

OPINION OF ADVOCATE GENERAL

KOKOTT

delivered on 15 December 2005¹

I — Introduction

1. The present case provides an opportunity to clarify the legal position of nationals of third countries who are members of the families of citizens of the Union as regards their access to the labour market within the Community.

3. Against this background the Luxembourg Cour administrative² (hereinafter also ‘the national court’) asks the Court as to the interpretation of Community law, and asks in substance whether the provisions relating to free movement of workers exempt the national of a third country from the requirement to obtain a work permit.

II — Legal framework

A — Community law

2. The case concerns a national of a third country who is married to a Luxembourg national and who lives with her in Belgium near the Luxembourg border. While his wife was attending a vocational training course and professional training in Belgium, he wanted to pursue employed activity in Luxembourg, but the authorities there refused him a work permit.

4. The Community law framework for the present case is Article 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for

1 — Original language: German.

2 — Higher Administrative Court.

workers within the Community (hereinafter ‘Regulation No 1612/68’),³ which provides:

‘Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.’

5. The preamble to Regulation No 1612/68 includes the following:

‘Whereas freedom of movement constitutes a fundamental right of workers and their families; whereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social

advancement, while helping to satisfy the requirements of the economies of the Member States; whereas the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed’ (third recital);

‘Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker’s right to be joined by his family and the conditions for the integration of that family into the host country’ (fifth recital).

6. This is supplemented by Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (hereinafter ‘the Student Directive’).⁴ The second sub-

3 — OJ, English Special Edition 1968 (II), p. 475. Article 11 of Regulation No 1612/68 was repealed and replaced by 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, corrected in OJ 2004 L 229, p. 35; hereinafter ‘Directive 2004/38’). However, this amendment does not take effect until 30 April 2006 and is therefore irrelevant to the facts of the main proceedings.

4 — OJ 1993 L 317, p. 59. Directive 93/96 was repealed and replaced by Directive 2004/38. However, this amendment does not take effect until 30 April 2006 and is therefore irrelevant to the facts of the main proceedings.

paragraph of Article 2(2) of the Student Directive provides:

‘The spouse and the dependent children of a national of a Member State entitled to the right of residence within the territory of a Member State shall be entitled to take up any employed or self-employed activity anywhere within the territory of that Member State, even if they are not nationals of a Member State.’

B — *National law*

7. The national court does not specify which provisions of Luxembourg law are applicable in the main dispute. However, the request for a preliminary ruling indicates that in Luxembourg persons such as Mr Cikotic who are not nationals of a Member State of the European Economic Area require a work permit, and that this may be refused *inter alia* for reasons of labour market policy.⁵

⁵ — It does appear from the file that in the present case the Luxembourg authorities applied in particular the following provisions of national law: Article 27 of the Law of 28 March 1972, as amended (Loi modifiée du 28 mars 1972 concernant (1) l’entrée et le séjour des étrangers; (2) le contrôle médical des étrangers; (3) l’emploi de la main-d’œuvre étrangère) and Article 10 of the Grand-Ducal Regulations of 12 May 1972 as amended (Règlement grand-ducal modifié du 12 mai 1972 déterminant les mesures applicables pour l’emploi des travailleurs étrangers sur le territoire du Grand-Duché de Luxembourg).

III — **Facts and main proceedings**

8. Ms Cynthia Mattern is a Luxembourg national. She is married to Mr Hajrudin Cikotic, whom the national court describes as a ‘Yugoslav national’.

9. In spring 2003 the couple lived together in the municipality of Athus (Aubagne) in Belgium. There Ms Mattern attended a vocational training course⁶ as a family and health care assistant⁷ and professional training. It appears from the file that on 30 June 2003 Ms Mattern received a degree certificate⁸ from her Belgian vocational college. From 15 July 2003 onwards she was in possession of a contract for employment on a permanent basis with a company in Pétange in the Grand Duchy of Luxembourg, although exactly when this contract was entered into is not clear.

10. Also in spring 2003 Mr Cikotic, while in Belgium, sought employment in Luxem-

⁶ — It appears from the file that this was professional training as a care assistant (aide soignante) undertaken from March to June 2003.

