applied Article 9 in order to compensate for the fact that the appeals to the courts which are available do not carry suspensory effect that provision would be rendered nugatory if, always save in cases of urgency, execution of the expulsion order contemplated were not suspended until that authority has given its decision. It therefore follows from Article 9 that as soon as the opinion in question has been obtained and notified to the person concerned an expulsion order may be executed immediately, subject always to the right of that person to stay on the territory for the time necessary to avail himself of the remedies accorded to him under Article 8 of the directive.

5. The first subparagraph of Article 9 (1) shows that determination of the existence of urgency in cases which have been properly justified is a matter for the administrative authority and that expulsion from the territory may then be effected even before the "competent authority" has been able to give its opinion.

6. The procedure concerning the consideration of the decision and concerning the opinion referred to in Article 9 of Directive No 64/221, which is intended to mitigate the effect of deficiencies in the remedies referred to in Article 8, is not intended to confer upon the courts additional powers concerning suspension of the measures referred to by the directive or to empower them to review the urgency of an expulsion order.

The performance of these duties by the national courts is governed by Article 8 of the directive.

The scope of that provision nevertheless may not be restricted by measures taken by a Member State under Article 9.

In Case 98/79

REFERENCE to the Court pursuant to Article 177 of the EEC Treaty by the President of the Tribunal de Première Instance [Court of First Instance], Liège, for a preliminary ruling in the summary proceedings pending before the President of that court between

JOSETTE PECASTAING, waitress and bar hostess, resident in Liège,

and

THE BELGIAN STATE, represented by the Minister for Justice,

on the interpretation of Article 8 and 9 of Council Directive No 64/221/EEC of 25 February 1964 on the co-ordination of special measures

concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health,

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Mrs Josette Pecastaing, a French national, lawfully entered Belgium on 8 October 1977 with a view to pursuing paid employment in the Liège area. She established her residence at Awans and declared her presence to the commune authorities which entered her in the population registers.

On 8 November 1977 Mrs Pecastaing, who held a registration certificate valid for three months, submitted an application for a residence permit in order to work in Belgium as a bar or café waitress.

On 3 May 1978 the Administration de la Sûreté Publique [Public Security Administration], Office des Étrangers [Aliens Office] refused her a residence permit by a decision based on Article 2A of the Law on the supervision of aliens of 28 March 1952 as amended by the Law of 30 April 1964 under which:

"No alien may enter or reside in Belgium unless he is authorized by the Minister for Justice in accordance with the formal requirements laid down by

Royal Decree or he satisfies certain conditions laid down by international agreements or by regulations adopted thereunder, by Law or Royal Decree."

The reason given by the decision for refusing to authorize residence was:

"Personal conduct which renders her residence undesirable for reasons of public policy. In Belgium she has worked in a bar which is suspect from the point of view of morals. Since mid-January 1978 she has no longer had any means of supporting herself, the employer's certificate that has been submitted being considered to have been issued as a favour. In France and Germany she has been reported for prostitution."

The decision contained an order that she was to leave Belgian territory within 15 days of notification.

The decision was notified to her on 16 May 1978 by a representative of the Mayor of Ans, near Liège, where Mrs Pecastaing had established her residence as from 24 February 1978.

On 24 May 1978 pursuant to Article 3a of the Law of 28 March 1952, as amended by the Law of 1 April 1969, Mrs Pecastaing requested the opinion of the Consultative Committee for Aliens provided for by Article 10 of the Law of 28 March 1952. Those provisions are worded as follows:

Article 10 of the Law of 1952

"A Consultative Committee for Aliens shall be set up with responsibility for giving its opinion to the Minister for Justice in cases provided for in articles ... of this law."

Article 3a of the Law of 1969

"Refusal to issue a residence permit to a national of another Member State of the EEC and any decision expelling such an alien from the territory before such a permit is issued shall, at the request of the person concerned, be examined by the Consultative Committee ..."

Mrs Pecastaing appeared before the Consultative Committee for Aliens on 14 December 1978. On the same day the Committee issued its opinion that the refusal of the residence permit was justified. The opinion is based on the following reason:

"Personal conduct which renders her residence harmful for reasons of public policy. She has worked in a bar which is suspect from the point of view of morals. The employer's certificate that has been submitted is considered to have been issued as a favour. In France and Germany she has been reported for prostitution in 1977."

By a letter of 12 January 1979 the Aliens Office of the Public Security Administration asked the Mayor of Ans to inform Mrs Pecastaing of the decision to uphold the refusal of the residence permit; the letter also called upon the Mayor to withdraw the order to leave the country which was in Mrs Pecastaing's possession and to replace it with "a new and final order to leave the country within fifteen days".

