules that question must be appreciated. On the one hand, the United Kingdom in particular contends that, as Bidar is a national of another Member State who is in the United Kingdom in order to follow university education, he falls exclusively within the scope of Directive 93/96. Bidar, on the other hand, refers to the fact that he had already been resident in the United Kingdom for three years prior to taking up his studies and that he had also followed his secondary education in the United Kingdom. In that respect he submits that he is in the same factual situation as Ms D'Hoop and must be regarded as an EU citizen who had made use of his right to move to another Member State under Article 18(1) EC. This implies that the question as to his right to a student maintenance loan should be considered under that Treaty provision in conjunction with Article 12 EC. In my view there are strong indications on the basis of the facts

37 — Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 77, as corrected in OJ 2004 L 229, p. 35.

set out in paragraph 5 that Bidar does indeed come within the second category and that he fulfils the conditions laid down in Directive 90/364. However, as it is up to the referring court to establish the facts and thereby determine which set of rules is applicable to the case, I will discuss both options.

40. Article 18(1) EC subjects the rights of EU citizens to move and reside within the territory of the Member States to the limitations and conditions laid down in the EC Treaty and the measures adopted to give it effect. As far as students are concerned, their situation is governed by Directive 93/96. This directive applies to students who have gone to another MemberState to take up a course of studies. In other words, following a course of studies in the host Member State is the reason for them using the rights conferred upon them by Article 18 (1) EC. Students in this situation must meet the conditions already mentioned in paragraph 18 above, particularly in respect of their financial independence. They must not become an unreasonable burden on the public finances of the host Member State nor, according to Article 3 of Directive 93/96, are they entitled to maintenance grants.

41. In *Grzelczyk* the Court confirmed these principles as such, but attenuated their severity in the light of the circumstances of the case at hand. Although barring entitlement to a maintenance grant, it found that the directive was silent as to the possibility of acquiring a social security benefit, such as a minimum subsistence allowance. In addition, though the directive was aimed at avoiding students becoming an unreasonable burden on public finance, the Court considered that this principle was not to be applied in an absolute sense, but must be understood as meaning that in certain cases, such as that of *Grzelczyk* who had run into financial difficulty in his final year of studies, Member States must accept a degree of financial solidarity by supporting each other's nationals.

42. If Bidar is to be regarded as a student coming solely within the ambit of Directive 93/96, it is abundantly clear that Article 3 of the directive presents a considerable barrier for him being eligible for a maintenance grant in the United Kingdom. However, what is at issue is not eligibility for a maintenance grant, but eligibility for a (subsidised) loan to cover maintenance costs. Student loans are not covered explicitly by Article 3 of Directive 93/96 and indeed, in view of the fact that they now have been explicitly excluded by the parallel provision in Directive 2004/38, Article 24(2), it could be inferred that eligibility for such loans is not excluded by Article 3 of Directive 93/96.

43. That being said, the question as to whether students coming from other Mem-

ber States should be eligible for student loans for maintenance costs must be answered by reference to the general principle of Article 1 of Directive 93/96 that in order to obtain the right to residence in the host Member State, students must declare that they possess sufficient resources to avoid becoming a burden on the social assistance system during their period of residence. As the Court stated in *Grzelczyk*, the directive only requires a declaration by the student to that effect at the beginning of his period of residence within the Member State. There are two reasons for querying whether this condition also applies to student loans for maintenance costs. The first is that such loans generally are not part of the social assistance systems of the Member States and indeed, in *Grzelczyk*, the Court made just this distinction. The second is that, although such loans are usually provided at non-commercial conditions and repayment in certain cases is waived, the burden on the public finances resulting from these aspects is smaller than in the case of benefits that do not have to be repaid.

44. Nevertheless, it is clear from the basic condition that students must of themselves possess sufficient resources on arriving in the host Member State, that they are precluded from applying for a (subsidised) loan in respect of maintenance costs. The cumulative effect of loans provided under conditions, such as those of the Student Support Regulations, constitutes a considerable burden on public finance, as is also apparent from the information provided by the national court on this point. [38] This justifies them being treated in the same manner as maintenance grants for the purposes of Article 3 of Directive 93/96.