⁷ — Formation d’auxiliaire familiale et sanitaire à l’enseignement secondaire professionnel.

⁸ — Certificat de qualification de sixième année de l’enseignement secondaire professionnel, issued on a temporary basis on 30 June 2003 in Aubagne (Athus) by the Athénée Royal Athus.

bourg. On 18 March 2003⁹ a company in Ernster in the Grand Duchy of Luxembourg issued a declaration of employment in respect of Mr Cikotic and at the same time applied for a work permit for him.¹⁰

Belgium, although Ms Mattern is now a private sector employee in Luxembourg.¹²

11. By decision dated 14 July 2003 the Luxembourg Minister for Work and Employment¹¹ refused to grant Mr Cikotic a work permit, because a sufficient number of unqualified persons seeking work were registered with the Luxembourg employment authorities and citizens of Contracting States of the European Economic Area were to be given priority of access to available jobs. In addition the employer had not registered the job in question as being available and since 17 March 2003 had been filling it (with Mr Cikotic) unlawfully.

IV — Request for a preliminary ruling and proceedings before the Court

14. On 11 February 2005 the Luxembourg Cour administrative stayed the proceedings and referred the following question to the Court for a preliminary ruling:

12. Ms Mattern and Mr Cikotic appealed against the refusal to the administrative courts, and claimed in particular that there had been an infringement of Community law. At the moment the proceedings are pending on appeal before the Luxembourg Cour administrative.

13. So far as is known, Ms Mattern and Mr Cikotic continue to live together in Athus in

‘Do the Community rules concerning freedom of movement for workers apply to the situation of a national of a third country married to a Community national who has attended a vocational training course and professional training in a Member State other than her own, and may therefore the non-Community spouse be exempt from the requirement to obtain a work permit on the basis of rules guaranteeing to Community nationals and members of their families who are third country nationals the right to freedom of movement as workers?’

9 — The date the declaration was lodged with the Luxembourg employment authorities (Administration de l’Emploi).

10 — Déclaration d’Engagement tenant lieu de demande en obtention du permis de travail.

11 — Ministre du Travail et de l’Emploi.

12 — See the undisputed statements in the plaintiffs’ written pleadings before both the courts in the main proceedings.

15. Before the Court the German and United Kingdom Governments and the Commission made written submissions.

17. Apart from any specific rights under, for example, Association Agreements,¹³ as the law stands a national of a third country has no *direct right under Community law* to access to the labour market in any Member State.¹⁴

V — Analysis

16. By its request for a preliminary ruling the national court asks essentially whether a national of a third country may be prevented from taking up and pursuing an activity as an employed person in a Member State where:

- the third country national is married to a national of the Member State in question;
- in a different Member State his wife has attended a vocational training course and professional training;
- both spouses live together in that other Member State.

18. However, he may have a *derived right* to take up and pursue an activity as an employed person in a Member State if his wife or child works there as a migrant worker (Article 11 of Regulation No 1612/68). The same applies for the spouse or child of a citizen of the Union who is living in that Member State as a student in exercise of his right to free movement (second paragraph of Article 2(2) of Directive 93/96).¹⁵

13 — For example, Article 28 of the Agreement on the European Economic Area (OJ 1994 L 1, p. 3) provides for a comprehensive extension of free movement of workers throughout the EEA; for Swiss nationals the applicable agreement is the bilateral Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons (OJ 2002 L 114, p. 6). A less extensive measure is the Agreement establishing an Association between the European Economic Community and Turkey (OJ 1977 L 361, p. 1) and the implementation measures for it in Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association (see *inter alia* Article 12 of the Association Agreement and Article 6 of Decision No 1/80).

14 — For recent developments in this area, see for example the Commission Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities COM(2001) 386 final (OJ 2001 C 332 E, p. 248); for future development see also Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), and in particular Articles 11 and 14 thereof.

15 — A corresponding provision having horizontal effect shall come into force on 30 April 2006, namely Article 23 of Directive 2004/38 for family members of citizens of the Union. This provision will replace both Article 11 of Regulation No 1612/68 and the second paragraph of Article 2(2) of Directive 93/96.

