OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 10 MARCH 1976 [1]

Mr President,
Members of the Court,

Both Article 48 (3) of the Treaty of Rome with regard to the movement and employment of wage-earners and Article 56 (1) concerning the right of establishment of the self-employed introduce an exception to the two fundamental principles of freedom of movement of persons within the Community and the prohibition on any discrimination based on nationality. This exception is based on public policy in the wide meaning of the term and enables the Member States to undertake, in respect of foreigners who are Community nationals, measures restricting their right of access to and residence on their territory.

However, the scope of this derogation, which is to be strictly interpreted, cannot be determined unilaterally by any one of these States free from supervision by the Community authorities. In particular there is judicial supervision which is the responsibility of the Court.

Although it may therefore be accepted that in their use of the exception of public policy the national authorities have retained a margin of discretion, this power which the Member States enjoy may only be exercised within *the limits* imposed by Community law and by the decided cases of the Court.

I have recalled the essential grounds of the judgment delivered by the Court more than a year ago in the *Van Duyn* case since the answer to the questions referred for a preliminary ruling to the Court by the Tribunal de première instance of Liège, whose order for reference was confirmed on 22 December 1975 by the Cour d'appel, is governed by the same considerations.

These questions have been referred to the Court in the context of criminal proceedings brought against a French national charged with having entered and resided in Belgium without the authorization of the Minister of Justice in the manner set out by the Royal Decree of 21 December 1965 relating to conditions of entry, residence and establishment for aliens in Belgium.

According to the information contained in the files relating to the national proceedings, the accused has in the past been convicted by French courts for procuring. He has also been suspected of having committed armed robbery. However, it appears that the police enquiry did not result in his being charged with a criminal offence.

In accordance with instructions issued by the Procureur Général of Liège concerning (I quote) 'the suppression of gangsterism and the adoption of measures against international criminals' Jean Royer was detected for the first time on 18 January 1972 in Grâce-Hollogne, in the district of Liège, where his wife ran a café and dance-hall. Royer had entered Belgium in November 1971 and had failed to comply with the formalities for registration in the population registers, as required by Belgian law.

Charged with illegal residence, Royer was informed of an administrative decision of 'expulsion from Belgian territory' coupled with a prohibition on returning. In accordance with this expulsion order Royer moved to Germany.

However, a few weeks later he returned to Grâce-Hollogne. His presence was

1 — Translated from the French.

quickly detected and on 17 April 1972 he was arrested by the gendarmerie and committed to prison. He was set at liberty by an order of the Chambre des mises en accusation of Liège of 10 May but before leaving prison was served with a Ministerial Decree under the third paragraph of Article 3 of the Law of 28 March 1952 on the control of aliens on the ground that 'his personal conduct shows his presence to be a danger to public policy' and that 'he has not observed the conditions attached to the residence of aliens and he has no permit to establish himself in the Kingdom'.

It is relevant to point out that according to the order making the reference, an enquiry carried out some months earlier on Royer's behaviour in Belgium had disclosed nothing discreditable. It appears then that it was solely the information which the Belgian police had on Royer's criminal past which caused them to take the view that Royer's presence constituted a potential danger to public policy.

Be that as it may, the fact is that the criminal proceedings which gave rise to the order for reference were only based on the charge of illegal residence, an offence created by Article 12 (1) of the Law on the control of aliens which also prescribes the penalty for it. This provides: 'The following shall be punished by imprisonment of between one month and one year and by a fine of 100 to 1 000 francs:

(1) an alien who, without the necessary authorization, enters or resides in the country or who, without the required permit, establishes himself albeit temporarily in the Kingdom.'

After this expulsion order Royer apparently did in fact leave Belgian territory. The charges of illegal entry and residence were prosecuted before the Tribunal de première instance. The Ministère Public appealed against the judgment making the reference to the Court and on 22 December 1975 the Cour de Liège simply confirmed in the same terms the questions referred for a preliminary ruling by the court of first instance.

Such are the essential facts which caused the Tribunal correctionnel of Liège to refer questions concerning the interpretation of various provisions of Community law on freedom of movement for workers and the right of establishment.