45. I could, however, envisage an exception to this rule and, indeed, the Netherlands Government also suggested that in certain exceptional circumstances there may be reasons for applying Article 3 leniently. Referring to my earlier observation in paragraphs 31 and 32 that the conditions imposed by Directive 93/96 must be applied in accordance with the general principles of Community law, particularly the principle of proportionality, it must be ensured that the core of the fundamental rights accorded by Article 18(1) EC is respected. For instance, a student who first complied with the basic conditions of the directive may encounter financial difficulties at a later stage of his studies. In such a situation, it would seem to me that the logic of the *Grzelczyk* judgment should apply. Where, according to that judgment, under Articles 18(1) and 12 EC, an EU citizen, as a student, is entitled to a minimum subsistence allowance in his final year of studies on an equal footing with nationals of the Member State if his financial position has changed since he took up his studies, there would be no reason to exclude entitlement of EU citizens in a similar situation under those provisions to the less

38 — See paragraph 70 of this Opinion.

burdensome instrument of a student loan. In such exceptional situations the principle of financial solidarity between the nationals of the Member States entails that once a student has commenced a course of studies in another Member State and has progressed to a certain stage of these studies, that State should enable him to complete these studies by providing the financial assistance which is available to its nationals.

46. The second situation to be considered is based on the presumption that Bidar should not be regarded as a student falling within the scope of Directive 93/96, but as an EU citizen who has exercised his right to move to and reside on the territory of another Member State. This involves examining whether following the introduction of the provisions on EU citizenship and education, the scope of the EC Treaty now extends to financial support provided by the Member States for students' maintenance costs.

47. In its judgments of 21 June 1988 the Court held that in view of the stage of development of Community law at that time, assistance for maintenance and training given to students, who did not enjoy worker or worker-derived status, in principle, falls outside the scope of the E(E)C Treaty for the purposes of Article 12 EC. This was explained by the fact that such assistance is to be regarded, on the one hand, as a matter of educational policy which is not as such included in the spheres entrusted to the Community institutions and, on the other, a matter of social policy which falls within the competence of the Member States in so far as it is not covered by specific provisions of the E(E)C Treaty.

48. After those judgments a number of provisions were added by the Treaty of Maastricht to the EC Treaty on education. Articles 3(1)(q), and 149 EC now provide a basis for Community action in this area. The scope of these provisions is limited. Any action taken by the Community in this field is restricted to promoting cooperation between the Member States in various respects, including the mobility of students and teachers. Harmonisation is excluded explicitly. Though opening the possibility to take certain incentive measures in the field of education, the Treaty provisions in this area are based on the principle that the Member States retain responsibility for the content of teaching and the organisation of education systems.

49. I am not convinced that assistance granted for maintenance costs must still be regarded as falling outside the scope of Community law for the sole reason that such assistance must be regarded as an aspect of the 'organisation of education systems'. What is important in this context is that, although conferring limited powers

on the Community institutions, these provisions do make it possible for the Community itself to adopt measures for facilitating the mobility of students, including the provision of financial assistance with maintenance costs. Not only is educational policy as such therefore now within 'the spheres entrusted to the Community institutions', this also applies to financial measures adopted to facilitate student mobility. In *Grzelczyk* the Court, too, attached importance to these developments since its judgment in *Brown*.[39]

50. The inclusion of these provisions on education is therefore indicative of the fact that the subject of assistance with maintenance costs now falls within the substantive scope of the EC Treaty. Furthermore, it is important that, in comparison with the situation in 1988 under the EEC Treaty, the EC Treaty grants fundamental rights to move and reside within the territory of the Member States not only to economically active nationals of the Member States, but also to nationals of the Member States who are not economically active. Certainly, the exercise of these rights has been made subject to limitations and conditions and to measures adopted to facilitate the exercise of this right. As has repeatedly been emphasised by intervening parties, these include conditions relating to the financial independence of these economically inactive EU citizens. It does not follow from this, however, that social benefits of various kinds, including financial support for maintenance costs, fall by their nature outside the scope of the Treaty. In this respect I need only refer to the case-law on EU citizenship and social benefits, reproduced above. The directives adopted to facilitate the exercise of the rights granted by Article 18(1) EC may lay down rules concerning eligibility for benefits provided by the Member States or even excluding such eligibility, this does not place these benefits outside the scope of the Treaty.

