# OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 28 June 1988

*My Lords,*

In these proceedings, the Commission applies under Article 169 of the EEC Treaty for a declaration that Belgium has failed to fulfil its Treaty obligations by reason of the manner in which it treats nationals of other Member States except Luxembourg for the purpose of determining the level of government funding and staffing for higher educational institutions other than universities.

The relevant provisions are contained in Article 2 of the Royal Decree of 21 July 1982 as amended by Article 1 of the Royal Decree of 12 July 1984. As so amended, Article 2 provides that only certain categories of foreign students other than Luxembourg nationals will be taken into account for determination of central funding and staffing levels. Of the 10 categories listed in paragraphs (b) to (k) of Article 2 (1) 2 the first nine were narrowly defined (including children or wards of a Belgian national or resident and students who were or whose spouse was working in Belgium) and the 10th in paragraph (k) was a residual category of 'others'. Those falling within paragraph (k), however, would only be taken into account up to a number equal to 2% of Belgian students taken into account for the relevant institution in the previous academic year.

This position was not altered by the Law of 21 June 1985 with which the Court is familiar from the judgment of 2 February 1988 in Case 293/85 *Commission* v *Belgium* ECR 305 and which abolished the specific registration fee (or 'minerval') for certain categories of foreign students. Indeed, Article 64 of that law added to the Law of 7 July 1970, on the general structure of higher education, an Article 9 bis providing expressly that institutions of higher education might refuse to register students ineligible for finance. This provision was not expressly mentioned in the Commission's reasoned opinion sent to the Belgian Government on 25 July 1986 or in its letter of 15 November 1985 seeking Belgium's observations on the alleged infringements, but explicit reference was made to the risk, allegedly borne out in practice, of Community students being refused access to courses at such institutions in Belgium.

The Commission considers that such actual or potential refusal deprives Community nationals who wish to go to Belgium for the sole purpose of studying of a right which

they derive from Article 7 read with Article 128 of the Treaty as interpreted by the Court in Case 293/83 (*Gravier* v *City of Liège* [1985] ECR 593). Furthermore, children of migrant workers may be deprived of rights flowing from Article 12 of Regulation No 1612/68 (Official Journal, English Special Edition 1968-69, p. 45) which provides that 'the children of a national of a Member State who is or who has been employed in another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'. Children of deceased migrant workers retain their entitlement under Article 12 by virtue of Regulation No 1251/70 (Official Journal, English Special Edition 1970, p. 402) which provides in Article 3 (1) that 'the members of a worker's family . . . who are residing with him in the territory of the Member State shall be entitled to remain there permanently . . . even after his death' and in Article 7 that 'the right to equality of treatment, established by Council Regulation (EEC) No 1612/68, shall apply also to persons coming under the provisions of this regulation'.

At no time before or since the Commission lodged its application has Belgium contested the Commission's basic point of view. The Government has merely stated that the law would be changed. It appears that some amendments were made by a Royal Decree of 6 November 1987 and that further amendments are envisaged. It was only at the hearing that the Government, whilst not denying an infringement, suggested that the Commission's attack should be directed, not against Article 2 of the 1982 Decree, but against the provisions authorizing the refusal of ineligible students. If this argument had been admissible, which it is not, I should have rejected it since, as already indicated, the risk of refusal was mentioned in the reasoned opinion.

On the merits, the Commission's claim rests principally on *Gravier* in which the Court held that 'the conditions of access to vocational training fall within the scope of the Treaty' (paragraph 25) and that therefore 'the imposition on students who are nationals of other Member States, of a charge, a registration fee or the so-called "minerval" as a condition of access to vocational training, where the same fee is not imposed on students who are nationals of the host Member State, constitutes discrimination on grounds of nationality contrary to Article 7 of the Treaty' (paragraph 26).

The provisions at issue in this case clearly discriminate on nationality grounds and the application concerns those Belgian institutions of higher education, other than universities, which provide vocational training within the definition given in paragraph 30 of the *Gravier* judgment.

Do the contested provisions affect 'conditions of access' to such training? In *Gravier*, the Court emphasized that 'the questions referred concern neither the organization of education nor even its financing, but rather the establishment of a financial barrier to access to education' (paragraph 18) and that 'educational organization and policy are not as such included in the spheres which the Treaty has entrusted to the Community institutions' (paragraph 19). However, 'access to and participation in courses of instruction and

apprenticeship, in particular vocational training, are not unconnected with Community law' (ibid.). The Court thus draws a distinction between the organization and financing of education and access to it.