Whatever may be the complaints levelled against Royer, and in this respect his personality and his convictions in France can hardly be said to operate in his favour, I believe that the Court must simply seek to extract objectively from Community law those elements which are necessary to enable the national court to decide the case before it.

Indeed it is difficult to know in what capacity Royer seeks to claim a right of residence in Belgium. The order making the reference does not supply any precise information in this respect: Royer's counsel submitted to the national court a contract of employment between the accused's wife and the undertaking which owns the establishment of which she is the salaried manageress; this contract provides that the manageress shall be assisted by the members of her family. It is for the national court alone to deduce that Royer may therefore claim either that he is an employed person or that he is the spouse of an employed person. Further, the questions referred by the Tribunal de Liège do not exclude the possibility that Royer may also benefit from the provisions of Article 52 et seq. concerning the right of establishment. However, like the Commission I believe that the questions of interpretation raised must be answered in the same way both as regards freedom of movement for workers and the right of establishment.

Again, like the Commission I find it necessary to rearrange the numerous and detailed questions referred to the Court so as to examine them in a logical order.

I — 1. The references to the provisions of Community law of which the Belgian court seeks an interpretation suggest two hypotheses whereby the position of the person concerned is governed either by the chapter of the Treaty relating to workers, especially Article 48 which was implemented by Regulation No 1612/68 of the Council and by Directive No 68/360 of the Council, or by the chapters relating to the right of establishment and the supply of services, especially Articles 52, 53, 56, 62 and 66 implemented by Directive No 73/148 of the Council.

In both cases we must first examine the basis of the right of residence in the territory of a Member State for nationals of other Member States who benefit from the right of freedom of movement for workers or the right of establishment.

Does this right arise directly from the provisions of the Treaty and, where appropriate, from the Community measures implementing the Treaty or is it only conferred by the residence permit issued by the national authorities of the host State?

The answer to this question is clearly governed by the case-law of the Court. Since the end of the transitional period both Article 48 and Article 52 have been directly applicable as the Court has recognized in particular in the judgments of 4 December 1974 (Case 41/74, *van Duyn* v *Home Office* [1974] ECR 1337) and of 4 July 1974 (Case 2/74, *Reyners* v *Belgium* (1974) ECR 631).

They confer on individuals rights which they may plead in the national courts and which the latter must protect.

The former of these provisions expressly provides the right for workers to move freely in the territory of Member States and to reside there for the purposes of employment.

The right of establishment which opens the way for activities as self-employed persons and allows these to be exercised under the same conditions as for nationals of the Member State, postulates by implication but beyond all doubt the right to enter the territory and to reside there.

In each case the existence of these rights is confirmed in the directives adopted by the Council pursuant to Articles 49, 54 and 63 for the purpose of abolishing restrictions on entry and residence whether for employed or for self-employed persons. Article 10 of Regulation No 1612/68, Article 1 of Directive No 68/360 and Article 1 of Directive No 73/148 extend in more or less identical terms the application of Community law relating to entry and residence in the territory of Member States to the spouse of any person covered by these provisions.

These articles provide that Member States shall grant *the persons referred to the right to enter their territory simply on production of a valid identity card or passport;* they further grant them the right of permanent residence which is merely *proved* by the issue of an administrative document.

Thus Article 1 of Regulation No 1612/68 provides that any national of a Member State, irrespective of his place of residence, 'has the right to take up an activity as an employed person, and to pursue such activity within the territory of another Member State'; Article 10 of that regulation extends the right to 'instal themselves' to the members of the family of the person possessing that right. Article 4 of Directive No 68/360 provides that Member States shall grant 'the right of residence in their territory' to the persons referred to and that this right shall be 'proved' by the issue of a particular residence permit. It is stated in the preamble to Directive No 73/148 that the freedom of establishment can only be fully attained if 'a right of permanent residence is granted to the persons who are to enjoy freedom of

establishment' and that freedom to provide services necessarily entails that the persons providing and receiving services shall be guaranteed 'a right of residence for the time during which the services are being provided'.

Therefore the right of residence which arises directly from the provisions of the Treaty is an individual right attaching to the person of the Community national whether employed or self-employed. This right is in no way subject to the issue by the national authorities of a residence permit which only serves to prove an existing right and cannot be regarded as giving rise to this right. The reservation of public policy and security contained in Article 48 (3) and Article 56 (1) is not a condition precedent to the acquisition of the right of entry and of residence but, in individual and properly justified cases, makes it possible to restrict the exercise of a right deriving directly from the Treaty.