51. Maintenance assistance has long been regarded as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.[40] In *Lair* the Court observed that such assistance is particularly appropriate from a worker's point of view for improving his professional qualifications and promoting his social advancement.[41] In a more general vein, the Court considered in *Echternach and Moritz* that equal treatment as regards benefits granted to members of workers' families contributesto their integration in the society of the host country, in accordance with the aims of the freedom of movement of workers.[42] Where it is acknowledged that such a benefit comes within the scope *ratione materiae* of the EC Treaty for workers and given the rationale of this finding, it would seem to me artificial to

39 — *Grzelczyk*, cited in footnote 16, at paragraph 35 of the judgment.

40 — *Lair* and *Brown*, both cited in footnote 2, at paragraph 24 and paragraph 25 of the judgments respectively.

41 — *Lair*, ibid., at paragraph 23 of the judgment.

42 — *Echternach and Moritz*, cited in footnote 11, at paragraph 20 of the judgment.

exclude the same benefit from the scope of the Treaty for other categories of persons who are now also covered by the Treaty. The question whether these latter categories of persons are entitled to such benefits should be distinguished from the question whether the benefit itself is within the scope of the Treaty.

52. Furthermore, it is important in this regard to point to the development of the case-law described above in respect of the rights adhering to EU citizenship under Article 18(1) EC since the Court's judgment in *Martínez Sala*. Not only are EU citizens entitled to equal treatment with nationals of the host Member State in which they are lawfully resident with respect to matters coming within the scope *ratione materiae* of the Treaty, citizenship itself may provide a basis for bringing certain matters within that scope where the objectives pursued by the national measure correspond with those pursued by the Treaty or secondary legislation as is apparent from the Court's judgment in *Collins*. The Court has already recognised that benefits of the kind at issue in this case contribute to the integration of the recipients in the society of the host Member State in accordance with the aims of free movement of workers. As the provisions on citizenship likewise aim to facilitate the free movement of economically inactive persons, this provides a further reason for considering that they come within the scope *ratione materiae* of the EC Treaty.

53. I therefore conclude that the first question referred by the High Court should be answered in the negative, i.e. that since the introduction of Articles 17 EC et seq. on EU citizenship and in view of the developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses either in the form of subsidised loans or grants, no longer falls outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition of discrimination on grounds of nationality.

B — *The second question: grounds for justifying differential treatment*

54. By its second question the High Court asks the Court which criteria must be applied by the national court in determining whether the conditions governing eligibility for maintenance assistance are based on objectively justifiable conditions not dependent on nationality. This question is based on the premiss that the conditions laid down in the Student Support Regulations in respect of eligibility of EU citizens, who do not enjoy worker status or a status which is derived from a worker, for maintenance assistance, constitute discrimination within the meaning of Article 12 EC.

55. In order to be eligible for maintenance assistance economically inactive EU citizens are required to be 'settled' in the United Kingdom within the meaning of national immigration law. Periods spent receiving full-time education are not taken into consideration for calculating the period of being settled. Settled status must also be demonstrated by the possession of a residence permit. This same condition of 'being settled' does not apply to British nationals. They only need to have been ordinarily resident within the United Kingdom for the three years prior to commencing their studies. I would only remark in this regard that where the eligibility conditions are more cumbersome for EU citizens who are lawfully resident in the United Kingdom than for British nationals, it is quite clear that this amounts to an indirect discrimination on grounds of nationality within the meaning of Article 12 EC. Consequently, it must be considered whether such a difference in treatment can be justified under Community law.

56. Bidar and the United Kingdom, Austrian and German Governments assert that a difference in treatment of this type may be justified by objective considerations which are unrelated to the nationality of the persons concerned and are proportionate to the legitimate aim of the national provisions. The United Kingdom, German, Austrian and Netherlands Governments and the Commission assert further that the Member States are entitled to ensure that there is a real link between the student and the Member State or its employment market or that there is a sufficient degree of integration in society. The Finnish Government refers in this regard to a permanent structural and real link with the society of the Member State of study. The United Kingdom submits that it is legitimate for a Member State to ensure that the parents of students have made or the students themselves are likely to make, a sufficient contribution through work and hence taxation to justify the provision of subsidised loans. Referring to Advocate General Ruiz-Jarabo Colomer's Opinion in *Collins*, the Austrian, German and Netherlands Governments add that the Member States have a legitimate interest in preventing abuse of their student support schemes. As to the proportionality requirement, various Governments and the Commission contend that a minimum period of residence is both necessary and appropriate. In order to determine what is an adequate period, they refer to the period of five years required for permanent residence laid down in Article 16 of Directive 2004/38.