19. In discussing these provisions I shall not consider in any further detail entry and residence rights, or the issue of abuse of Community law. The information available gives no indication that Mr Cikotic is resident in the Community illegally, or that the marriage is a sham, or that Mr Cikotic and Ms Mattern's choice of Belgium as their residence is a sham.

1612/68 if his wife Ms Mattern, a Luxembourg national who attended professional training in Belgium, may be regarded as an employed person (worker) for the purposes of that provision.

A — *Derived right to take up and pursue an employed activity under Article 11 of Regulation No 1612/68*

20. The first possibility is that Mr Cikotic has a derived right of access to the labour market under Article 11 of Regulation No 1612/68, to which the national court expressly refers in its reference for a preliminary ruling. Mr Cikotic can rely on this provision if he falls within its personal and territorial scope of application.

22. According to the Court's case-law, the concept of worker, within the meaning of Article 39 EC and of Regulation No 1612/68, has a specific Community meaning and must not be interpreted narrowly.¹⁶

23. The essential feature of an employment relationship is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.¹⁷

24. Neither the *sui generis* nature of the employment relationship under national law,

1. Personal scope of application: spouse of an employed person

21. Mr Cikotic is within the personal scope of application of Article 11 of Regulation No

16 — Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15; and Case C-109/04 *Kranemann* [2005] ECR I-2421, paragraph 12. See also Case 75/63 *Hoekstra (née Unger)* [1964] ECR 177, p. 184 et seq.; Case 53/81 *Levin* [1982] ECR 1035, paragraphs 11 and 13; Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraph 16; Case 344/87 *Bettray* [1989] ECR 1621, paragraph 11; Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 14; Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 13; and Case C-188/00 *Kurz* [2002] ECR I-10691, paragraph 32.

17 — See *Lawrie-Blum*, paragraph 17; *Bettray*, paragraph 12; *Bernini*, paragraph 14; *Meeusen*, paragraph 13; *Kurz*, paragraph 32; *Collins*, paragraph 26; *Trojani*, paragraph 15; and *Kranemann*, paragraph 12 (all cited above, footnote 16).

nor the level of productivity of the person concerned, the origin of the funds from which the remuneration is paid or the limited amount of the remuneration can have any consequence in regard to whether or not the person is a worker for the purposes of Community law.¹⁸ Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a worker.¹⁹

25. Consequently, a person engaged in preparatory training in the course of occupational training must be regarded as a worker if the training period is completed under conditions of genuine and effective activity as an employed person.²⁰

26. On the information available it is not possible to determine conclusively whether Ms Mattern fulfils all of these criteria. In any event, in preliminary reference proceedings under Article 234 EC the Court has no jurisdiction to give a ruling on the facts in the main proceedings or to apply the rules of Community law which it has interpreted to

national measures or situations.²¹ Instead, it is for the national court to make the necessary findings on this point.

27. Since a training period completed in the context of occupational training is intended above all to develop occupational aptitude, the national court is entitled, when assessing the genuine and effective nature of the services in question, to examine whether the person concerned has completed a sufficient number of hours in order to familiarise himself with the work.²²

28. In addition, the national court will have to determine whether Ms Mattern received any remuneration for her professional training, even if only of a limited amount. Only if she did can she be regarded as an employed person (worker).

29. Ultimately, whether Mr Cikotic comes within the personal scope of application of

18 — *Levin*, paragraph 16; *Lawrie-Blum*, paragraphs 20 and 21; *Betray*, paragraphs 15 and 16; *Kurz*, paragraph 32; *Trojani*, paragraph 16; and *Kranemann*, paragraph 17 (all cited above, footnote 16).

19 — *Betray*, paragraph 13; *Bernini*, paragraph 14; *Meeusen*, paragraph 13; *Collins*, paragraph 26; *Trojani*, paragraph 15; and *Kranemann*, paragraph 12 (all cited above, footnote 16).

20 — *Bernini*, paragraph 15; see also *Lawrie-Blum*, paragraphs 19 to 21; and *Kranemann*, paragraph 13 (all cited above, footnote 16).

