OPINION OF ADVOCATE GENERAL TESAURO

delivered on 30 January 1992 *

Mr President,
Members of the Court,

1. In this reference for a preliminary ruling the Tribunal Superior de Justicia de Cantabria seeks a ruling from the Court of Justice on the interpretation of Articles 3(c), 7, 52, 53 and 56 of the EEC Treaty, and of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services. [1]

In particular, the national court asks whether the aforesaid provisions permit a Member State to deny the holder of dual nationality, where one nationality has been conferred by a Member State and the other by a non-member country, the right to exercise freedom of establishment merely because the non-member country was the place of his habitual residence, his last residence or his actual residence.

2. I shall briefly summarize the facts of the case; for the details I would refer the Court to the Report for the Hearing.

Mr Micheletti, who has born in Argentina of Italian parents, has since birth possessed both Argentine nationality (by virtue of the *ius soli*) and Italian nationality (by virtue of the *ius sanguinis*). [2] Upon his arrival in Spain, he applied to the competent authorities on 3 March 1989 for a temporary Community residence card, which was issued to him on production of an Italian passport for a period of six months.

Before his residence card expired, Mr Micheletti applied for permission to establish himself definitively in Spain as a dentist; the relevant qualification, acquired in Argentina, was recognized by the Spanish authorities on 13 January 1989 on the basis of an agreement between Spain and Argentina on the mutual recognition of qualifications. [3]

However, he was denied the right of establishment by the competent Spanish authorities. The reason for that refusal, as is clear from the order for reference, is that on the basis of Article 9(10) in conjunction with the final part of Article 9(9) of the Spanish Civil Code, where a person has dual nationality, that corresponding to his last residence or to

* Original language: Italian.

1 — OJ 1973 L 172, p. 14.

2 — Italian nationality is based on Law No. 555 of 13 June 1912 (Official Gazette of the Italian Republic of 30 June 1912) and, more specifically, on Article 1, as amended by Article 5 of Law No 123 of 21 April 1983 (Official Gazette of the Italian Republic of 26 April 1983), according to which 'the child of an Italian father or mother is himself an Italian citizen'.

3 — In that regard, it must be pointed out that the equivalence of a qualification recognized not by reason of nationality but because the qualification in question has been acquired in one of the Contracting States.

his actual residence prevails. According to the Spanish authorities, although Mr Micheletti submitted documents attesting to his residence in Italy (at Ponti sul Mincio), it is undisputed that before his arrival in Spain he was residing in Argentina and, consequently, in the light of the aforesaid provisions of the Spanish Civil Code, he must be regarded as an Argentine national.

3. Against that background, the national court raises in substance the question of the compatibility with Community law of the legislation on which the refusal of the Spanish authorities to issue a permanent residence card was based.

Bearing in mind that acquisition and loss of nationality is — and that is not contested here — exclusively a matter for each State, I would point out first of all that Article 52 of the Treaty, the provision which is most relevant in this case, provides for freedom of establishment for 'nationals of a Member State in the territory of another Member State'. In order to be able to exercise the right of establishment, therefore, the only preliminary condition laid down is possession of the status of 'national' of one of the Member States, which status is to be determined by the Member State concerned. As yet there is no Community definition of nationality; the provisions of Community law which require an individual to possess the 'nationality' of a Member State as a prerequisite for their application must be understood as referring to the national law of the State whose nationality serves as the basis of the right relied upon.

That reference to national law is also expressly set out in the Treaty on European Union, brought into being by the recent agreements arrived at in Maastricht; after stating in Article 8 that 'Citizenship of the Union is hereby established', the Treaty immediately goes on to state that 'Every person holding the nationality of a Member State shall be a citizen of the Union', [4] without laying down any other condition.

In conclusion, it is clear that possession of the nationality of a Member State is the only prerequisite which an individual must satisfy in order to be able to exercise the right of establishment, a prerequisite which is governed by the national law of the State concerned. Furthermore, Directive 73/148 has simplified the problems which may arise in that regard, making the applicability of that right conditional on mere possession of the identity card or passport which Member States are required to issue to their own nationals (Articles 3 and 6).