57. I have already had the opportunity in my Opinion of 27 February 2003 in *Ninni-Orasche*[43] to express my views on the circumstances in which EU citizens enjoy equal treatment under Articles 18(1) and 12 EC in respect of obtaining financial support with study costs. The facts of that case were comparable to those of the present case, but

43 — Case C-413/01 *Ninni-Orasche* 2003 ECR I-2144.

differed as to the basis of the right of residence and the personal circumstances of the persons concerned. However, the legal assessment of the grounds of justification for differential treatment is essentially the same.

58. As the Court has held on various occasions [44] and as all parties having submitted written and oral observations state, inequality of treatment can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and it is proportionate to the legitimate aim of the national provisions. In this respect the Court has recognised that it is legitimate for a national legislature to wish to ensure that there is a real link between the applicant for an allowance in the nature of a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and the geographic employment market in question. [45]

59. In both these cases the social benefits, the tideover allowance in the case of *D'Hoop* and the jobseeker's allowance in the case of *Collins*, were aimed at providing financial assistance to the beneficiaries either in the transition from education to employment or them otherwise genuinely seeking employment. In order to ensure that there was sufficient connection with the domestic employment market, the Court considered in *Collins* that a residence requirement is in principle appropriate, but that it must not go beyond what is necessary in order to attain that objective. The criteria used in applying this requirement must be clear, made known in advance and provision must be made for a means of redress of a judicial nature. Where a period of residence is required in order to be eligible, 'the period must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State'. [46] In *D'Hoop* the Court found that the requirement that a school diploma be obtained in Belgium in order to be eligible for the tideover allowance was 'too general and exclusive in nature', as 'it unduly favours an element which is not necessarily representative of the real and effective degree of connection between the applicant for that benefit and the geographic employment market, to the exclusion of all other representative elements'. [47]

60. In the case of maintenance assistance for students, be it in the form of a subsidised loan or a grant, the real link to be established is not primarily with the employment market of the host Member State, although that may be an aspect which may be taken into consideration. Rather, this link is to be found

44 — See e.g. *D'Hoop* and *Collins*, both cited in footnote 18, respectively at paragraphs 36 and 66 of these judgments.

45 — See *D'Hoop* and *Collins*, both cited in footnote 18, respectively at paragraphs 38 and 67 of the judgments.

46 — *Collins*, ibid., at paragraph 72 of the judgment.

47 — *D'Hoop*, ibid., at paragraph 39 of the judgment.

in the degree of affinity which the applicant for this assistance has with the educational system and the degree of his integration into society. [48] It would seem to me that where an EU citizen has followed his secondary education in a Member State other than that of which he is a national, which is more adapted to preparing him for entry to an establishment of higher or tertiary education in that Member State than elsewhere, the link with the education system of the host Member State is evident. In assessing the degree of integration, the individual circumstances of the applicant must necessarily be taken into account. As far as this is concerned, it should be emphasised that the situation of an EU citizen who has come to another Member State as a minor, as the dependant of another EU citizen, must be distinguished from EU citizens who have moved to another Member State as adults making their own choices. The chances that an EU citizen in the situation of Bidar has integrated into society as a young person, having lived there under the legal guardianship of his grandmother, who was already settled in the United Kingdom, and having followed secondary education in the host Member State, surely must be deemed to be greater than EU citizens arriving at later stages of life.

61. Obviously a Member State must for reasons of legal certainty and transparency lay down formal criteria for determining eligibility for maintenance assistance and to ensure that such assistance is provided to persons proving to have a genuine connection with the national educational system and national society. In this respect, and as the Court recognised in *Collins*, a residence requirement must, in principle, be accepted as being an appropriate way to establish that connection under the conditions set out in that judgment and cited in paragraph 59 above. It may be inferred from these conditions that the Court recognises that a residence requirement may be imposed as a starting point of the assessment of the situation of an individual applicant. The fact that it states that the period must not exceed what is necessary for the purpose of enabling the national authorities to satisfy themselves that a person is genuinely seeking work in the domestic employment market, indicates, however, that other factors must be able to be taken into account in that assessment. This is further borne out by its consideration in *D'Hoop* that the single condition applied by the national authorities in that case was too general and exclusive and that no account could be taken of other representative factors. Ultimately, it would appear to me that if the result of the application of a residence requirement is to exclude a person, who can demonstrate a genuine link with the national education system or society, from the enjoyment of maintenance assistance, this result would be contrary to the principle of proportionality.