21 — See the consistent case-law of the Court, and for a recent judgment see Joined Cases C-211/03, C-299/03, and C-316/03 to C-318/03 *HLH Warenvertriebs* [2005] ECR I-5141, paragraph 96.

22 — *Bernini* (cited above, footnote 16), paragraph 16.

Article 11 of Regulation No 1612/68 depends on the findings the national court makes.

material time (spring 2003)²⁵ Ms Mattern was attending a vocational training course and professional training there, and that at the same time Mr Cikotic was seeking access to the labour market not in *that* Member State but in *another* Member State, namely Luxembourg.

2. Territorial scope of application: place of the activity

30. Mr Cikotic is within the territorial scope of application of Article 11 of Regulation No 1612/68 if his wife, Ms Mattern, is pursuing an activity as an employed person²³ 'im Hoheitsgebiet eines Mitgliedstaats'²⁴ (in the territory of a Member State) and he wants to take up any activity as an employed person within the territory 'of that same State'.

31. The main features of the present case are that the married couple, Mr Cikotic and Ms Mattern, live together in Belgium, that at the

32. Article 11 of Regulation No 1612/68 does not apply in such circumstances, because its wording requires the place of the income-earning activity of the employed person who comes from within the Community and of that of his spouse who is a national of a third country to be *in the same Member State* (within the territory of 'that same State'). The Governments who participated in the proceedings and the Commission made this point too.

33. The right conferred by Article 11 of Regulation No 1612/68 on family members of migrant workers to pursue employed activity is not a direct right to free movement. As with the other provisions in Articles 10 to 12 of Regulation No 1612/68, it benefits *the migrant worker* whose family includes a national of a third country as a spouse or dependent child. These provisions form part of a legislative scheme intended to eliminate all obstacles to the mobility of *migrant workers*, in particular as regards their right to be joined by their families and

23 — The other possibility mentioned in Article 11 of Regulation No 1612/68, namely self-employed activity, is not relevant in the present case.

24 — Equivalent wording is found in the French, Italian, Portuguese and Dutch language versions. By contrast, the Danish, English, Finnish, Swedish and Spanish language versions of Article 11 of Regulation 1612/68 refer to the pursuit of an activity in the territory of 'another' Member State.

25 — In that connection it is to be recalled that in spring 2003 Mr Cikotic was in Belgium while seeking work in Luxembourg, and that on 18 March 2003 a Luxembourg company applied to the authorities there for a work permit for him. The refusal by the Luxembourg Minister for Work and Employment was dated 14 July 2003.

the conditions for the integration of those families into *their host country*.²⁶

improvement of living conditions and the promotion of social advancement to which this recital also refers may frequently be best achieved if not only the migrant worker but also the co-habiting spouse contributes to the maintenance of the family with his or her income.

34. Thus, the aim of Article 11 of Regulation No 1612/68 is simply to realise the right of *migrant workers* to freedom of movement pursuant to Article 39 EC, and in doing so to protect their and their families' right to a family life, as expressed in Article 8 of the European Convention on Human Rights²⁷ and now also in Article 7 of the Charter of fundamental rights of the European Union.²⁸ It is against this background that the description of free movement as a 'fundamental right of workers and their families' in the third recital to Regulation No 1612/68 must also be understood. The

35. The consequence of this aim of integration is that members of migrant workers' families do not have a right to pursue employed activity anywhere in the Community, but only in the Member State in which the migrant worker is working.

36. Clearly, the ideal situation of the migrant worker and his family members finding accommodation, work and education in the same place is not always attainable. In order best to ensure their integration into the host State notwithstanding that, it may be necessary for the members of the migrant worker's family to seek suitable work in areas close to the family home.

37. This necessity is recognised in the wording of Article 11 of Regulation No 1612/68: the migrant worker's spouse and children have the right to pursue any activity as an employed person 'throughout the

26 — See the fifth recital of Regulation No 1612/68. As regards the importance of family life for the purposes of the provisions relating to free movement of workers, see also Case C-157/03 *Commission v Spain* [2005] ECR I-2911, paragraph 26; Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 53; Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraphs 38, 39 and 42; Case C-356/98 *Kaba* [2000] ECR I-2623, paragraph 20; and Case C-308/89 *Di Leo* [1990] ECR I-4185, paragraph 13.