The decision refusing the issue of a residence permit was notified to Mrs Pecastaing on 23 January 1979.

On 9 March 1979 Mrs Pecastaing had two writs served on the Belgian State, one for an action before the civil section of the Tribunal de Première Instance, Liège, the other instituting summary

proceedings before the President of that court.

In the proceedings before the Tribunal de Première Instance Mrs Pecastaing seeks the withdrawal of the decision refusing to authorize residence with an order to leave the country on the grounds that it is unlawful and contrary to Community law and claims that the Belgian State should be ordered to pay damages.

In the summary proceedings before the President of the Tribunal de Première Instance, Liège, Mrs Pecastaing submits that formal notice should be given that she contests the legality of the decision in question and that the Belgian State should be prohibited from enforcing the order to leave the country until there has been a final ruling on the legality of the measure.

Having heard the parties at the hearings on 8 May, 28 May and 13 June 1979, the President of the Tribunal de Première Instance, Liège, in summary proceedings, by order of 18 June 1979 stayed proceedings pursuant to Article 177 of the EEC Treaty pending a preliminary ruling by the Court of Justice on the following questions:

Interpreting Articles 8 and 9 of Directive No 64/221, in its judgment delivered on 8 April 1976 in Case 48/75 *Royer* [1976] ECR 497, the Court ruled in the fourth paragraph of the operative part of the judgment, on the basis of paragraphs 52 to 62 of the grounds of the decision, that:

"A decision ordering expulsion cannot be executed, save in cases of urgency which have been properly justified, against a person protected by Community law until the party concerned has been able to exhaust the remedies guaranteed by Articles 8 and 9 of Directive No 64/221."

First group of questions

A — The remedies to which the judgment applies include those provided for by Article 9 (2) of Directive No 64/221, which are laid down by Article 1 of the Belgian Law of 1 April 1969, forming Article 3a (as amended) of the Law of 28 March 1952 on the supervision of aliens, namely applications for the review of decisions refusing the issue of the first residence permit or decisions ordering expulsion of the person concerned before the issue of the permit (Belgian Conseil d'État: judgment 17, 722 of 18 June 1976 and judgment 18,609 of 2 December 1977; Recueil des Arrêts du Conseil d'État, 1977, p. 1381).

It appears that the suspensory remedies also include, as being guaranteed by Article 8 of the Directive, the applications for annulment of administrative measures available under national law. Do those suspensory remedies also include an action for civil liability in respect of a wrongful act brought against the author of a decision ordering expulsion?

In other words, is the suspensory effect a rule of procedure limited solely to the exercise of direct remedies or is it an adaptation, for the benefit of persons protected by Community law, of the fundamental right which all persons have to a fair civil hearing?

B — More generally, in disputes between a national of one Member State of the European Community and a public authority of another Member State concerning rights and obligations of a civil nature (within the meaning of Article 6 of the Convention for the Protection of Human Rights) involving the implementation of rules of Community law, does the right to a fair hearing imply that personal access to the courts of the State concerned must be effectively made available to the said national?

If the above question is answered in the affirmative, may it be deduced from the Convention for the Protection of Human Rights read together with Community law that that national has the right to be in person within the territory of the State against which he is bringing proceedings during the course of the action, irrespective of any administrative measure ordering his expulsion, except in cases of urgency which have been properly justified?

Second group of questions

In a case of urgency which has been properly justified, the decision ordering expulsion may be executed notwithstanding any appeal.

Does the existence of that urgency form an integral part of the decision ordering expulsion so that the administrative authority which took the decision is exclusively competent to ascertain whether such urgency exists?

Or does it, on the contrary, appertain to the exercise of a judicial remedy, such that, in the event of a dispute, the court before which the action is brought may decide the question?

The order of the President of the Tribunal de Première Instance, Liège, was lodged at the Court Registry on 21 June 1979.

In pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 2 August 1979 by the plaintiff in the main action, Mrs Pecastaing, represented by Jacques Levaux of the Liège Bar, on 8 August by the Commission of the European Communities, represented by its Principal Legal Adviser, Paul Leleux, acting as Agent, on 10 September by the Government of the Kingdom of Belgium, represented by Dominique Drion of the Liège Bar, on 11 September by the Government of the French Republic, represented by Marc Dandelot, Secretary General of the Comité Interministériel pour les Questions de Coopération Économique Européenne [Interministerial Committee for Questions Concerning European Economic Co-operation], acting as Agent, and on 14 September by the Government of the Kingdom of Denmark, represented by Per Lachmann, Adviser at the Ministry for Foreign Affairs, acting as Agent.

The Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory enquiry. It invited the Government of the Kingdom of Belgium however to reply in writing to a number of questions; a reply was received to those questions within the time set.

II — Written observations submitted to the Court

Mrs Josette Pecastaing, the plaintiff in the main action, recalls that according to the decided cases of the Court of Justice the right of establishment is a right which the Treaty confers directly on nationals of the Member States of the EEC which they may invoke before the courts of the

host State and which the latter courts must protect; the Member States can restrict exercise of that right only by reasoned decisions based on grounds of public policy, public health and public security and in compliance with certain conditions of a procedural nature.

(a) The application of the exception on grounds of public policy with regard to the right of establishment is subject to six criteria: it must be based on the personal conduct of the person concerned; the concept of public policy must be interpreted strictly and its scope cannot be determined unilaterally by each Member State; the conduct contrary to public policy must be particularly serious; it must entail conduct contrary to substantive and objective public policy which contrasts with a concept of moral public policy; the conduct contrary to public policy must take place in the territory of the country refusing the right of establishment; the exception on grounds of public policy should relate to problems arising in the future. Having regard to those requirements the decision of the Belgian State to refuse the plaintiff in the main proceedings a residence permit is clearly without good reason and is unlawful.

(b) Belgian law makes three remedies available to an EEC national who is notified of a decision refusing a residence permit: he may apply, within eight days of notification, to the Consultative Committee for Aliens which has the power only to give an opinion to the Ministry for Justice; he can appeal to the Conseil d'État [Council of State], administrative division, after first applying to the Consultative Committee for Aliens and within two months from the decision taken after hearing the opinion of that committee; finally he can appeal to the courts of law for a ruling on the legality of an administrative measure on the basis of the civil liability of the public authority and Article 92 of the Belgian Constitution in the terms of which disputes relating to civil rights fall within the exclusive jurisdiction of the courts.

(c) The questions raised in the present case may be summarized as follows:

Having regard to the operative part of the judgment of the Court of 8 April 1976 (Case 48/75 *Royer* [1976] 1 ECR 497) it appears to have been established that an appeal to a court of law has suspensory effect. Does the action for damages brought by the plaintiff in the main action constitute an appeal to a court of law within the meaning of Articles 8 and 9 of Council Directive No 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition 1963-1964, p. 117)? An appeal may not have suspensory effect; who is the judge of the urgency?

The action brought by the plaintiff in the main proceedings for a ruling that the decision in question is illegal and must be

withdrawn indeed constitutes an appeal against that decision. The question therefore is merely whether the appeal to a court of law against a decision refusing the right of establishment has suspensory effect.

(d) This question does not arise with regard to the application to the Consultative Committee for Aliens: Directive No 64/221/EEC shows clearly that the answer is in the affirmative.

The question does arise on the other hand for appeals to the Conseil d'État and to the courts of law. Such proceedings do have suspensory effect; this is shown by various considerations.

Recognition that an appeal has suspensory effect corresponds to the decided cases of the Court of Justice, in particular the *Royer* case *(supra)* and the *Rutili* case (judgment of 28 October 1975, Case 36/75 *Rutili* v *Minister for the Interior* [1975] 2 ECR 1219).

The defects of the application to the Consultative Committee for Aliens make it necessary for other appeals to proper courts which do have suspensory effect to be provided.

The Consultative Committee can only give an opinion; if only that application were regarded as having suspensory effect the logical inference would be that a national of a Member State of the EEC has no means of obliging another State to recognize his right of establishment. By virtue of its composition the Consultative Committee for Aliens is both a judge and a party to a case; the requirement of a competent authority distinct from that which takes the decision is only apparently fulfilled. The period for bringing an application before the Committee is only eight days from notification of the decision of refusal of a residence permit; the decision makes no mention of that period. Thus in most cases the period is not complied with. The procedure before the Committee contains no guarantee that the rights of the defence will be observed.

The principle exists that no restriction on fundamental human liberties can be made without being subject to the supervision of the courts. As human rights and fundamental freedoms are at issue the principle that measures of the administration are self-executing ["privilège du préalable"] is subject to the principle of control by the courts. The right of establishment cannot be restricted without the courts exercising supervision.

As the rule of Community law is addressed to the Member States they cannot have a choice between observing the law and paying damages by way of reparation for breach thereof. The State should be obliged to observe the rule of law.

The plaintiff in the main action has an uncontestable right of action; Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms enshrines her right to a fair hearing.