In these circumstances, in so far as they concern Community nationals, national rules may serve no other object than to enable a check to be kept on the presence on the territory of this privileged category of aliens and to ascertain their status as nationals of another Member State when the residence permits are periodically renewed.

What is the effect, in this respect, of the Belgian law relating to supervision of aliens?

I shall first examine the provisions relating to entry and residence of aliens on Belgian territory.

The basic provision is the Law of 28 March 1952, as amended by the Laws of 30 April 1964 and of 1 April 1969.

In principle Article 2 (A) provides that no alien may enter or reside in Belgium unless he is authorized to do so by the Minister of Justice in the manner set out in the Royal Decree, or unless he satisfies certain conditions laid out in particular in international agreements.

Further, by virtue of paragraph C, no alien may *establish himself* in the Kingdom without obtaining a permit from the Minister of Justice.

This article thus establishes a scheme of prior authorization. However the Royal Decree of 21 December 1965, amended in 1969, contains in Chapter III special provisions for nationals of Member States of the European Community which take account of the requirements of Community law.

Under Article 33 of the Decree, for these nationals entry into Belgium is only subject to possession of an official passport or identity card issued by the authorities of the State of which they are nationals.

As regards their establishment in Belgium, Article 39 provides that the 'establishment permit' required by the Law of 28 March 1952 shall be issued to them *as of right.* Therefore issue of this document merely serves to prove the existing right of residence guaranteed to them by Community law.

It is true that Article 38 provides that a registration certificate shall cover their residence in this country for the first three months from their date of entry into Belgium provided that they entered the country lawfully. This certificate is issued by the local administration when they declare their arrival. It may only be extended on one occasion for the same period of three months.

Although it is not prescribed by the Community directives, the requirements of this document may not be regarded as being contrary to the rules contained in the Community directives. It is justified by the practical necessity to reduce the period required for issuing the establishment permit but does not

impose any condition precedent to the exercise of the right of residence which is guaranteed by Community law to the national of another Member State who established himself in Belgium in order to carry out one of the activities referred to in Articles 48 or 52 of the Treaty.

The obligation imposed by Article 15 of the Royal Decree that all aliens must be entered on the population registers at the local administration of their place of residence within eight days of their entry into Belgium if they intend to reside there for a longer period, is based on the provisions of the Law of 2 June 1856 on general censuses and the population registers. In the case of Community nationals it cannot be regarded as a condition precedent to their right of residence. In addition, infringements of this law are merely minor offences. They are punished by mere 'peines de police' (minor penalties in summary proceedings).

In these circumstances the fact that a national of a Member State of the Community failed to comply with this obligation and that he does not possess either a registration certificate or an establishment permit do not suffice to deprive him of the individual right of residence which he holds directly under the Treaty.

Certainly Community law does not prevent Member States from imposing appropriate penalties for failure to comply with national provisions relating to the control of aliens in order to ensure the effectiveness of these provisions. However, in view of the principle of non-discrimination enshrined in Articles 7 and 48 of the Treaty these penalties must not be in excess of those applicable to nationals of the Member State in question where they do not comply with the administrative requirements prescribed for cases of change of residence. In particular so serious a measure as arrest, detention for the purposes of removal or expulsion from the national territory appears to be out of proportion with the infringement with which Royer is charged; it is not a legitimate means of constraint against a person who has merely taken advantage of the right conferred on him by the Treaty to enter the territory of a Member State and to reside there even if that person failed to comply with the formalities concerned with the control of aliens.

Although the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, cannot be regarded as a Community measure whose direct application must be ensured by the national courts, under the supervision of this Court, it should be noted that Article 5 (1) (f) serves, if it were necessary, to confirm the conclusion which I think is inescapable.

2. Nevertheless it must further be examined whether the fact of failure to comply with a requirement of registration under national law constitutes 'personal conduct' which is of such a nature as to justify, on grounds of public policy, a measure such as removal from the territory.