27 — European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

28 — OJ 2000 C 364, p. 1. Although the Charter of fundamental rights does not yet have binding legal effect comparable to that of primary law, it does at least, as a legal reference, provide information on the fundamental rights guaranteed by the Community legal order. See my Opinions in Case C-540/03 *Parliament v Council*; case pending before the Court, paragraph 108, and in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, footnote 83; to the same effect, see the Opinion of Advocate General Poiares Maduro in Case C-181/03 P *Nardone v Commission* [2005] ECR I-199, paragraph 51; the Opinion of Advocate General Mischo in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 126; the Opinion of Advocate General Tizzano in Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 28; and the Opinion of Advocate General Léger in Case C-353/99 P *Council v Hautala* [2001] ECR I-9565, paragraphs 82 and 83; more hesitantly, see also the Opinion of Advocate General Alber in Case C-63/01 *Evans* [2003] ECR I-14447, paragraph 80.

territory' of the host State, that is including places other than where the family home is and where the migrant worker works.

the Grand Duchy of Luxembourg instead of having to commute to a more distant Belgian city such as Brussels or Namur.

38. Admittedly, in border regions it may frequently be easier to find suitable work in a neighbouring Member State than 'throughout the territory' of the host State. For example, when in Salzburg it may be more complicated to go to Vienna than to go to neighbouring Upper Bavaria (in Germany), and the distance from Thionville (in France) to Luxembourg is significantly less than the distance to Paris or Marseille. It is indeed in the area around the borders between Belgium, Luxembourg, France and Germany that frontier workers²⁹ have become a widespread phenomenon. Athus in Belgium, where Mr Cikotic and Ms Mattern live together, is in the immediate vicinity of the Luxembourg border. From there it is only approximately 47 kilometres to the seat of Mr Cikotic's potential employer in Ernster, Luxembourg.³⁰ Accordingly, it would certainly promote the integration of Ms Mattern's and Mr Cikotic's joint family life in Belgium if Mr Cikotic were able to work in

39. However, as Community law presently stands Article 11 of Regulation No 1612/68 does not confer on nationals of third countries a right to such opportunities to pursue employed activity *across intra-Community borders*. The Community legislature did not confine the persons concerned to pursuing employed activity strictly in the place where the migrant worker worked, but extended the right to the whole of the territory of the host Member State — for the purpose of promoting integration and increasing the probability that appropriate employment is found. However, it is apparent that at least so far it has not decided to extend the right of family members to pursue an employed activity beyond the borders of the host Member State, not even only to border regions near to the family home of the migrant worker.

40. Accordingly, as Community law stands at present:

29 — Article 1(f) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, corrected at OJ 2004 L 200, p. 1) defines 'frontier worker' as 'any person pursuing an activity as an employed or self-employed person in a Member State and who resides in another Member State to which he returns as a rule daily or at least once a week'; see also Article 1(b) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

30 — According to www.viamichelin.de and www.map24.de, each visited most recently on 9 November 2005, this trip takes about 36 minutes by car, of which about 21 minutes (35 kilometres) are spent on major roads.

Article 11 of Regulation No 1612/68 does not confer on a national of a third country a right to take up activity as an employed person in a Member State other than the one in which his spouse is pursuing employed or self-employed activity in exercise of her right as a national of a Member State to free movement.

3. Subsequent changes in the facts of the present case following the refusal of the work permit

any activity as an employed person throughout the territory of 'that same State').

41. In case national procedural law permits the national court to take into account changes in the circumstances of the present case *after* the Luxembourg Minister for Work and Employment issued the refusal decision,³¹ in other words after 14 July 2003, the following supplementary points should be made.

44. The fact that that Member State is Ms Mattern's home Member State does not gainsay this.

42. It appears from the file that from 15 July 2003 onwards Ms Mattern was in possession of a contract for employment on a permanent basis with an undertaking in Pétange in the Grand Duchy of Luxembourg and has been employed in Luxembourg in the private sector since then.

