OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 13 NOVEMBER 1974 [1]

Mr President,

Members of the Court,

Introduction

This preliminary reference is of special interest for two reasons.

It is the first time that a court of the United Kingdom, the High Court of Justice in London, has made a reference to the Court of Justice for interpretation of Community rules under Article 177 of the Treaty of Rome.

This is also the first time that the Court has been called upon to decide the important problem raised by the limitations, expressed in Article 48 of the Treaty, to the principle of freedom of movement for workers within the Community imposed by considerations of public policy and public security.

Consequently, you will have to examine, in this connection, the extent to which the power of the Member States to assess the essential requirements of national public policy can be reconciled with a uniform application of Community law and in particular with the application of the principle of non-discrimination between migrant and national workers.

You will also have to make a ruling as to the direct effect of a directive of the Council, or at least of a particular provision of a directive. The case-law of this Court does however already indicate the reply to be given to this question.

I — The facts

The facts giving rise to the main action are straightforward.

Miss Yvonne Van Duyn, a Dutch national, arrived at Gatwick Airport in England on 9 May 1973. She declared that her purpose in coming to the United Kingdom was to take up an offer of employment as a secretary, made to her a few days earlier by the Church of Scientology of California, the headquarters of which are at Saint Hill Manor, East Grinstead, in the County of Sussex.

After an interview with the immigration authorities, she was returned to the Netherlands that same day.

The ground of refusal of leave to enter the United Kingdom is stated in the document handed to her by the immigration officer. It reads:

'You have asked for leave to enter the United Kingdom in order to take employment with the Church of Scientology but the Secretary of State considers it undesirable to give anyone leave to enter the United Kingdom on the business of or in the employment of that organization'.

This decision was taken in accordance with the policy adopted, in 1968, by the Government of the United Kingdom which considered — and still considers — the activities of the Church of Scientology to be socially harmful.

I must however re-examine the grounds of the decision to exclude Miss Van Duyn when I come to consider the question of whether the decision taken by the immigration authorities is based on the *'personal conduct'* of the plaintiff, within the meaning of Article 3 (1) of Council Directive No 64/221, a provision which the Court is asked to interpret.

In her action in the High Court (Chancery Division) against the Home

1 — Translated from the French.

Office, Miss Van Duyn sought, in fact, to rely on Article 48 of the Treaty and on Article 3 of Directive No 64/221, adopted for the purpose of coordinating special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

After examining the motion made by the plaintiff in the main action and upon hearing Counsel for the Home Office, the defendant, the Vice-Chancellor, a Judge of the High Court, decided to stay the proceedings and to refer three preliminary questions to the Court.

The first question concerns the direct effect of Article 48 of the Treaty.

Under the second, the Court is asked whether Council Directive No 64/221 is also directly applicable so as to confer on individuals rights enforceable by them in the courts of the Member States.

The third question concerns the interpretation of Article 48 of the Treaty and of Article 3 of the Directive. The High Court asks you whether, when the competent authorities of a Member State decide, on grounds of public policy, to refuse a Community national leave to enter that State on the basis of the personal conduct of the individual concerned, those authorities are entitled to take into account, as being matters of personal conduct:

(a) the fact that the individual is or has been associated with an organization the activities of which the Government of the Member State considers to be contrary to the public good but which are not unlawful in that State;

(b) the fact that the individual intends to take up employment in a Member State with such an organization, it being the case however that no restrictions are placed upon nationals of the Member State who take up similar employment.

These three questions are clearly framed and follow a logical order.

II — Discussion

1. Direct effect of Article 48 of the Treaty establishing the European Economic Community

My Lords, this first question need not long retain us.

The criteria which the Court has evolved over the past years for the purpose of determining whether a provision of Community law and, in particular, a rule set out in the Treaty of Rome, is directly applicable so as to confer on individuals rights enforceable by them in the national courts, are clearly laid down:

— the provision must impose a clear and precise obligation on Member States;

— it must be unconditional, in other words subject to no limitation; if, however, a provision is subject to certain limitations, their nature and estent must be exactly defined;

— finally, the implementation of a Community rule must not be subject to the adoption of any subsequent rules or regulations on the part either of the Community institutions or of the Member States, so that, in particular, Member States must not be left any real discretion with regard to the application of the rule in question.

