

OPINION OF MR ADVOCATE GENERAL TESAURO  
delivered on 21 February 1991 \*

*Mr President,  
Members of the Court,*

'1. If so requested by an official responsible for frontier supervision, aliens entering the Netherlands shall be required:

1. In the present action the Commission seeks a finding from the Court that, by maintaining in force and by applying legislation by virtue of which citizens of a Member State may be required to answer questions put by border officials regarding the purpose and duration of their journey and the financial means at their disposal for it before they are permitted to enter Netherlands territory, the Kingdom of the Netherlands has failed to fulfil the obligations imposed on it by Directives 68/360 <sup>1</sup> and 73/148 <sup>2</sup> and by the second paragraph of Article 5, in conjunction with Articles 3(c), 48, 52 and 59, of the EEC Treaty.

- (a) to produce and hand over the document held by them in order to cross the frontier;
- (b) to provide information concerning the purpose and duration of their stay in the Netherlands;
- (c) to show what means are available to them with a view to their entry into the Netherlands.

2. ...

2. Aliens' right of entry and frontier supervision are governed in the Netherlands by, *inter alia*, the Vreemdelingenwet (Law on aliens) of 13 January 1965 and by the Vreemdelingenbesluit (Aliens Order) of 19 September 1966, Article 23 of which provides:

3. The provisions of the opening subparagraph and subparagraph (c) of the foregoing paragraph shall not apply to the nationals of a Member State who are seeking employment.'

\* Original language: Italian.

1 — Directive 68/360/EEC of the Council of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (I), p. 485).

2 — Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence with the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

That legislation was brought to the Commission's attention by a complaint made by a German national who, on being questioned by the border authorities as to the purpose of his journey, first stated that he was under no obligation to answer and then that he had only five German marks in his possession; he was, for that reason, refused entry to Netherlands territory.

3. Before examining the parties' arguments, I think it is appropriate to make it clear that, as the Commission itself has been at pains to emphasize, the infringement of Community legislation of which the Netherlands is accused relates exclusively to personal checks to which Community citizens are subjected at the Netherlands frontier which *do not* bear any relation to matters of public policy, public security or public health. The inspection of luggage and other goods is likewise not at issue in this dispute. The application relates only to the right to enter and stay in Netherlands territory but not the right to reside there.

4. The applicant's reasoning is based on the premise that in practice all citizens of the Member States are vested with rights under the Treaty and that as a result those who present themselves at a frontier bearing an identity card or passport are presumed to be entitled to entry and residence.

Moreover, Article 3(1) of Directive 68/360 and Article 3(1) of Directive 73/148 require the Member States to admit to their territory those persons to whom those directives are applicable, merely upon presentation of a valid identity card or passport.

However, even if those provisions do not expressly prohibit the questioning of citizens of a Member State, when they cross a frontier, on matters unconnected with their identity documents, it seems obvious, in the Commission's view, that to put questions to

such people in order to establish whether they have a right to enter and visit the country is incompatible with the fundamental principle of free movement of persons which is laid down in Article 3(c) of the Treaty and constitutes the basis for the two directives.

5. The Netherlands Government, for its part, having stated — without being contradicted by the applicant — that the controls at issue are carried out at random and not systematically, emphasizes that the status of citizen of a Member State does not automatically confer the right to enter and stay in other Member States, since there is at least one class of Community nationals — those who are not in gainful employment — who do not, under the Community legislation in force, enjoy an independent right to enter and remain in a country.

The two directives referred to by the Commission apply, in the defendant's contention, to those people who already have a right of residence under the Treaty and the secondary legislation; and it is precisely that situation that the frontier authorities should be able to check, albeit, of course, in a manner which is not liable, in fact or in law, to undermine the Community principle of free movement of persons.

6. As is apparent, the question raised is not one that can be resolved solely by construing specific provisions of the two directives referred to but relates more generally to an assessment of the very scope of the principle of free movement of persons

and the limits which Community law imposes on the supervisory powers of the national authorities.

In that connection, it must first be stated that Article 48 of the Treaty, dealing with freedom of movement for workers, Articles 52 and 59 thereof, dealing with the elimination of barriers to freedom of establishment and the freedom to provide services within the Community, and also the provisions of secondary law adopted in that area give effect to the fundamental principle laid down in Article 3(c) of the Treaty, according to which '... the activities of the Community shall include the abolition, as between Member States, of obstacles to freedom of movement for persons ...'.<sup>3</sup>

The Single Act has enhanced the importance of that objective by inserting in the EEC Treaty Article 8a, according to which the internal market 'shall comprise an area without internal frontiers in which the free movement of persons ... is ensured ...'.