45. Of course, Community law generally does not apply to purely domestic cases.³² However, if the individual case has a link to Community law, in particular because a person has exercised his right to freedom of movement, Community law is applicable also against the Member State of which that person is a national.³³ The underlying reason for this is that nationals of a Member State would be discouraged from exercising their right to freedom of movement if doing so would preclude them from relying on Community law against their home Member State in the same way as nationals of other Member States.

43. Thus, considering the facts as of today Mr Cikotic seeks access to the labour market *in the same Member State* as that in which his wife pursues an employed activity, and accordingly on the wording of Article 11 of Regulation No 1612/68 falls within its territorial scope of application (taking up

46. Accordingly, if the national court holds that Ms Mattern satisfies the definition of a

31 — This may be the point of the reference to the judgment in *Kraus* (cited below, footnote 33) in the penultimate paragraph of the order making the reference, in which reference is made to Ms Mattern's professional career 'in [her] country', that is to the possibility of her returning to the Luxembourg labour market.

32 — Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, paragraphs 16 and 17; Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3762, paragraphs 23 and 24; and Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraphs 16 and 21.

33 — Case C-19/92 *Kraus* [1993] ECR I-1663, paragraphs 15 and 16; Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 30; and Case C-224/02 *Pusa* [2004] ECR I-5763, in particular paragraph 17.

migrant worker,³⁴ she is a person who has exercised her right under Article 39 EC to free movement and thus falls within the scope of application of Community law.

spouse and children not only rights of entry and residence³⁷ but also a right to work in the same Member State in which the migrant worker works. Therefore, where the migrant worker returns to the labour market of his home Member State the members of his family must have a right to work there too, under Article 11 of Regulation No 1612/68.

47. This reasoning applies also in relation to the derived rights of members of migrant workers' families as set out in Articles 10 to 12 of Regulation No 1612/68.³⁵ This is because, as already stated,³⁶ these derived rights ultimately promote the mobility of migrant workers and protect their family life.

49. That Ms Mattern and Mr Cikotic are entitled to carry on living in the home they share in Belgium despite any employed or self-employed activity they pursue in Luxembourg follows, so far as Ms Mattern is concerned, from her right as a citizen of the Union to free movement under Article 18 EC,³⁸ and, so far as Mr Cikotic is concerned, by virtue of a derived right of residence under Article 1(1) in conjunction with Article 1(2)(a) of Directive 90/364.

50. In summary:

48. Accordingly, in order best to guarantee the mobility of a migrant worker — including his right to return to the labour market in his home Member State — and in particular to enable him to maintain his family life, it is necessary to confer on the migrant worker's

Where a worker who has exercised his right to freedom of movement returns to the

34 — See above, paragraphs 22 to 28.

35 — Thus, the Court has already held that it is possible to rely on Community law as regards entry and residence of a national of a third country if the national of the third country is married to a citizen of the Union who is returning to his home country: see Case C-370/90 *Singh* [1992] ECR I-4265, paragraphs 19 to 23, and Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 54.

36 — See above, paragraphs 33 ff.

37 — *Singh* (cited above, note 35), paragraphs 19 to 23, and *Akrich* (cited above, note 35), paragraph 54.

38 — This right of residence may be restricted under Article 1 of Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26, hereafter 'Directive 90/364'). This Directive was repealed and replaced by Directive 2004/38; however, this amendment does not take effect until 30 April 2006 and is therefore irrelevant to the facts of the main proceedings.

Member State of which he is a national, Article 11 of Regulation No 1612/68 confers on his spouse who is a national of a third country a right to take up any activity as an employed person throughout the territory of that same State.

on the Student Directive, which I shall now consider briefly on a subsidiary basis.