These criteria, which Mr Advocate-General Gand proposed in 1966 in his opinion in *Lütticke* (Case 57/65, Recueil 1966, p. 311) and which the Court has adopted in several judgments, have been confirmed and refined in particular by the judgments of 12 September 1972 (Cases 21 to 24/72, Recueil 1972, p. 1227) and 24 October 1973 (Case 9/73, *Schlüter,* [1973] ECR 1135) and, more recently still, by the judgment of 21 June 1974 (Case 2/74, *Reyners)* in connextion with Article 52, on the right of establishment.

The fact that the provisions of Article 48, which are among the most important in the Treaty in that their purpose is to establish freedom of movement within

the Community for employed persons, satisfy these criteria can no longer be open to doubt following the judgment, also very recent, of 4 April 1974 (Case 167/73, *Commission v France,* [1974] ECR 359).

By this decision, the Court stated that the provisions of Article 48 and of Regulation No 1612/68 of the Council on employment of migrant workers are directly applicable in the legal system of every Member State and give rise, on the part of those concerned, to rights which the national authorities must respect and safeguard.

If the High Court of England had had knowledge of this judgment when it decided to make this reference for a preliminary ruling, it is probable that it would not have put its first question to the Court. It is understandable that it considered it necessary to do so because it made its order for reference on 1 March, in other words before the Court delivered its decision on the direct effect of Article 48.

However that may be, the problem is resolved for the future and it suffices for the Court to confirm, with regard to this matter, its judgment of 4 April 1974.

2. *Direct effect of Council Directive No 64/221*

There is less certainty regarding the solution of the second question which, as has been seen, is concerned with the direct applicability of the Council Directive of 25 February 1964.

Article 189 of the Treaty distinguishes in fact between regulations, which are not only binding but also directly applicable in the Member States, and directives, which are also binding on the States but which have, in principle, no direct effect inasmuch as they leave to the States the choice of methods for their implementation.

Nevertheless, looking beyond formal legal categories, the Court declared in its judgments of 6 and 21 October 1970 (Case 9/70, *Grad,* Recueil 1970, p. 838: Case 20/70, *Lesage,* Recueil 1970, p. 874; Case 13/70, *Haselhorst,* Recueil 1970, p. 893), that, apart from regulations, other Community acts mentioned in Article 189 may have direct effect, particularly in cases where the Community authorities have imposed on Member States the obligation to adopt a particular course of conduct. The Court stated that the positive effect of these acts would be lessened if individuals were unable, in such a case, to enforce through the courts rights conferred on them by decisions of this nature, even though such decisions were not taken in the form of regulations.

The statement contained in the Judgment of 17 December 1970 (Case 33/70, *SACE,* Recueil 1970, p. 1224) is even clearer:

'a *directive,* the purpose of which is to set a final date for the implementation by a Member State of a Community obligation, concerns not only the relations between the Commission and that State, but also entails legal consequences on which individuals may in particular rely whenever, *by its very nature,* the provision enacting that obligation is directly applicable.'

When faced with a directive, it is therefore necessary to examine, in each case, whether the wording, nature and general scheme of the provisions in question are capable of producing direct effects between the Member States to which the directive is addressed and their subjects.

What is the position as regards Council Directive No 64/221?

The purpose of this act is to coordinate, in the Member States, measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

It was adopted on the basis of Article 48 — and it in facts refers expressly to the rules applicable at that time to freedom of movement for workers — and of Article 56, on the right of establishment.

The Directive is intended to limit the powers which the States have undeniably retained to ensure, within the area of their competence, the safeguarding of their public policy and, in particular, of public security within their territory.

Article 3 (1) of this Directive lays down, as the Court knows, that: 'measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the person concerned'.

For the purpose of giving a practical answer to the question put by the High Court there is in fact no need to examine whether all the rules fixed by the Directive have direct effect or not.

Only Article 3 (1) is relevant in this case. However, in order to judge whether Article 3 (1) is directly applicable, it is necessary to approach the matter of its interpretation and therefore to encroach a little on the third preliminary question.

As to the scope of Article 3 (1), there is no doubt that it covers both employed persons, dealt with under Article 48, and those pursuing activities as self-employed persons, dealt with under Articles 52 et seq.

With regard to employed migrants, the Council had the power under Article 48 to adopt a regulation, and this is, moreover, what it did as regards the conditions of their employment in a Member State.

