JUDGMENT OF THE COURT
9 August 1994 *

In Case C-43/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Administratif, Châlons-sur-Marne (France), for a preliminary ruling in the proceedings pending before that court between

Raymond Vander Elst

and

Office des Migrations Internationales (OMI)

on the interpretation of Articles 59 and 60 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco (Rapporteur) and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris, R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

* Language of the case: French.

Advocate General: G. Tesauro,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the applicant, by F. Fazzi-De Clercq, of the Ghent Bar,

— the French Government, by P. Pouzoulet, Assistant Director in the Legal Department of the Ministry of Foreign Affairs, and C. Chavance, Attaché Principal d'Administration Centrale in the Legal Department of the Ministry of Foreign Affairs, acting as Agents,

— the German Government, by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and C.-D. Quassowski, Regierungsrat in the Federal Ministry of Economic Affairs, acting as Agents,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom, by J. D. Colahan, of the Treasury Solicitor's Department, acting as Agent, and R. Plender QC,

— the Commission of the European Communities, by M.-J. Jonczy, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the French Government, the German Government, represented by B. Kloke, Regierungsrat in the Federal Ministry of Economic Affairs, acting as Agent, the United Kingdom and the Commission at the hearing on 19 April 1994,

after hearing the Opinion of the Advocate General at the sitting on 1 June 1994,

gives the following

Judgment

1 By decision of 22 December 1992, received at the Court on 15 February 1993, the Tribunal Administratif (Administrative Court), Châlons-sur-Marne, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on Articles 59 and 60 of the Treaty.

2 Those questions were raised in proceedings between Mr Vander Elst, an employer of Belgian nationality established in Belgium, and the Office des Migrations Internationales (International Migration Office, hereinafter 'OMI'), a French body attached to the Ministry of Employment and responsible *inter alia* for the recruitment of foreign workers in France.

3 Mr Vander Elst operates a specialist demolition business in Brussels. In addition to Belgian nationals, the business has for several years continuously employed Moroccan nationals, who are legally resident in Belgium, hold Belgian work permits, are covered by the Belgian social security scheme and are paid in Belgium.

4 In 1989 the Vander Elst business carried out demolition work involving the recovery of materials on a building in Reims called 'Château Lanson'. The work took one month. In order to carry out the work, Mr Vander Elst put a team of eight persons on site, who were regular employees and of whom four were Belgian and four Moroccan. For the latter, he had previously obtained short-stay visas, valid for one month, from the French Consulate in Brussels.

5 When French employment inspectors made a check at the Reims site on 12 and 18 April 1989, they found that the Moroccan workers employed by Mr Vander Elst and working on the site did not have work permits issued by the French authorities. According to the inspectors, a short-stay visa was not sufficient to enable them to take up paid employment in France.

6 Article L.341-2 of the French Labour Code provides that all aliens wishing to take up paid employment in France must submit 'an employment contract countersigned by the administrative authorities or a work permit and a medical certificate', in addition to the documents and corresponding visas. The first paragraph of Article L.341-6 of the said Code makes it unlawful for 'any person to engage or continue to employ an alien who has not been granted permission to take up paid employment in France'. The penalty for failure to comply with those provisions, according to Article L.341-7 of that Code, is payment of a special contribution to the OMI, the amount of which may not be less than 500 times the guaranteed minimum hourly rate laid down in Article L.141-8 of the Code. Furthermore, according to Article L.341-9 of the Labour Code, recruiting foreign workers and bringing them into France are matters exclusively for the OMI.

7 The French employment inspectors considered that Mr Vander Elst had infringed Articles L.341-6 and L.341-9 of the French Labour Code by employing in France nationals of non-member countries who had no corresponding work permits,

without informing the OMI. On the basis of the report drawn up by the inspectors, the OMI accordingly demanded a special contribution of FF 121 520 from the applicant, pursuant to Article L.341-7 of the Labour Code. Following consultation with the director of the labour and employment office, the amount of the special contribution was reduced to FF 30 380.

8 Mr Vander Elst lodged an administrative appeal against that decision with the Director of the OMI, who dismissed it by a decision of 9 March 1990. Mr Vander Elst then brought an action before the Tribunal Administratif, Châlons-sur-Marne, for the annulment of the decision relating to the abovementioned special contribution and, in the alternative, for the contribution to be reduced on account of his good faith and the fact that he had at once taken steps to obtain, and had obtained, the temporary work permits required.

9 In support of his action, the applicant claimed in particular that the contested provisions of the French Labour Code constituted a barrier to the freedom to provide services, which was incompatible with Article 59 et seq. of the Treaty.

10 Taking those arguments into consideration, the national court decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Must the provisions of Community law as a whole, and in particular Articles 59 and 60 of the Treaty, be interpreted as precluding a Member State of the Community from subjecting to authorization or to the payment of a fee to an immigration authority the employment in its territory of workers who are nationals of States outside the Community and who are lawfully and habitually employed by an undertaking established in another Member State of the Community in connection with a supply of services by that undertaking in its territory?

(2) Is French legislation which requires French undertakings employing workers from non-member countries to obtain work permits or to pay a special contribution to the OMI discriminatory, having regard to those same provisions, against undertakings from other Member States of the Community, and in particular Belgium?'

11 By those questions the national court seeks in substance to ascertain whether Articles 59 and 60 of the Treaty are to be interpreted as precluding a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority and to pay the attendant costs, with the imposition of an administrative fine as the penalty for infringement.