It follows that the issue of the permanent residence card may not be made conditional on fulfilment of a further requirement such as actual residence (or a similar criterion); instead, it is sufficient for the applicant to be a national of a Member State in the aforesaid sense, in other words that he should be recognized as such by the national law of the Member State concerned.

4 — That statement is also accompanied by a Declaration on the citizenship of a Member State, which is annexed to the Final Act and on the basis of which the Conference states that wherever the Treaty establishing the European Community refers to nationals of the Member States, the question whether a person has the nationality of one Member State or another is to be determined exclusively by reference to the national law of the State concerned. The Member States may specify by way of information which persons are to be regarded as their nationals for Community purposes by lodging a statement to that effect with the Presidency; they may, if necessary, modify that statement.

4. That conclusion, in my view, is such as to rule out the possibility of denying the right of establishment to a national of a Member State on the sole ground that he also holds the nationality of a non-member country and was last resident in that country. Once it has been established that the person in question is a national of a Member State, there is no other factor or criterion which must or may be taken into consideration.

That conclusion is confirmed, albeit indirectly, by the Court's judgment in *Auer* [5] in which the Court stated that 'there is no provision of the Treaty which, *within the field of application of the Treaty*, makes it possible to treat nationals of a Member State differently according to the time at which or the manner in which they acquired the nationality of that State, as long as, at the time at which they rely on the benefit of the provisions of Community law, they possess the nationality of one of the Member States and that, in addition, the other conditions for the application of the rule on which they rely are fulfilled'. [6]

The aforesaid ruling of the Court is equally applicable, in my view, in the case of dual nationality: the nationality of one Member State is sufficient, irrespective of the time at which or the manner in which it was acquired and irrespective of the fact that the person who relies on it is at the same time the holder of another nationality, to bring the provision relied upon into operation under the Community legal system.

5 — Judgment in Case 136/78, *Ministère Public* v *Auer* [1979] ECR 437, paragraph 28.

6 — Emphasis added.

5. In fact the terms of the problem can be simplified in relation to the terms in which it was presented in the course of the proceedings.

To begin with, this case involves two nationalities which are not exactly in conflict, but which are held concurrently, neither of which is being called in question. Moreover, both are based on criteria which are universally applied and recognized, namely the *ius soli* and the *ius sanguinis* respectively.

The Spanish Government itself, far from challenging the legality of Mr Micheletti's status as an Italian national, highlights the lesser ... 'effectiveness' of that nationality in relation to Argentine nationality, inasmuch as the latter coincides with Mr Micheletti's previous habitual residence. [7] And it is precisely in that connection that the Spanish Government refers to the criterion of effective nationality, which has gained recognition as a general principle of international law.

I do not believe that the case before the Court constitutes an appropriate setting in which to raise the problems relating to effective nationality, whose origin lies in a 'romantic period' of international relations and, in particular, in the concept of diplo-

7 — Amongst other things, still in accordance with its view of Italian nationality as only 'latent' and 'in suspense', the Spanish Government refers to the Agreement on dual nationality of 29 October 1979 concluded between Italy and Argentina (Official Gazette of the Italian Republic No. 152 of 14 June 1973) in support of that contention. In that regard, it may be pointed out that the agreement applies exclusively to Italian and Argentine nationals who only subsequently acquire the nationality of the other country. It is classified as an agreement derogating from Article 8(1) of Law No. 555 of 1912 on nationality, according to which the voluntary acquisition by an Italian national of another nationality automatically entails the loss of Italian nationality. The agreement in question is therefore inapplicable to Mr Micheletti since he has simultaneously held both Italian and Argentine nationality since birth.

matic protection; still less, in my view, is the well known (and, it is worth remembering, controversial) *Nottebhom* judgment of the International Court of Justice [8] of any relevance. Nor, above all, is it necessary, in my opinion, to view the problem in terms of a choice of the applicable law from the standpoint of private international law.