The right of action would be devoid of all substance if the decision ordering expulsion could be executed before a ruling has been given on the legality of

the decision. With regard to the right of residence it is particularly clear that when an expulsion order in executed the action before the courts is merely of theoretical interest as the breach of law is in practice irreparable. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms should be interpreted as giving individuals a personal right of access to the courts. An alien who appeals to the courts against a decision ordering expulsion must be able to be present in person at the hearing of his case which necessarily entails giving him right of access to the territory in which the proceedings are being held. Expulsion before the end of the proceedings would irremediably compromise that right.

According to the decided cases of the Court exercise of the right of establishment is conceivable only together with the protection provided by the national courts.

Commonsense arguments should suffice to show that the right of establishment cannot exist unless it is possible to have that right recognized and established and to oblige the Member State to observe it. The need for a genuine appeal to the courts with suspensory effect is self-evident.

The application to the Conseil d'État is insufficient. An alien who, within eight days of the decision refusing him the right of establishment, has not referred the matter to the Consultative Committee for Aliens loses the right to appeal to the Conseil d'État; that period is so short that, in practice, it is very frequently impossible to refer the matter to the Committee and consequently, in most cases, to the Conseil d'État. It is therefore essential that the appeal to the courts should be regarded as a proper appeal having suspensory effect.

(e) Certainly in some cases special urgent reasons justifying the expulsion of an alien cannot be held up by a procedure with suspensory effect. That possibility should, however, be interpreted strictly without being open to abuse. Supervision of the exercise thereof is necessary; the administration cannot be the sole judge of the urgency of an expulsion.

The answer should therefore be given to the second question that whereas a Member State retains the right, in cases of urgency which have been properly justified, to expel a national of the EEC, notwithstanding an appeal, the Member State is nevertheless obliged to ensure that the alien is able to contest the urgent nature in an appeal to the courts even if it is in the context of a special accelerated procedure such as for example summary proceedings.

The *Government of the Kingdom of Belgium* first summarizes the legal provisions of both Community law and national law applicable in Belgium to the right of establishment, in particular the Royal Decree of 21 December 1965 on conditions for entry, residence and establishment of aliens in Belgium and

the Law of 28 March 1952 on the supervision of aliens, as amended on a number of occasions, and specifies the remedies available to aliens in Belgium against expulsion orders.

A — The question of suspensory effect

(a) The fact is not denied that, save in cases of urgency which have been properly justified, remedies provided pursuant to Article 9 of Directive No 64/221/EEC have suspensory effect. The suspensory effect is clear from the wording of that provision which requires the Member States to organize a procedure before an authority which is not the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion. Such a procedure must be set up where there is no right of appeal to a court of law or where such appeal may be only in respect of the legal validity of the decision or where it cannot have suspensory effect. The Belgian legislature adapted its national legislation to comply with the directive; it therefore set up a special procedure. It is laid down by Article 3a of the Law of March 1952 on the supervision of aliens as amended by the Law of 1 April 1969.

(b) Comparison between Article 9 of Directive No 64/221/EEC and the procedure laid down for an application to the Consultative Committee for Aliens shows that the Belgian legislature has set up a procedure which complies with the directive.

The defects alleged by the plaintiff in the main action are not relevant. The principal allegation is that the Consultative Committee for Aliens issues only an opinion; the procedure for an opinion however is expressly provided for by the directive. The Consultative Committee for Aliens is an authority which is not the same as the one which takes the decision; the fact that its members are appointed by the Minister for Justice cannot be regarded as compromising their independence. The alien may appear in person or be represented. The ministerial decision of rejection must, following the proceedings before the Consultative Committee for Aliens, form the subject of another ministerial decision and the Belgian legislature has therefore set up a genuine appeal procedure within the meaning of the directive. The observations of the Minister for Justice and the note reporting to the Consultative Committee and the Committee's opinion are communicated to the alien.

The appeal provided for by Article 3a of the Law of 28 March 1952 is therefore in accordance with Directive No 64/221/EEC.

(c) Other remedies, apart from the application to the Consultative Committee for Aliens and the remedies provided for under Article 8 of Directive No 64/221/EEC, do not have suspensory effect.

The purpose of the directive is not to establish several remedies having suspensory effect but to ensure that an alien has an appeal procedure in order to present his case before an authority which is not the same as that which takes the decision. Such a procedure exists in Belgium; under that procedure the authority is obliged to give notice of a new decision following the procedure and an appeal may be filed against the new decision to the Conseil d'État with the result that an alien has access to two

levels of appellate authorities within the context of the administrative procedure.

It would be unreasonable to hold that any remedy whatsoever has suspensory effect: a decision could be deprived of effect for an uncertain period.