Furthermore, as the Court itself has emphasized on several occasions, the right of the citizens of a Member State to enter the territory of another Member State and to reside there, for the purposes envisaged in the Treaty, is conferred directly by the Treaty itself or, as the case may be, by the provisions adopted for its implementation.<sup>4</sup>

<sup>3</sup> — Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 16.

<sup>4</sup> — Case 157/79 *Pieck* [1989] ECR 2171, paragraph 4; Case 8/77 *Sagulo* [1977] ECR 1495, paragraph 4.

7. More particularly, in order better to illustrate the legislative background to the dispute, it is appropriate to mention here, in addition to the provisions just referred to, Regulation No 1612/68<sup>5</sup> on freedom of movement for employed persons, which extends the right of residence to members of the worker's family and to people seeking employment; the abovementioned Directive 68/360, which harmonizes the administrative provisions governing the right of entry and residence of workers and their families; and Regulation No 1251/70,<sup>6</sup> which confers on workers the right to remain in the territory of a Member State after becoming a pensioner or becoming subject to a permanent incapacity to work, that right also being extended to his family.

The counterpart of Directive 68/360 as regards the right of establishment and freedom to provide services is Directive 73/148, which also constitutes the basis for the right of residence of the members of families of self-employed persons. The right to remain in the territory of another Member State after having worked there is then granted to self-employed persons and members of their families by Directive 75/34.<sup>7</sup>

It should also be remembered that, by virtue of decisions of the Court, tourists come within the scope of the Treaty as recipients of services.<sup>8</sup>

<sup>5</sup> — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

<sup>6</sup> — Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (OJ, English Special Edition 1970 (II), p. 402).

<sup>7</sup> — Council Directive 75/34/EEC of 17 December 1974 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity (OJ 1974 L 14, p. 10).

<sup>8</sup> — Case 186/87 *Cowan* [1989] ECR 195, paragraph 15; Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 16.

8. It is apparent from the foregoing that, even disregarding the more recent directives adopted in order to grant, albeit under certain specified conditions, a right of residence to all Community citizens,<sup>9</sup> Community law at present already grants, for various reasons, a right to enter and stay in other Member States to nearly everyone possessing the nationality of a Member State. In addition to the case of someone who goes to another State to work there, the conceivable possibilities are manifold: people may travel in order to seek work, to consult a professional practitioner, to enjoy an excursion and go to a restaurant or, to give an extreme example, even without carrying any means of payment, simply in order to visit shops with a view to returning at a later stage to make purchases, the latter case being one in which it is not possible to say that the person in question is not a purchaser of goods or the recipient of services merely because he does not make payment immediately.

by the people concerned since, as has been seen, any statement could justify entry by the person questioned. And if the officials responsible for carrying out the checks were to ask Community nationals to prove or at least furnish credible evidence to support their statements, the resultant hindrance would be disproportionate and such a practice would be manifestly in breach of legislation which, by contrast, is designed to facilitate the free movement of persons by simplifying controls.

9. It should also be pointed out that an examination of the text of the directives in question shows that the Community legislature intended to make a distinction between the right to enter the territory of a Member State and the right to reside in that State.

In those circumstances, the Netherlands Government's claim that it is entitled to carry out frontier checks, albeit on an unsystematic basis, to establish whether a citizen of another Member State falls within the scope of the Community legislation and thus enjoys a right of entry is seen to be unsubstantiated or, if not, liable to create serious obstacles to the free movement of persons. Indeed, such controls would be pointless if the frontier authorities had to base their checks solely on the replies given

As already pointed out by Advocate General Warner in his Opinion in *Pieck*,<sup>10</sup> Article 3 of Directive 68/360 (and the same argument applies to the corresponding Article 3 of Directive 73/148) contains an apparent contradiction. It applies only to persons to whom the directive applies, yet it requires Member States to allow such persons to enter their territory simply on production of a valid identity card or passport, a document which is inherently unlikely to show whether the holder is a person to whom the directive applies.

<sup>9</sup> — Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26); Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28); Council Directive 90/366/EEC of 28 June 1990 on the right of residence for students (OJ 1990 L 180, p. 30). Those three directives were adopted on the basis of Article 235 of the Treaty; the time-limit imposed on the Member States for adoption of the necessary implementing provisions is 30 June 1992.

In the face of such a provision, there are but two possibilities: to conclude that it is

<sup>10</sup> — Case 157/79, cited above.

implicit in Article 3 that the person concerned must prove that he is entitled to entry by virtue of the Community legislation or to consider that the authors of the directive intended that, save only for cases where exceptions are justified on grounds of public policy, public security or public health, the Member States must allow Community citizens to enter their territory, subject to prior ascertainment of nationality, deferring further checks to a later time.