It must be remembered in the first place that under Article 3 (1) of Directive No 64/221 which applies both to employed and to self-employed workers, such measures may be based exclusively on the personal conduct of the individual concerned. Paragraph 2 provides that 'previous criminal convictions shall not in themselves constitute grounds for the taking of such measures'. In the judgments of the Court in the *Bonsignore* case (Case 67/74, *Bonsignore* v *Oberstadtdirektor der Stadt Köln* [1975] ECR 297) and the *Rutili* case (Case 36/75, *Rutili* v *Minister of the Interior* [1975] ECR 1219) the Court ruled that the motive of 'general prevention' justifying the expulsion of a national of a Member State in order to dissuade other aliens from committing crimes similar to that committed by the

party concerned was not compatible with Article 3 of this directive.

A number of criminal convictions in the State of residence or in the State of origin or in another State are certainly an important factor for consideration. Article 5 (2) of the directive provides for consultation in this respect between the competent authorities, obliging the Member State consulted to give its reply within two months. However these consultations must not be made as a matter of routine. Above all the factor constituted by a prior criminal conviction must be seen in the context of all the factors to be considered before an expulsion order or refusal of admission is adopted: such a measure must serve to punish anti-social conduct and *grave* and *existing* danger to public policy. Measures taken in respect of aliens on grounds of public policy must be exclusively based on the personal conduct of the individual concerned; in other words these measures must be *individual* in nature.

In view of what I have already said the failure to comply with the provisions relating to the control of aliens, even taken in conjunction with prior criminal convictions, cannot constitute prejudice to public policy and public security justifying so serious a measure as expulsion if the current behaviour of the alien in the State of residence has revealed nothing discreditable.

In this same contect Article 3 (3) of the directive provides that expulsion cannot be justified by the mere fact that the national identity card which authorized entry and residence or establishment has expired. Moreover under Article 3 (4) the State which issued the identity card undertakes to re-admit the holder without any formality even if the nationality of the holder is in dispute. This serves to confirm the ancillary or subsidiary nature of the residence permit.

As regards the rôle of national administrative documents in relation to the rights conferred by the Treaty, a parallel may be drawn with the licences or certificates issued by the national authorities with regard to the movement of goods.

On 13 October 1970 the Bundesfinanzhof ruled that a goods movement certificate is not a document which creates rights but is merely a declaration whereby the authorities of the exporting Member State certify the correctness of certain information supplied by the exporter calculated to justify preferential treatment. Before that, on 12 August 1968, the Hessisches Finanzgericht had ruled that the provisions relating to the goods movement certificate are of a purely formal nature and cannot influence the course of commercial transactions in the Community.

Moreover, on 6 June 1972, the Court of Justice ruled in Case 94/71 *(Schlüter and Maack* v *Hauptzollamt Hamburg-Jonas* [1972] ECR 307) that the declaration which the exporter must make, and in particular the submission of an exit certificate, all sufficient evidence of the intention of the exporter to receive the refund and satisfy the requirements of the Community rules. Although for reasons of their administrative organization Member States may require exporters to submit in addition a request worded in the form prescribed by national law, nevertheless they cannot penalize a failure to comply with this obligation by depriving them of the right to a refund.

In addition, on 1 February 1972, in Case 49/71 *(Hagen* v *Einfuhr- und Vorratsstelle für Getreide* [1972] ECR 23) the Court ruled that an offer to the intervention agency which was originally incomplete could subsequently be completed.

II — The fourth question referred by the Belgian court asks whether it follows from Article 4 (1) and (2) of Directive No 68/360 that the Member States are

obliged to grant the right conferred by the Treaty once the person concerned is able to produce the required proof and whether it also follows therefrom that, in the case of a national of another Member State who is unlawfully on its territory, a Member State is obliged, before resorting to a measure invoking physical constraint, to employ other means to induce him to regularize his position voluntarily.

I have already recalled that Article 4 (1) and (2) of the directive provides that Member States 'shall grant' the right of residence in their territory to those persons who are able to produce the documents listed in the directive and that this right is 'proved' by the issue of a special residence card for nationals of the Member States.

The aim of this provision is therefore not to create a right for Community nationals but to regulate the exercise of a right conferred by the Treaty. The right of residence must be granted to all persons falling within the categories set out in Article 1 who are capable of proving by producing the documents listed in paragraph (3) that they fall within one of these categories.