(d) In Belgium the courts of law have jurisdiction, in the context of proceedings concerning an administrative decision, only to rule on the legality of the decision and to award damages but not to annul or order the withdrawal of the decision. It would be unacceptable to suspend a measure or a decision during such proceedings. It would *a fortiori* not be acceptable in the present instance where the measure adopted concerning the plaintiff in the main proceedings has in no way removed her right of action provided for in Article 6 of the European Convention for the Protection of Human Rights and she has by no means lost her right to a fair hearing.

In its judgment of 21 February 1975 in the *Golder* case the European Court of Human Rights held that "the right of access to the courts is not absolute. As this is a right which the Convention sets forth without, in the narrower sense of the term, defining, there is room, apart from the bounds delimiting the very content of any right, for limitations permitted by implication." Thus it has been accepted that the right to appear in person in a civil action is not, as such, guaranteed by Article 6 or by any other provision of the Convention; in any event the plaintiff in the main action could appear in person before the Belgian courts in the course of a lawful stay in Belgium or during a brief visit to Belgium.

(e) It is clear that neither Article 9 of Directive No 64/221/EEC nor the Court of Justice in the decision in the *Royer* case intended that any procedure whatsoever should have a suspensory effect. Only a specific administrative procedure set up in each State of the Community where there is no right of appeal to a court of law or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect is essentially to have suspensory effect. The proceedings currently pending before the Tribunal de Première Instance, Liège, relate without question to the legal validity of the decision; it is quite clear that they do not have suspensory effect as only proceedings set up or existing on the basis of Articles 8 and 9 of the directive are to have such effect.

The Belgian State has obviously given the plaintiff the two-fold guarantee referred to by the Court of Justice in the *Rutili* case: on the one hand she has been informed of the reasons for the restrictive measure and, on the other, procedure for review has been made available, first by the Consultative Committee for Aliens and subsequently by the Conseil d'État.

(f) It must be held that the initiation of proceedings for civil liability in respect of a wrongful act against the author of a decision ordering expulsion does not constitute an appeal having suspensory effect.

B — The question of urgency

The question of urgency arises when the decision refusing establishment or ordering expulsion is executed; in any event it arises only if an appeal is lodged by the alien and that appeal has suspensory effect.

If the appeal does not have suspensory effect the authority which adopted the decision has the power to execute it; in that case if the urgency does not constitute a formal and integral part of the decision ordering expulsion it is nevertheless a matter within the exclusive jurisdiction of the administrative authority.

If the appeal has suspensory effect the authority which took the decision must have a discretionary power which may be influenced by the alien's own conduct. In the first instance the urgency is a matter for the authority which adopted the decision where the person concerned clearly continues to move in the circles which gave rise to the contested decision.

The way must not be opened, by means of proceedings to examine the question of urgency, for any alien who has been informed of a decision ordering expulsion to thwart or cause to be suspended the effects of the decision for the duration of the proceedings; the effect of that would be that, contrary to the aims of Directive No 64/221/EEC, any proceedings brought before any court to examine the question of urgency would have suspensory effect.

The *Government of the Kingdom of Denmark* considers, with regard to the last paragraph of Question B of the first group of questions raised in the order from the national court, and after first recalling the law applicable in Denmark to remedies against a decision ordering expulsion, that the inference must not be drawn from Articles 8 and 9 of Directive No 64/221/EEC that an alien has the right to reside in the country as long as the proceedings involving him are pending if the legal system in that State provides that an application at an earlier stage of the proceedings has suspensory effect. The provision that the national may reside in the country throughout the whole of the proceedings before the courts of law is unnecessary insofar as exercise of a citizen's rights can be guaranteed in a manner which is less interventionist. The answer should be given to the question asked that Community law does not confer suspensory effect on an appeal to a court of law against an administrative decision.

The *Government of the French Republic* takes the view that Articles 8 and 9 of Directive No 64/221/EEC were intended to refer only to appeals against administrative measures refusing a residence permit to the exclusion of all other proceedings, and, in particular, proceedings calling into question the civil liability of the authority which adopted the contested measure. That conclusion follows from the wording of Article 8 itself and from the third recital in the Preamble to the Directive. The directive therefore refers only to actions before the courts in which it is claimed that a measure is *ultra vires* or in which the courts have full jurisdiction (Article 8 of

the Directive) or, where they do not have suspensory effect or are not available, administrative appeals to an authority which is independent of that which adopted the measure (Article 9), in the present instance the application to the Consultative Committee for Aliens.

(a) Two possibilities must be distinguished with regard to the right to remain provisionally in the territory of a Member State:

Article 8 of the Directive, which refers to the national law of the Member States as amended to comply with Article 10 of the Directive, gives the individual the right of appeal to a court of law. In this case the person concerned should have the time necessary to lodge an appeal against the administrative measure affecting him; the minimum period of fifteen days referred to in Article 7 of the Directive, which can be shortened only in cases of urgency, appears to be sufficient to that end.

