OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 17 April 1986

My Lords,

The Raad van State of the Netherlands has referred to the Court under Article 177 of the EEC Treaty the question:

'Where a national of Member State A pursues within the territory of Member State B an activity which must in itself be regarded as effective and genuine work within the meaning of the Court's judgment in *Levin* v *Staatssecretaris van Justitie*, can the fact that he claims financial assistance payable out of the public funds of Member State B in order to supplement the income he receives from that activity lead to the conclusion that the provisions of Community law relating to the free movement of workers do not apply to him?'

The question has arisen in proceedings between Mr R. H. Kempf, a national of the Federal Republic of Germany and the Netherlands Staatssecretaris van Justitie, which concern Mr Kempf's right to stay in the Netherlands under Community law as a worker.

The facts stated in the order for reference, briefly, are that Mr Kempf entered the Netherlands on 1 September 1981. He worked from 26 October 1981 to 14 July 1982 as a music teacher at the De Sprankel Foundation in Zwolle. He gave some 12 lessons a week. At that time it seems that he lived with a Dutch national to whom he was either married or with whom he had set up home and by whom he had a child. During the period of his employment he received HFL 984 a month as wages; he also applied for and received supplementary benefit under the Wet Werkloosheidsvoorziening ('WWV') which comes out of public funds and is paid to those who have the status of workers or who are looking for work. Then he became ill and could not work. He received financial assistance from the WWV and also from the Algemene Bijstandswet ('AB'), a form of general assistance not limited to those who are workers. Both these payments come from public funds. In addition, he was granted benefit under the Ziektewet, a form of social security benefit aimed at providing financial assistance to workers who, as a result of temporary incapacity to work owing to sickness or accident, have no income.

On 30 November 1981, whilst he was working, he applied for a residence permit 'to pursue an activity as an employed person'. That application was refused by the police authorities on 17 August 1982; an application for review of that decision was rejected by the Secretary of State by a decision dated 9 December 1982 and on 10 January 1983 Mr Kempf appealed against

that decision. The present reference was registered at the Court on 9 May 1985.

Mr Kempf and the Commission submit that the question referred should be answered in the negative; the Netherlands and the Danish Governments submit that it should be answered in the affirmative.

The question for the Court, in my view, is within a narrow compass — much narrower than some of the arguments have assumed.

The starting point is the Court's judgment in Case 53/81 *Levin* [1982] ECR 1035 where it was held that a worker, for the purposes of the Community's rules relating to the free movement of workers, includes a person who works part-time and who obtains less than the minimum guaranteed remuneration in the sector under consideration, so long as (a) the person pursues 'effective and genuine activities to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary' and (b) what is done constitutes 'an economic activity'.

Whether the definition given in *Levin* is satisfied is in my view a question of fact for the national court, even if any further refinement of the definition constituted a matter of law. In the present case, the Raad van State has clearly accepted that Mr Kempf's employment was an effective and genuine activity and thus not to be regarded as purely marginal and ancillary. On the evidence it was plainly entitled to come to that view. The criticism based on the fact that Mr Kempf worked only 12 hours a week (if that is what 12 lessons amounts to) seems to me to be misplaced. It is not enough simply to take the number of hours actually worked; they must be seen in relation to the normal number of hours worked in a particular sector of employment. It is accepted that Mr Kempf taught almost half of the normal number of classes taught by a full-time teacher, namely 26; that is almost the same proportion as the applicant in the *Levin* case. Such an argument also ignores the amount of time which teachers must spend in preparation.

Accordingly the question is not whether to give 12 lessons is genuine and effective employment or a purely marginal and ancillary activity. That has already been decided.

The sole question is whether the person carrying on such activity is precluded from relying on the provisions of Community law relating to the free movement of workers because he claims (sc. and receives) financial assistance payable out of public funds in order to supplement the income he earns.

In *Levin* the Court said that 'in this regard no distinction may be made between those who wish to make do with their income from such an activity and those who supplement that income with other income, whether the latter is derived from property or from employment of a member of their family who accompanies them'.

It is suggested that the Court thereby intended to limit the category of workers to (a) those who were prepared to make do with what they could earn and (b) those whose income, otherwise insufficient, was supplemented from property or the earnings of a relative.