The present case is not concerned with a direct financial barrier to access, as in *Gravier* and in Case 152/82 (*Forcheri* v *Belgium* [1983] ECR 2323). However, if the fee cannot be required of the Community student, and is not forthcoming from any other source, it may no longer be economically possible for the educational institution to offer places to Community students once the 2% limit has been reached. The Commission's contention is in essence that, despite the fact that educational organization and policy, including financing, are matters for the Member States, Community law requires that Member States do not adopt arrangements for the financing of vocational training which enable their own nationals to undertake such training without numerical limit but which in practice impose a numerical limit on those nationals of other Member States who may undertake such training.

In the judgment of 21 June 1988 in Case 39/86 (*Lair* v *Universität Hannover* ECR 3161), the Court held that the provision of maintenance and training grants by Member States did not fall within the scope of Article 7 of the Treaty but was rather a matter of educational policy, not as such entrusted to the Community institutions as held in *Gravier*, and of social policy which fell within Member State competence in so far as not specifically covered by other provisions of the Treaty (see the judgment of 9 July 1987 in Joined Cases 281, 283 to 285 and 287/85 (*Federal Republic of Germany and Others* v *Commission* ECR 3203), especially at paragraph 14); and that the *Gravier* principle only covered grants for registration or tuition fees required for access to education (see paragraphs 14 and 15 of the judgment). This ruling was confirmed in the judgment of 21 June 1988 in Case 197/86 (*Brown* v *Secretary of State for Scotland* ECR 3205) concerning the payment by a Member State of both tuition fees and maintenance grants in which the Court held that only the former fell within Article 7 of the Treaty.

There is a distinction between the present case and those of Mrs Lair and Mr Brown. They were not prevented from following their courses by the relevant national rules, although they had to bear some of the cost which the State bore in the case of nationals. The Belgian rules in issue in the present case, however, potentially lead to Community students being completely excluded from courses.

It is arguable that the Belgian rules relate to the financing of education and are therefore not subject to the provisions of Article 7 of the Treaty, not least since *Lair* and *Brown* show that not all arrangements connected with the provision of vocational training have to be the same for non-nationals as for nationals.

In my opinion, however, the 2% limitation is a 'financial barrier to access to education' within the meaning of *Gravier*. If no financial provision is made for Community nationals over and above the 2%, students in excess of that percentage are effectively excluded from access on the basis of their nationality. If a financial barrier making it more difficult for the Community student to accede to vocational training may not be charged, *a fortiori* measures which completely exclude such access are unacceptable. This rule seems to me to be in a different category from the policy as to maintenance grants; financial policies adopted by Member States which affect access to education must not be such as to introduce in practice discrimination against Community nationals on the basis of their nationality. The Commission's principal claim, in my view, is made out.

As to the Commission's second claim, Article 12 of Regulation No 1612/68 provides a right to admission under the same conditions as host State nationals to the types of education it lists, which are not confined to vocational training, for children of migrant workers. Certain categories of such children are not expressly covered by paragraphs (a) to (j) of Article 2 (1) 2 of the 1982 Decree as amended. In particular, there is no provision for children, resident in Belgium, of migrant workers no longer so resident or deceased.

In Case 9/74 (*Casagrande* v *Landeshauptstadt München* [1974] ECR 773), the Court interpreted Article 12 as referring 'not only to rules relating to admission, but also to general measures intended to facilitate educational attendance' (paragraph 4) and deduced from the second paragraph of the article, under which Member States are required to encourage 'all efforts to enable such children to attend these courses under the best possible conditions', that it is 'intended to encourage special efforts, to ensure that the children may take advantage on an equal footing of the education and training facilities available' (*ibidem*).

In my view, Belgium has failed in its obligations flowing from that article in not making specific provision for some of those entitled to benefit thereunder, thus placing them in the residual category of paragraph (k) of the relevant national provision, with the risk that some of them will therefore be refused access to the courses in question.

I therefore consider that the Commission's claim wholly succeeds and that Belgium should pay the Commission's costs.