Article 9 of the Directive constitutes an absolute minimum which affords guarantees to nationals of the Community in cases where there is no right of appeal to a court of law within the meaning of Article 8 or where such appeal does not have suspensory effect. In such a case if there is a decision ordering expulsion it should be suspended until the person concerned has been able to appear before the authority referred to in the second subparagraph of Article 9 (1) and has been able to submit his defence in person except where that would be contrary to the interests of national security (Article 9 (2)). In the judgment in the *Royer* case the Court of Justice hald that the lodging of an appeal within the meaning of Articles 8 and 9 does not have suspensory effect on condition that the individual has been able to exhaust the procedure under Article 9 (1).

(b) A reply to the question asked in terms which would imply the presence, in the territory of the State, of the person concerned for the whole duration of the proceedings would have the effect of giving the appeal suspensory effect which is contrary both to the directive and the decided cases of the Court of Justice. The decision in the *Royer* case which gives complete guarantees for the protection of the rights of citizens while enabling the Member States to carry out effective supervision in the interests of public security should be confirmed. If that is not done all measures ordering expulsion will be paralysed by long drawn-out proceedings and this will in effect have the result of depriving the Member States of their right of expulsion.

The *Commission* observes that the wording of the questions referred to the Court covers aspects of national law, Community law and international law which can be separated only with difficulty insofar as the national judge is seeking the meaning of Articles 8 and 9 of Directive No 64/221/EEC on the basis, on the one hand, of the distinction in Belgian law between administrative appeals and actions relating to civil rights and on the other, of the concept of a fair hearing. As far as Community law is concerned the questions could be worded as follows:

(a) As the right of residence in a country in order to engage in economic

activity, in this instance as an employed person, is recognized as a subjective right do the procedural guarantees against any decision by the authorities restricting the exercise of that right on grounds of public policy within the meaning of Directive No 64/221/EEC, as interpreted in the decision in the *Royer* case, apply to any proceedings in which the validity of such a decision is contested?

(b) Do the remedies, exercise of which is guaranteed by Articles 8 and 9 of the Directive and which must be exhausted before a decision ordering expulsion can be executed (*Royer* case) include any judicial dispute between a person holding the right of residence and the public authorities of a Member State objecting to that right, for example an action for civil liability in respect of a wrongful act brought against that State, even where the procedure provided for in Article 9 (2) has been complied with? In other words is the suspensory effect inherent in any remedies existing under national law?

(c) Is urgency which has been properly justified, which in the *Royer* case was held to authorize the provisional execution of a decision ordering expulsion notwithstanding any appeal, subject to the examination by the court having jurisdiction to ensure that the right of residence is observed or is it solely a matter for the administrative authority which took the decision?

A — The first group of questions (the first two questions)

(a) The procedural guarantees are essential to protect the right of residence conferred directly on persons entitled to freedom of movement under the Treaty. It follows from the *Royer* case that a decision ordering expulsion cannot be executed, save in cases of urgency which have been properly justified, until the party concerned has been able to exhaust the remedies guaranteed by Articles 8 and 9 of the Directive. Seen in this light no valid distinction can be drawn between the refusal to issue a first residence permit, accompanied by an order to leave the territory, or a decision ordering the expulsion of an alien who already holds such a permit. Consequently, regarding the grounds justifying such a measure, the alleged personal conduct complained of must, according to the decided cases of the Court, constitute a genuine and sufficiently serious threat to public policy affecting a fundamental interest of society and, as regards the procedural guarantees, the execution of the decision ordering expulsion must be suspended until the remedies available to the party concerned have been exhausted.

(b) In this respect in Article 9 (2) of the Directive the case is distinguished of the refusal to issue a first residence permit in order to mitigate the effects of the absence of any right of appeal to a court

of law having suspensory effect. That precaution is justified precisely by the generally expeditious nature, without real guarantees, of decisions ordering the expulsion of foreign nationals who have not yet obtained a residence permit.

(c) Article 8 of the Directive is applicable equally to all decisions, before or after the issue of a first residence permit, which have the effect of restricting the right of residence on grounds of public policy or public security. Consequently the intervention of the authority referred to in Article 9 (2) — in Belgium the Consultative Committee for Aliens — by no means exhausts the procedural guarantees afforded to the party concerned and, in particular, not the rights of appeal offered by national law against the decision taken on hearing the opinion of that committee.