I do not read the judgment as giving such an exclusive definition. The Court was dealing with the facts of the case where there was income from private property and

it was no doubt possible that the husband would earn something. The essential ruling was that a part-time worker was not deprived of Community rights as a worker merely because he earned less than the minimum guaranteed remuneration in the sector under consideration. As I see it, so long as an effective and genuine economic activity, not being purely marginal and ancillary, is carried out a person would not be barred merely because he received funds from sources other than from property or the earnings of a relative. In this context I can see no valid distinction in principle between a person receiving additional income from property of his own and one receiving a voluntary allowance from a parent or friend or indeed from charitable funds.

Is there any difference where the moneys come from public funds as they certainly do here under the WWV and the AB, whatever the position under the Ziektewet?

The rights conferred by Article 48 are clearly fundamental to the existence of the Community. That Article should not be read restrictively even though a person should not be allowed to abuse it. For a person to seek to go to a Member State other than his own in order to gain a higher form of social security or assistance by the device of a fictitious job, or one which was so insignificant in time that it could not be regarded as the pursuit of genuine and effective activities, would be such an abuse. It does not follow that mere entitlement to and receipt of social security or assistance by a person who has obtained a job enabling him to pursue genuine and effective activities constitutes such an abuse. The right to stay as a worker flows from the taking of such a job; it is not precluded or removed by the fact that under the social security or assistance rules of the Member State in question the person is entitled to and receives financial benefit because he does not earn enough to maintain an adequate (or the generally accepted) standard of living in that Member State. It would not in any event be tolerable, in my view, that a person who could supplement his earned income by private means should qualify as a worker but that a person doing the same job, who was entitled to public social security or assistance, should not. If a person deliberately and for no good reason took a part-time job when he could do a full-time job, that might under national law affect his rights to public funds. It does not prevent him from being a worker.

Entitlement to such financial assistance may raise the question as to whether the person is really engaged in the pursuit of effective and genuine activities because his activities are on such a small scale. It does not, however, follow, as has been argued, that merely because a person is entitled to social security or assistance his job is necessarily 'marginal and ancillary'. Once it is accepted that a person's activities do satisfy the *Levin* test, entitlement to and receipt of such financial assistance is not a barrier to his rights as a worker. If it were otherwise, differences could arise between Member States with different entry points to financial assistance and in particular between those which do and those which do not prescribe a minimum guaranteed remuneration.

This is a case where the person concerned had a job at the time he applied for a residence permit. That has been taken as the relevant time. In view of Article 7(1) of Directive 68/360 (Official Journal, English Special Edition 1968 II at p. 485) it has not been suggested (and in my view rightly not suggested) that if he did acquire rights as a worker, he subsequently lost those rights when he became ill. Whether a person who obtains social security or assistance before he has a job, and to enable him to look for a job, has rights under Article 48 is not a question which arises in this case.

Reference has been made to Cases 249/83 *Hoeckx* v *Openbaar Centrum voor Maatschappelijk Welzijn*, and 122/84 *Scrivner* v *Centre public d'aide social de Chastre* (judgments of 27 March 1985) where it was held that a minimum income benefit constituted a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 (Official Journal, English Special Edition 1968 II at p. 475). Those cases, however, in my view, do not assist directly in the decision in the present case. The plaintiffs there were tacitly treated as being entitled to remain in Belgium under Article 7 of Commission Regulation No 1251/70 (Official Journal, English Special Edition 1970 II at p. 402).

Nor do I consider that the mere fact that a person pursuing genuine and effective activities is entitled to social security or assistance of itself justifies his exclusion or expulsion under Article 48(3) of the Treaty or under Article 2(2) of Council Directive 64/221/EEC (Official Journal, English Special Edition 1963-64 at p. 117).

Accordingly, in my opinion, the question referred falls to be answered on the following lines:

The fact that a national of Member State A (who pursues within the territory of Member State B by way of employment effective and genuine activities of an economic nature to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary) claims and receives financial assistance payable out of the public funds of Member State B in order to supplement the income he receives from that activity does not mean that the provisions of Community law relating to the free movement of workers do not apply to him.

The costs of the parties to the action before the national court are to be dealt with by that court; the costs of Denmark and the Commission are not recoverable.