The reasons which, according to Advocate General Warner, militate in favour of the latter solution are essentially twofold. In the first place, the fact that pursuant to Articles 4 and 8 of Directive 68/360 (the same applies to Article 4 of Directive 73/148) it is only when applying for a residence permit that the person concerned must furnish proof that he falls within the scope of the legislation; and, secondly, the consideration that the authors of the directive, aware of the great breadth of the principle of free movement of persons, could not have intended to make it more difficult to cross Community frontiers by making controls more burdensome.

10. That reasoning, which I share to the full, also seems to me to be supported by the grounds of the recent judgment in *Commission v Belgium*,<sup>11</sup> in which the Court, after stressing that 'the only precondition which Member States may impose on the right of entry into their territory for the persons covered by the abovementioned directives is the production of a valid

identity document or passport', went on to conclude that the controls relating to possession of a residence permit are not in breach of Community law in view of the fact—which I consider essential—that those controls, carried out sporadically, were not in that case a condition of entry into Belgian territory.

11. Before concluding, I should like to refer, in order better to clarify my reasoning, to a particular aspect of the problem at issue in the present case, namely the power of the authorities responsible for frontier checks to put questions to nationals of Member States on grounds of public policy, public security or public health (see Article 10 of Directive 68/360 and Article 8 of Directive 73/148).

This issue was extensively discussed at the hearing and in addition the United Kingdom, which intervened in support of the defendant, attached particular importance to the fact that certain questions may legitimately be put in the event of its being necessary to establish whether the document produced is valid or whether the person producing it is its lawful holder.

12. The hypotheses put forward by the United Kingdom Government are classic instances of situations in which the competent authorities are not only empowered but are also under an obligation to make the requisite inquiries, but it seems to me that even in circumstances other than those extreme cases the officials responsible for frontier checks may put questions to people whose behaviour is such as to raise

11 — Case 321/87, [1989] ECR 997, paragraphs 11 to 15.

suspensions or, in any event, in circumstances in which public security appears particularly threatened.

In that connection, however, it must be made clear that whilst it is true that 'the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty and the provisions adopted for its implementation',<sup>12</sup> it is also true that, as the Court also stated recently, 'the restriction which the EEC Treaty lays down concerning free movement of persons on grounds of public policy, public security or public health must be regarded not as imposing a condition precedent to the acquisition of the right of entry and residence but as providing the possibility, in individual cases where there is sufficient justification, of imposing restrictions on the exercise of a right derived directly from the Treaty. It does not therefore justify administrative measures imposing in a general way formalities at the frontier other than the mere production of a valid identity card or passport'.<sup>13</sup>

From this it follows in the first place that the actual request for information motivated

by grounds of public policy or public security must be justified by the existence of particular circumstances; and in the second place that the national authorities will be under a responsibility, where they believe that they should refuse a Community citizen access to their territory, to justify the adoption of such a measure specifically in relation to the personal conduct of the person in question,<sup>14</sup> bearing in mind that 'in so far as it may justify certain restrictions on the free movement of persons subject to Community law, recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation of the social order which any infringement of the law involves, of a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'.<sup>15</sup>

13. In the light of the foregoing considerations, I am of the opinion that the Netherlands legislation is not in conformity with Directives 68/360 and 73/148; however, there is no evidence to show that the Kingdom of the Netherlands has specifically infringed the provisions of the Treaty to which the Commission refers in its application but which, on the other hand, it did not expressly advert to at the pre-litigation stage.

12 — Case 30/77 *Bouchereau* [1977] ECR 1997, paragraph 34; Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 18.

13 — Case 321/87 *Commission v Belgium*, *supra*, paragraph 10; Case 157/79 *Pieck*, *supra*, paragraph 9.

14 — See Article 3 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117); judgments in joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 11; Case 48/75 *Royer* [1976] ECR 497, paragraphs 45 to 48; and Case 67/74 *Bonsignore* [1975] ECR 297, paragraph 6.

15 — Judgment in *Bouchereau*, *supra*, paragraph 35; *Adoui and Cornuaille*, *supra*, paragraph 8; and Case 36/75 *Rutili* [1975] ECR 1219, paragraphs 26 to 28.

I therefore suggest that the Court:

- (1) Declare that, by maintaining in force and by applying legislation by virtue of which citizens of a Member State may be required to answer questions put by border officials regarding the purpose and duration of their journey and the financial means at their disposal before they are permitted to enter Netherlands territory, the Kingdom of the Netherlands has failed to fulfil the obligations imposed on it by Directives 68/360/EEC and 73/148/EEC;
- (2) Order the Kingdom of the Netherlands to pay the costs;
- (3) Order the intervener to bear its own costs.