For persons who are self-employed, Article 56 (2) limits the possibility to the use of directives. Without doubt the Commission considered it desirable to unify, by means of the same legal instrument, the rules concerning freedom of movement for the employed and those concerning the right of establishment of the self-employed, at least as regards measures relating to public policy in the Member States.

But recourse to that procedure does not preclude Article 3 of the Directive from having direct effect.

What other aim could the Council have had in enacting this provision than to limit discretionary power of Member States and subject restrictions on freedom of movement, such as refusal of leave to enter, exclusion or expulsion, to the condition that these measures should be based *exclusively* on the personal conduct of the persons concerned?

It seems that the Council thereby wished to prevent Member States from taking general measures relating to whole categories of persons and, were seeking, in particular, to prohibit collective exclusions and expulsions.

The Council has, in any case, imposed on Member States a clear and precise obligation. The first condition for direct effect is satisfied.

The second is also. The rule is sufficient in itself. It is not subject either to the adoption of subsequent acts on the part either of the Community authorities or of Member States. The fact that the latter have, in accordance with the principle relating to directives, the choice of form and methods which accord with their national law does not imply that the Community rule is not directly applicable. On the contrary, it is so closely linked to the implementation of Article 48, as regards employed persons, that it seems to me to be inseparable from and is of the same nature as that provision of the Treaty.

Finally, it is clear thar even though the States have retained their competence in the field of public security, Article 3 (1) of the Directive imposes a specific limitation on that competence, in the exercise of which they cannot act in a discretionary manner towards Community nationals.

These considerations lead me to conclude that the provision in question confers on Community nationals rights which are enforceable by them in the national courts and which the latter must protect.

3. *Public security and the concept of personal conduct*

I now come to the third question. What is meanty by 'personal conduct' which is

such as to justify refusal of leave to enter a Member State? How should this concept be defined?

Looking beyond a commentary on the words themselves, the solution seems to me to be governed by two prime considerations:

— Firstly, freedom of movement for workers is one of the fundamental principles of the Treaty and the prohibition on any discrimination on grounds of nationality between workers of the Member States is not subject to any other limitations than those provided for, in restrictive terms, in paragraph (3) of Article 48, relating to public policy, public security and public health (Judgment of 15 October 1969, Case 15/69, *Ugliola,* Recueil 1969, p. 368).

— Secondly, if a 'Community public policy' exists in areas where the Treaty has the aim or the effect of transferring directly to Community institutions powers previously exercised by Member States, it can only be an economic public policy relating for example to Community organizations of the agricultural market, to trade, to the Common Customs Tariff or of the rules on competition.

On the other hand, it seems to me that, under present conditions and given the present position of the law, Member States have sole power, given the exceptions expressed in certain Community provisions such as Directive No 64/221, to take measures for the safeguarding of public security within their territory and to decide the circumstances under which that security may be endangered.

In other words, even though the general proviso relating to public polity, which is found both in Article 48 and in Article 56, is a limited exception to the principles of the Treaty concerning freedom of movement and freedom of establishment, and one which must be restrictively construed, I did not think, contrary to the opinion of the Commission, that it is possible to deduce a Community concept of public security. This concept remains, at least for the present, national, and this conforms with reality inasmuch as the requirements of public security vary, in time and in space, from one State to another.

In my opinion, the third question must be decided in accordance with the above considerations.

First of all, to what extent can the concept 'personal conduct' be applied to the facts provided by the national court, namely that a Community national is associated with an organization, the activities of which are considered to be contrary to public policy, without however being illegal, and that she intends to take up employment with that organization, it being the case that nationals are not subject, in similar circumstances, to any restriction?

In truth, the question, expressed in those terms, led me to examine the file received from the High Court for evidence permitting a clearer understanding of the facts which warranted the exclusion of the plaintiff in the main action.

It is clear from the file that not only did the plaintiff go to England with the avowed intention of taking up employment as a secretary with the Church of Scientology, but that she had already worked in a Scientology establishment in the Netherlands for six months prior to her arrival in England and that she had taken a course in Scientology and was a practising Scientologist.

It is clearly on the basis of these facts as a whole, the accuracy of which it is obviously not for the Court to judge, that the British immigration authorities decided to refuse her leave to enter.