However it appears to me that this article does not lay down any legal obligation upon the national authorities to prove the existence of special arrangements in respect of a person who is in an unlawful position where these authorities have in addition reasons for believing that his presence may endanger public policy and public security.

Where the conduct of the alien leaves something to be desired in this respect and where, without falling *ipso facto* under the criminal law, an expulsion order appears definitively justified in the opinion of the national authorities, it is my opinion that the alien should be clearly and formally warned of the risk of expulsion unless he changes his attitude.

III — The fifth question referred by the Belgian court asks whether a decision to expel an individual or a decision to refuse to issue a residence or establishment permit may, in view of the requirements of Community law, give rise to an immediate expulsion or whether these measures may only take effect after rights of appeal before the national courts have been exhausted.

As the Court of Justice stated in the *Rutili* case of 28 October 1975, under Article 8 of Directive No 64/221 any person expelled from the territory must have the same legal remedies against this decision as are available to nationals of the State against acts of the administration; in default of this the person concerned must, under Article 9, at the very least be able to exercise his right of defence before a competent authority which must not be the same as that which adopted the measure restricting his freedom; finally, the remedies before a competent authority must, save in cases of urgency, arise before the measure expelling him.

Thus, save in cases of urgency which are justified, where a legal remedy within the meaning of Article 8 is available, the decision ordering expulsion may not take effect before the party concerned has been able to invoke such a remedy. The same applies in the cases where although such a remedy is available it has no suspensory effect: the person concerned must be able to exercise his right before an authority which is not the same as that which adopted the measure restricting his freedom and, again save in cases of urgency which are justified, this measure may not take effect before the competent authority has given a ruling.

Finally, under Article 7 of the directive, the period allowed for leaving the territory shall not, save in cases of urgency, be less than 15 days following the notification of the final decision whether or not the person concerned retained the residence permit.

IV — The sixth, seventh and eighth questions referred by the Belgian court

ask whether, as regards Articles 53 and 62 of the Treaty, a Member State may return to provisions and practices which are less liberal than those which it applied before or after the entry into force of the Treaty.

Articles 53 and 62 prohibit the Member States from introducing any new restrictions on the right of establishment and the freedom to provide services as they existed at the date of the entry into force of the Treaty; by new measures of liberalization they clearly refer only to those which must be taken in pursuance of an obligation arising from the Treaty.

Directive No 64/221 established a number of limitations on the Member States' discretion in matters relating to the safeguard of public policy, public security and public health and it sets out their obligations under the Treaty in this respect. However it leaves untouched the Member States' jurisdiction as to the form and appropriate means of achieving the necessary result.

Therefore in a case where a Member State has adopted provisions or practices more liberal than those required by Community law, Community nationals cannot thereby obtain more extensive rights than those deriving from Articles 53 and 62 and the implementing provisions of Community law, in particular Directive No 64/221. Therefore Belgium could return to a less liberal system provided that this system remains in conformity with Community law and, it may be added, with international agreements.

In conclusion I propose that the Court should rule that:

1. (a) The right of nationals of a Member State to enter upon the territory of another Member State and to reside there derives directly from Articles 48, 52 and 59 and from the provisions of Community law adopted in implementation thereof, irrespective of any residence permit issued by the host State;

   (b) The failure by nationals of a Member State to comply with the formalities for the control of aliens does not constitute a threat to public policy and public security and cannot, therefore, by itself justify a decision of expulsion or detention;

2. Article 4 of Directive No 68/360 provides for Member States the obligation to issue a residence permit to any person who has proved that he falls within the categories referred to in Article 1 of this directive by producing the documents prescribed;

3. Save in cases of urgency which have been justified, an expulsion decision may not take effect before the party concerned has been able to exhaust the remedies which are guaranteed him under Articles 8 and 9 of Directive No 64/221;

4. Articles 53 and 62 of the Treaty prohibit a Member State from introducing new restrictions on the right of establishment and the freedom to provide services which have in fact been attained at the date of the entry into force of the Treaty; the Member States may not return to less liberal provisions or practices where the liberalization measures already adopted are in implementation of the Treaty obligations.