The fact is that Article 52 of the Treaty, which is the relevant provision in this case, far from demanding that a choice be made between the two nationalities, merely requires that at least one of those nationalities, possession of which is not open to question, should be that of a Member State. It is therefore incorrect to view the problem in terms of one nationality prevailing over the other on grounds of residence. For the purposes of the application of Article 52, it is unnecessary for either to prevail, nor can residence be construed as an additional connecting factor for those purposes. The only limits which a Member State may rely upon, on the basis of the Treaty (Article 56) and Directive 73/148 (Article 8), are those concerning public policy and public security.

6. Those considerations also find support in the case-law of the Court which, in a case involving the problem of dual nationality, namely *Gullung*, [9] implicitly acknowledged that the person in question was entitled to rely on both nationalities in order to take advantage of the facilities offered by Community law. The fact that in that case two 'Community' nationalities were involved is not in my view such as to detract from the principle laid down there.

Furthermore, if the argument were to prevail that only one nationality must always and invariably prevail, even for the purposes of Community law, it would follow-in the absence of unambiguous and uniform criteria common to all the Member States — that each case of dual nationality would be resolved differently in each Member State. The inevitable consequence of that situation would be that, on the basis of criteria which are in themselves lawful, there would be discrimination between different categories of nationals. Their eligibility or otherwise to share in the benefits conferred by Community law would depend on the internal provisions and/or criteria applied, for the purpose of resolving conflicts of nationality, by the State in which they intend to establish themselves, to the detriment of a fundamental freedom guaranteed by the Treaty in the same manner to all the nationals of the Member States.

7. Finally, I would remind the Court of the Declarations made by the German Government and the United Kingdom, which are annexed to the Treaty and relate to the definition of persons who are to be regarded as their nationals for Community purposes, that is to say persons who are subject to Community law inasmuch as they are regarded by those two Governments as German and British nationals respectively. Apart from any legal effects which may arise from

8 — Judgment of 6 April 1955, 1955 Series, p. 4. As is well known, in that judgment the International Court of Justice applied the concept of effective nationality in establishing whether the only State of which Nottebohm was a national had a right to exercise diplomatic protection, stating that in the circumstances of the case there was no genuine connexion with the State (Liechtenstein) which had conferred that nationality upon him.

9 — Judgment in Case 292/86, *Gullung* v *Conseils de l'Ordre des Avocats du Barreau de Colmar et de Saverne* [1988] ECR 111, paragraph 12.

those declarations, they show that those two States have construed the expression 'national of a Member State', for the purposes of the relevant Community legislation, as being very wide in scope, certainly far wider than the circumstances of the present case; for instance, even individuals who do not have any personal or territorial link with the existing Republic of Germany [10] and do not in any event meet the requirements of effective nationality laid down in the *Canevaro* judgment, [11] still less those laid down in the *Nottebohm* judgment, [12] are regarded as German nationals.

Those considerations lend support to the view that a Member State cannot make the application to all the nationals of the Member States of a fundamental right guaranteed by the Treaty, such as the right of establishment, conditional on requirements not laid down by the relevant legislation, in particular the criterion of residence or the like, even where the person who relies upon that right is at the same time a national of a non-member country.

8. In the light of those considerations, therefore, I propose that the Court answer the question submitted by the Tribunal Superior de Justicia de Cantabria as follows:

'The relevant Community legislation, in particular Article 52 of the EEC Treaty, must be interpreted as precluding a Member State from denying a national of another Member State the right to exercise freedom of movement on the ground that he simultaneously possesses the nationality of a non-member country in which he had his habitual residence, his actual residence or his last residence'.

10 — In its Declaration the German Government states that 'All Germans as defined in the Basic Law for the Federal Republic of Germany shall be considered nationals ...'. According to Article 116(1) of the Basic Law, not only persons holding German 'nationality' but also those who had that status on 31 December 1937 are to be considered 'Germans'.

11 — Judgment of 2 May of the Permanent Court of Arbitration in Revue de Droit International Privé et de Droit Pénal International, 1912, p. 331.

12 — Judgment of 6 April 1955 of the International Court of Justice.