(d) With regard to Community law the nature of the remedies made available by national law against administrative decisions ordering expulsion are of little importance. The differences existing in this respect between the various Member States would make uniform application of Article 8 of the Directive impossible if account had to be taken of the particular characteristics of each national law; the distinction between the jurisdiction of the courts of law and that of administrative bodies, which does not exist in certain Member States, is not relevant.

If, under Belgian law, a remedy exists before the courts of law enabling a decision ordering the expulsion of a national of another Member State to be challenged, not only is Article 8 of the Directive applicable to that remedy but necessarily, also the rule set out in the judgment in the Royer case excluding the execution of the measure until the remedy has been exhausted.

(e) The following answer should therefore be given to the first group of questions:

A measure ordering the expulsion, before or after the issue of a first residence permit, of a national of a Member State, entitled to the fundamental right under the Treaty to reside in the territory of another Member State, cannot be executed, save in cases of urgency which have been properly justified, until the proceedings initiated by him against that measure have been exhausted irrespective of the nature under national law of those remedies and the body appealed to.

B — The second group of questions (third question)

(a) The provision for cases of urgency, which authorizes the national authorities to execute a measure ordering expulsion before all remedies have been exhausted is particularly dangerous for the protection of individual rights. If its application is left to the sole discretion of the author of the measure the latter could in that way considerably reduce or even nullify the procedural guarantees intended by the Community legislature

and specified by the Court in the *Royer* case. The execution of any measure ordering expulsion has serious, often irremediable, consequences for the party concerned, even if it is subsequently annulled. If the supervisory jurisdiction conferred on the relevant courts did not extend to the alleged urgency and the justification therefore the effectiveness of the supervision would be considerably reduced.

(b) The answer to the second group of questions should therefore be that cases of urgency alleged by the administrative authority in order to execute a measure ordering expulsion immediately, notwithstanding any appeal, is, in the same way as the measure itself, subject to the supervision and appraisal of the court hearing the application.

III — Oral procedure

Mrs Pecastaing, the plaintiff in the main action, represented by Luc Misson, of the Liège Bar, the Government of the Kingdom of Belgium, represented by Dominique Drion, assisted by J. C. Godfroid, specialist Legal Adviser at the Aliens Office of the Ministry of Justice, and the Commission, represented by its Legal Adviser, Jean-Claude Séché, delivered their oral observations and replied to questions raised by the Court at the hearing on 10 January 1980.

The Advocate General delivered his opinion at the sitting on 31 January 1980.

Decision

1 By an order of 18 June 1979, which was received at the Court on 21 June 1979, the President of the Tribunal de Première Instance, Liège, in the course of summary proceedings, submitted pursuant to Article 177 of the EEC Treaty a series of questions on the interpretation of Articles 8 and 9 of Council Directive No 64/221 of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition, 1963-1964, p. 117) in order to determine whether an application submitted by a French national claiming, in civil proceedings, the suspension of an expulsion order issued against her by the Belgian police is admissible.

The application in Belgium of Directive No 64/221

2 The information obtained in the course of the proceedings shows that Belgium has not enacted specific legislation for the implementation of Article 8 of the directive. In fact it is not contested that appeals in administrative matters to the Belgian Conseil d'État are open to any person, irrespective of nationality, so that the persons referred to in Article 1 of the directive thereby have the right of appeal to a court of law against police measures affecting them. With regard to the application of Article 9, in the Law of 1 April 1969 (*Moniteur Belge,* p. 6182) Belgium adopted a provision intended to enable the persons covered by the directive to apply to the Consultative Committee set up by Article 10 of the Law on the supervision of aliens of 28 March 1952. In accordance with the Royal Decree of 22 December 1969 (*Moniteur Belge,* 1970, p. 1402) persons who have been refused a residence permit or against whom an expulsion order has been made before a permit was issued have the right to submit a complaint to the said Committee by addressing an application to the Minister of Justice within eight days from the date on which they were notified of the decision concerning them.

3 The information obtained in the course of the proceedings establishes that, according to the relevant decisions of the administrative courts, an alien who has failed to apply to the Consultative Committee within the prescribed time-limit is barred from subsequently submitting an application to the Conseil d'État. In reply to the questions raised by the Court of Justice the Belgian Government has furthermore explained that, according to administrative practice, an alien affected by a police measure is not informed, at the time the decision is notified to him, of his right to complain to the Consultative Committee or of the time-limit for such a complaint or of the consequences of the failure to complain to the said Committee with regard to a subsequent appeal to the courts.

The background to the application

4 The order from the national court and the documents on the case show that the plaintiff lawfully entered Belgium on 8 October 1977 and that she worked as a waitress in bars in the Liège region which the police consider to be of doubtful moral character. On 8 November 1977 Mrs Pecastaing, who had in the meantime registered with the administration of the commune in which she resided, applied for a residence permit as an employed person.