62. Additional factors which could be taken into account in a case such as the present

48 — Cf. for children of workers, *Echternach and Moritz*, cited in footnote 11 at paragraph 35 of the judgment.

one are the need for ensuring continuity in the education of the applicant,[49] the likelihood that he indeed will enter the national employment market and the possibility that he may not be eligible for maintenance assistance from other sources, such as the Member State of which he is a national as he no longer fulfils the eligibility criteria in that Member State.

63. It may also be recalled in this connection that the Court, in the context of Regulation No 1612/68, has stated that the freedom of workers must be guaranteed in compliance with the principles of liberty and dignity and the best possible conditions for the integration of the Community worker's family in the society of the host country.[50] There is no reason why this general principle should not apply in the context of the free movement of EU citizens as well.

64. All governments intervening in this case and the Commission point out that, according to Article 24(2) of Directive 2004/38, the Member States are not obliged to grant maintenance aid for studies to economically inactive EU citizens prior to acquisition of permanent residence. This status is only achieved after five years of continuous residence in the host Member State. Leaving aside that this directive entered into force on 30 April 2004, i.e. after the facts in the present case arose, and that it must be transposed by 30 April 2006, it would seem to me that in applying this condition, the fundamental rights conferred directly by the EC Treaty on EU citizens must be fully respected. This implies that the considerations set out above in respect of applying a residence requirement in individual cases are valid in respect of the application of a settlement requirement such as that contained in the Student Support Regulations and that account must be taken of all relevant factors in determining whether or not a genuine link exists with the educational system and the society of the host Member State. I do not consider that this amounts to an undermining of the requirement adopted by the Community legislature. Rather it is

49 — *Echternach and Moritz*, ibid., at paragraph 22 of the judgment.

50 — See *Di Leo*, cited in footnote 13, at paragraph 13 of the judgment; *Baumbast*, cited in footnote 21, at paragraph 50 and 59 of the judgment, and Case C-356/98 *Kaba* [2000] ECR I-2623 at paragraph 20.

necessary to ensure that this requirement is applied in conformity with the fundamental provisions of the EC Treaty.

65. The United Kingdom Government contends that it is legitimate for a Member State to ensure that students' parents have contributed sufficiently, or that the students themselves are likely to make a sufficient contribution to the public finances through taxation in order to justify maintenance assistance being granted. This argument suggests that there is a direct or indirect link between the obligation of residents of a Member State to pay taxes and the entitlement to benefits of the kind at issue in the present case. If it is taken to its logical conclusion, this argument implies that if parents have not contributed to taxation or only made a modest contribution, their children would not be eligible for maintenance assistance, whereas students whose parents have contributed significantly would be entitled to such assistance. It does not seem probable that the United Kingdom seriously would accept the social discrimination inherent to this position. Furthermore, as it is loans which are at issue here, it is illogical to require that a person has first contributed to public finances in order to be eligible for a loan which he thereafter must repay even though there is an element of subsidy in the terms for granting this loan. This ground for justification therefore is inherently contradictory

66. Finally, it was submitted by various intervening Governments that the Member States have a legitimate interest in preventing abuse of their student support schemes and in preventing 'benefit tourism'. I do consider that this is indeed a legitimate concern of the Member States, but the manner in which this should be ensured should not be such as to undermine the fundamental rights of EU citizens residing lawfully within their territory. A simple residence requirement is too non-selective for achieving this aim. In my view it can be achieved adequately in the context of establishing whether or not an applicant has a genuine link with the national education system or society as set out above.

67. These considerations lead me to the following conclusion: where the result of the application of a settlement requirement, such as that laid down in the Student Support Regulations, to an EU citizen, who is sufficiently integrated into society in the host Member State, whose education is closely linked to the education system in the Member State and who is in a comparable situation to a national of the host Member State, is to deny that EU citizen access to assistance with maintenance costs, this amounts to an unjustified discrimination within the meaning of Article 12 EC in conjunction with Article 18(1) EC. In those circumstances, the result of the application of such a settlement requirement is not in

proportion with the aim it seeks to achieve, i.e. that maintenance assistance is granted to those who have a genuine link with the national educational system.