B — Derived right to take up and pursue an employed activity under Article 2(2) of Directive 93/96

51. If the national court should hold that the professional training Ms Mattern attended in Belgium did not satisfy the requirements for being a real and genuine activity, but instead was on such a small scale as to be purely marginal and ancillary, then she could not be regarded as a worker. The same would apply if Ms Mattern did not receive any remuneration for the professional training — not even of a limited amount.³⁹

52. However, this does not by any means take Ms Mattern and Mr Cikotic outside the scope of application of Community law. Instead, it might be possible for them to rely

53. Contrary to what its title suggests, the Student Directive does not apply only to persons attending university or technical college. Instead, its substantive scope of application is engaged wherever a national of a Member State is resident in a Member State other than his home State and is enrolled in a recognised educational establishment for the principal purpose of following a vocational training course there (last clause of Article 1 of Directive 93/96). It follows that a vocational training course such as Ms Mattern's training in Belgium is encompassed by the Student Directive. Furthermore, this corresponds to the purpose of the Student Directive, which is generally to guarantee access by nationals of one Member State to vocational training in other Member States.⁴⁰

54. It is apparent from the second paragraph of Article 2(2) of the Student Directive that as the spouse of a citizen of the Union who is lawfully⁴¹ resident in a Member State for the purpose of receiving vocational training Mr

39 — See above, paragraphs 23 and 28.

40 — Third and fourth recitals, and the last paragraph of Article 1, of Directive 93/96.

41 — Article 1 of Directive 93/96 provides that a student and the members of his family may be denied residence if the student is not able to assure the authorities that he has sufficient resources to avoid him and his family becoming a burden on the social assistance system of the host Member State during their period of residence.

Cikotic is entitled to take up any employed activity anywhere within the territory of that Member State, regardless of his own nationality.

domestic situation. Following the introduction of the general right to freedom of movement (Article 18(1) EC), in moving his residence to a different country a citizen of the Union exercises a right conferred by Community law.⁴³

55. This provision's territorial scope of application is congruent with that of Article 11 of Regulation No 1612/68 ('anywhere within the territory of that Member State'). In addition, as regards the legal position of members of students' families the Student Directive is based on similar considerations to Regulation No 1612/68 and pursues comparable objectives. In particular, the eighth recital of the Directive states that a student's right of residence can only be genuinely exercised if it is also granted to the members of his family. The promotion of family life and the integration of the family into the host Member State are thus important within the framework of the Student Directive too. In the light of this, what has been stated above as regards Regulation No 1612/68 may be applied also to the Student Directive.⁴²

56. Given that Ms Mattern moved abroad, the present case does not concern a purely

57. In addition, Ms Mattern moved to another Member State as a student to receive vocational training. Such residence abroad may also be of advantage to the student's future career in his home Member State.⁴⁴ For example, on returning to his home Member State the student may undergo further training, or may immediately start to pursue professional activity. Therefore, the rights conferred by the Student Directive on Ms Mattern and her spouse may be relied on as against her home State, Luxembourg.⁴⁵

43 — To this effect, see also *D'Hoop* (cited above, footnote 33), in particular paragraphs 8 and 29; *Pusa* (cited above, footnote 33), in particular paragraphs 12, 17 and 21; and Case C-403/03 *Schempp* [2005] ECR I-6421, paragraphs 40 ff. To the opposite effect see Case C-112/91 *Werner* [1993] ECR I-429, paragraphs 16 and 17, although in the context of that case free movement of citizens of the Union and, inter alia, Directives 90/364 and 93/96 were not yet applicable; on this point see also the Opinion of Advocate General Léger in Case C-152/03 *Ritter-Coulais*, case pending before the Court, paragraphs 51 to 62.

44 — See, to the same effect, *Kraus* (cited above, footnote 33), paragraphs 18 ff., in relation to an academic degree obtained abroad.

45 — For the details, see above, paragraphs 44 to 48.

42 — See above, paragraphs 30 to 39.

VI — Conclusion

58. In the light of the foregoing analysis it is suggested to the Court that it should answer the Luxembourg Cour administrative as follows:

- '(1) Article 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community does not confer on a national of a third country a right to take up activity as an employed person in a Member State other than the one in which his spouse is pursuing employed or self-employed activity in exercise of her right as a national of a Member State to free movement.

- (2) Where a worker who has exercised his right to freedom of movement returns to the Member State of which he is a national, Article 11 of Regulation No 1612/68 confers on his spouse who is a national of a third country a right to take up any activity as an employed person throughout the territory of that same State.'