12 In France the requirement that undertakings should obtain work permits in order to employ nationals of non-member countries is coupled with the obligation to pay a fee which, like the heavy administrative fine imposed for non-compliance with that obligation, may entail a considerable financial burden for employers.

13 It should be borne in mind that the nationals of Member States of the Community have the right to enter the territory of the other Member States in the exercise of the various freedoms recognized by the Treaty and in particular the freedom to provide services which, according to settled case-law, is enjoyed both by providers and by recipients of services (see the judgments in Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195 and in Case C-68/89 *Commission* v *Netherlands* [1991] ECR I-2637, paragraph 10).

14 Article 59 of the Treaty therefore requires not only the elimination, against a person providing services who is established in another Member State, of all discrimination on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activ-

ities of a provider of services established in another Member State where he lawfully provides similar services (see the judgment in Case C-76/90 *Säger* v *Dennemeyer* [1991] ECR I-4221, paragraph 12).

15 Similarly, the Court has already held that national legislation which makes the provision of certain services on national territory by an undertaking established in another Member State subject to the issue of an administrative licence constitutes a restriction on the freedom to provide services within the meaning of Article 59 of the Treaty (see the judgment in *Säger*, paragraph 14). Furthermore, it is apparent from the judgment in Joined Cases 62/81 and 63/81 *Seco and Desquenne & Giral* v *Etablissement d'Assurance contre la Vieillesse et l'Invalidité* [1982] ECR 223 that legislation of a Member State which requires undertakings established in another Member State to pay fees in order to be able to employ in its own territory workers in respect of whom they are already liable for the same periods of employment to pay similar fees in the State in which they are established proves financially to be more onerous for those employers, who in fact have to bear a heavier burden than those established within the national territory.

16 Finally, as one of the fundamental principles of the Treaty, freedom to provide services may be restricted only by rules which are justified by overriding reasons in the general interest and are applied to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (see, in particular, the judgments in Case C-180/89 *Commission* v *Italy* [1991] ECR I-709 paragraph 17, and in Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 18).

17 In any event, as the Court has emphasized on several occasions, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical

effectiveness the provisions whose object is to guarantee the freedom to provide services (see the judgments in Case C-154/89 *Commission* v *France* [1991] ECR I-659, paragraph 12, and in Case C-76/90 *Säger*, cited above, paragraph 13).

18 In the circumstances, it is important to note, first, that the Moroccan workers employed by Mr Vander Elst were lawfully resident in Belgium, the State in which their employer was established and where they had been issued with work permits.

19 Secondly, it is apparent from the documents and hearings before the Court that the short-stay visas held by the persons concerned, issued by the French Consulate at their request, constituted valid documents permitting them to remain in France for as long as was necessary to carry out the work. Consequently, the national legislation applicable in the host State concerning the immigration and residence of aliens had been complied with.

20 Finally, as regards the work permits which are the focus of the main proceedings, they are required in order for a national of a non-member country to be employed by an undertaking established in France, whatever the nationality of the employer, because a short-stay visa is not equivalent to a permit. Such a system is intended to regulate access to the French labour market for workers from non-member countries.

21 Workers employed by an undertaking established in one Member State who are temporarily sent to another Member State to provide services do not in any way seek access to the labour market in that second State, if they return to their country of origin or residence after completion of their work (see the judgment in Case C-113/89 *Rush Portuguesa* v *Office National d'Immigration* [1990] ECR I-1417). Those conditions were fulfilled in the present case.

22 In those circumstances, the requirements at issue go beyond what may be laid down as a precondition for the provision of services. Accordingly, those requirements are contrary to Articles 59 and 60 of the Treaty.

23 As is clear from the case-law of the Court, Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means (see, in particular, the judgment in *Rush Portuguesa*, paragraph 18).

24 It is also important to note that, in this case, the Moroccan workers possess valid employment contracts governed by Belgian law and, in accordance with Articles 40 and 41 of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, signed at Rabat on 27 April 1976 and approved on behalf of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978 (OJ 1978 L 264, p. 1), all discrimination based on nationality between Community workers and those of Moroccan nationality, as regards working conditions or remuneration, and also in the field of social security, is to be eliminated.

25 As the Advocate General has rightly observed in paragraph 30 of his Opinion, irrespective of the possibility of applying national rules of public policy governing the various aspects of the employment relationship to workers sent temporarily to France, the application of the Belgian system in any event excludes any substantial risk of workers being exploited or of competition between undertakings being distorted.

26 The answer to the questions referred to the Court must therefore be that Articles 59 and 60 of the Treaty are to be interpreted as precluding a Member State from requiring undertakings which are established in another Member State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority and to pay the attendant costs, with the imposition of an administrative fine as the penalty for infringement.

Costs

27 The costs incurred by the French, German and Netherlands Governments, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Administratif, Châlons-sur-Marne, by decision of 22 December 1992, hereby rules:

Articles 59 and 60 of the EEC Treaty must be interpreted as precluding a Member State from requiring undertakings which are established in another Mem-

ber State and enter the first Member State in order to provide services, and which lawfully and habitually employ nationals of non-member countries, to obtain work permits for those workers from a national immigration authority and to pay the attendant costs, with the imposition of an administrative fine as the penalty for infringement.

Due Mancini Moitinho de Almeida

Diez de Velasco Edward

Kakouris Joliet Schockweiler

Rodríguez Iglesias Grévisse

Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass O. Due

Registrar President