It also emerges from the file that in 1968 the United Kingdom Minister of Health made a statement in Parliament in which he expressed the opinion that:

'Scientology is a pseudo-philosophical cult' of which the principles and practice

are, in the opinion of the British Government, a danger both to public security and to the health of those who submit to it.

The Minister announced, on that occasion, the decision of the Government to take all steps within its power to curb the activity of the organization. He stated that although there was no power under national law to prohibit the practice of Scientology, the Government could at least refuse entry to foreign nationals intending to work at the headquarters of the Church of Scientology in England.

It is, it seems, on the basis of this policy that Miss Van Duyn was refused leave to enter the United Kingdom by reason as much of the links which she had already had in the past with the said 'Church' in the Netherlands as of the fact that she was herself a practising Scientologist and, finally, by reason of her intention to take up employment at Saints Hill Manor.

Given this information, there is no doubt, in my opinion, that these facts fall within the concept of 'personal conduct' within the meaning of Article 3 (1) of the Directive and that mere association, albeit only through a contract of employment, with the Church of Scientology, is an element of a person's conduct.

Moreover, as I have said, the provision in question was essentially inspired by the concern of the Community institutions to prohibit Member States from taking collective measures in relation to Community nationals. It requires that an examination be made of the particular circumstances of each individual affected by a decision based on the safeguarding of public policy. The provision implies without any doubt that the grounds of such a decision should be subject to review by the national courts which, as is the case here, have the power — or sometimes even the duty — to consult this Court on the interpretation of the Community law applicable.

It is in relation to this point — and only this point — that the competence of the Member States in this area is limited by the Directive.

It is necessary to examine, finally, whether, by prohibiting the entry of a Community national on the grounds which I have rehearsed, the Government of the United Kingdom has not violated the principle of non-discrimination, in other words, that of equality of treatment with nationals, which is the necessary corollary of freedom of movement for individuals, and which, based principally upon Article 7 of the Treaty, is expressly applicable to employed persons by virtue of Article 48.

It is an established fact that, although the Church of Scientology is, in the eyes of the British Government, socially harmful, and although, in consequence, its activities are considered to be contrary to public policy, they are not unlawful in the United Kingdom and nationals are free to study and practise Scientology and also to work at the organization's establishment.

At first sight, there is therefore discrimination in the treatment inflicted on nationals of other States of the Community, in the fact that they are refused entry to Britain solely on the ground of their coming to practise Scientology at Saints Hill Manor and to take up employment at that establishment.

I do not think however that this discrimination is contrary to the Treaty.

As I have said, the proviso relating to public policy and particularly to public security has the effect of maintaining the competence of the Member States in this area, subject to the obligation that measures of public security must be justified by the personal conduct of those concerned.

But Member States retain, as regards both assessment of the threat to their security and the choice of measures to counteract such a threat, a power the exercise of which does not cast doubt

upon the principle of equality of treatment, unless, of course, they misuse this power by exercising it for an improper purpose, such as economic protection.

It so happens that, according to the statements of the British Government, there is no power under past or existing national law to take measures prohibiting the establishment of Scientology. That is one consequence of a particularly liberal form of government. It would doubtless be quite different in other Member States, the Governments of which regard the activities of the said organization as being contrary to public policy. But, in so far as the United Kingdom Government has the legal means to prevent foreign nationals, and even Community nationals, from coming to expand, within the UK, the band of followers of Scientology, I consider that it can act in the way it does without creating discrimination within the meaning of Article 48 of the Treaty. The action it has taken lies within the powers which the proviso relating to public policy contained in that Article confers upon every Member State.

In conclusion, I advise the Court to rule that:

1. The provisions of Article 48 of the Treaty and those of Article 3 (1) of the Council Directive No 64/221 are directly applicable in the legal order of every Member State and confer on individuals concerned rights which the national authorities must protect.

2. The fact that a person has been or is associated with an organization the activities of which are considered by a Member State to be contrary to public policy even though those activities are not, within the territory of that State, prohibited by national law, is a matter which comes within the concept of 'personal conduct' and which may justify a measure taken on the grounds of public policy or public security within the meaning of the aforementioned provision of Directive No 64/221.

3. The fact that a person enters the Member State concerned with the intention of taking up employment with an organization the activities of which are considered to be contrary to public policy and public security, it being the case that no restriction is placed upon nationals of that Member State who wish to take up similar employment with that organization, is likewise a matter falling within the concept of 'personal conduct'.