68. In the light of the foregoing observations the following answer must be given to the second question. Conditions laid down in national law governing eligibility for assistance with maintenance costs for students must be objectively justified and unrelated to the nationality of EU citizens. In order to determine whether this is the case a national court must ascertain that these conditions are appropriate for establishing a real link between an EU citizen applying for such assistance and the national education system and society. In addition, these conditions must not go beyond what is necessary for achieving that aim.

C — *The third question: temporal effects*

69. The third question concerns the temporal effects of a judgment by the Court finding that assistance with maintenance costs, either in the form of a subsidised loan or a grant, now comes within the scope of the EC Treaty for the purposes of the application of the prohibition of discrimination on grounds of nationality in Article 12 EC.

70. Bidar submits that there is no reason to limit the temporal effects of a judgment in this sense. To the extent that they have addressed this point, the intervening Governments of the Member States have argued that such a limitation should be imposed. The United Kingdom Government points out that temporal limitations on the effects of a judgment are only imposed exceptionally and, in particular, where two conditions are satisfied. Firstly, the Member State must have been led to adopt practices which did not comply with Community law by reason of objective, significant uncertainty regarding the scope of application of Community provisions, to which the conduct of the Community institutions or other Member States have contributed. It submits that a negative answer to the first question fulfils this condition. Secondly, there must be a risk of serious economic repercussions owing, in particular, to the large number of legal relationships entered into on good faith on the basis of rules considered to be validly in force. In this respect the Government refers to the calculation made in the order for reference which shows that the cost involved could amount to GBP 66 million for the academic year 2000/2001. At the hearing it was added to this that following the enlargement of the Union on 1 May 2004, this figure could rise to GBP 75 million per annum.

71. The case-law on this matter is well-settled and was summarised by the Court in *Grzelczyk*. There it stated that it has 'repeatedly held that an interpretation it gives to a provision of Community law clarifies and defines its meaning and scope only as it should have been understood and applied from the time of its entry into force ... . It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict the possibility for any person concerned to rely upon a provision which it has interpreted with a view to calling into question legal relationships established in good faith ... . It is also settled in case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effect of the ruling ... . The Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that both individuals and national authorities had been led into adopting practices which did not comply with Community law by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed ... .'[51]

72. Starting with this latter aspect, I agree with the submissions of the United Kingdom Government, that a negative answer to the first question amounts to a new and unforeseen development in Community law. I would accept in this respect that the Student Support Regulations took account of the state of Community law prior to such a finding by the Court. The answer which I gave to the second question, however, significantly restricts the scope of the answer given to the first question. The figures presented to justify the financial repercussions of a negative answer to the first question appear to be based on the presumption that all EU citizens, who do not qualify under Regulation No 1612/68, would henceforth be eligible for maintenance assistance. It is not exactly clear what the financial impact would be if only those EU citizens who are lawfully resident within the territory of the United Kingdom and have a genuine link with the national educational system and society were to become eligible for such financial assistance. However it cannot be excluded that this interpretation could have wider implications which could go back to the entry into force of the provisions on EU citizenship on 1 November 1993, not only in the United Kingdom, but in all Member States. In the event that the Court finds that the first question must be given a negative answer, I therefore consider that it is justified to limit the temporal effect of such a judgment to legal relationships established as from the date of that judgment, except where legal proceedings have been initiated prior to that date for the purpose of challenging decisions refusing entitlement to assistance with maintenance costs for students.

51 — *Grzelczyk*, cited in footnote 16, at paragraphs 50 to 53.

VI — Conclusion

73. I am, therefore, of the opinion that the Court should give the following answers to the questions referred by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court:

(1) Since the introduction of Articles 17 EC et seq. on EU citizenship and in view of the developments in relation to the competence of the European Union in the field of education, assistance with maintenance costs for students attending university courses either in the form of subsidised loans or grants, no longer falls outside the scope of the application of the EC Treaty for the purposes of Article 12 EC and the prohibition of discrimination on grounds of nationality.

(2) Conditions laid down in national law governing eligibility for assistance with maintenance costs for students must be objectively justified and unrelated to the nationality of EU citizens. In order to determine whether this is the case a national court must ascertain that these conditions are appropriate for establishing a real link between an EU citizen applying for such assistance and the national education system and society. In addition, these conditions must not go beyond what is necessary for achieving that aim.

(3) Article 12 EC may only be relied upon to claim entitlement to assistance with maintenance costs from the date of the judgment of the Court except in cases where legal proceedings were already initiated for the same purpose prior to that date.