The Belgian police sought information from the French authorities and were told that the plaintiff had previously been a prostitute in France and in the Federal Republic of Germany. Acting on that information, the Aliens Office of the Public Security Administration of the Ministry of Justice adopted a decision on 3 May 1978 refusing to issue her a residence permit, ordering her to leave the country within 15 days, and stating that otherwise she would be arrested and transported to the frontier by forces of public order. Mrs Pecastaing was notified of that measure on 16 May 1978. The decision states that the residence of the plaintiff in Belgium is "undesirable for reasons of public policy". Mrs Pecastaing immediately lodged a complaint with the Consultative Committee for Aliens. On 14 December 1978 the Committee issued an opinion upholding the refusal to grant the residence permit and on 12 January the Aliens Office repeated its decision embodying the expulsion order based on reasons substantially the same as those in the previous decision and providing for the same measures to enforce the order.

5 It is common ground that the plaintiff did not submit an appeal against that decision to the Conseil d'État. She gave as the reason for her failure to act the fact that the decision taken regarding her is not considered as a measure against which an appeal may be made since, according to existing case-law, an appeal to the Conseil d'État lies only against an expulsion order issued in the form of a ministerial decree. She did, however, institute proceedings before the Tribunal de Première Instance, Liège, against the Belgian State claiming damages on the grounds of an alleged illegality of the decision affecting her. At the same time she requested an interlocutory order suspending the expulsion order pending the judgment of the court on the substance of her claim.

6 In order to make its decision on the matter the national court submitted the following questions to the Court of Justice:

Interpreting Articles 8 and 9 of Directive No 64/221, in its judgment delivered on 8 April 1976 in Case 48/75, *Royer* [1976] ECR 497, the Court ruled in the fourth paragraph of the operative part of the judgment, on the basis of paragraphs 52 to 62 of the grounds of the decision, that:

"A decision ordering expulsion cannot be executed, save in cases of urgency which have been properly justified, against a person protected by Community

law until the party concerned has been able to exhaust the remedies guaranteed by Articles 8 and 9 of Directive No 64/221."

First group of questions

A — The remedies to which the judgment applies include those provided for by Article 9 (2) of Directive No 64/221, which are laid down by Article 1 of the Belgian Law of 1 April 1969, forming Article 3a (as amended) of the Law of 28 March 1952 on the supervision of aliens, namely applications for the review of decisions refusing the issue of the first residence permit or decisions ordering expulsion of the person concerned before the issue of the permit (Belgian Conseil d'État: judgment 17.722 of 18 June 1976 and judgment 18.609 of 2 December 1977; Recueil des Arrêts du Conseil d'État, 1977, p. 1381).

It appears that the suspensory remedies also include, as being guaranteed by Article 8 of the Directive, the applications for annulment of administrative measures available under national law. Do those suspensory remedies also include an action for civil liability in respect of a wrongful act brought against the author of a decision ordering expulsion?

In other words, is the suspensory effect a rule of procedure limited solely to the exercise of direct remedies or is it an adaptation, for the benefit of persons protected by Community law, of the fundamental right which all persons have to a fair civil hearing?

B — More generally, in disputes between a national of one Member State of the European Community and a public authority of another Member State concerning rights and obligations of a civil nature (within the meaning of Article 6 of the Convention for the Protection of Human Rights) involving the implementation of rules of Community law, does the right to a fair hearing imply that personal access to the courts of the State concerned must be effectively made available to the said national?

If the above question is answered in the affirmative, may it be deduced from the Convention for the Protection of Human Rights read together with

Community law that that national has the right to be in person within the territory of the State against which he is bringing proceedings during the course of the action, irrespective of any administrative measure ordering his expulsion, except in cases of urgency which have been properly justified?

Second group of questions

In a case of urgency which has been properly justified, the decision ordering expulsion may be executed notwithstanding any appeal.

Does the existence of that urgency form an integral part of the decision ordering expulsion so that the administrative authority which took the decision is exclusively competent to ascertain whether such urgency exists?

Or does it, on the contrary, appertain to the exercise of a judicial remedy, such that, in the event of a dispute, the court before which the action is brought may decide the question?

7 The questions as a whole are concerned to establish the obligations imposed on the Member States by Articles 8 and 9 of Directive No 64/221 with regard to the protection to be afforded by the courts to a person against whom an expulsion order is made. Specifically, clarification is requested of the obligations of the Member States under the directive with regard to the suspensory effect of applications against such a measure of the right to obtain a suspension of such measures and the evaluation of the concept of "urgency" appearing in Article 9 of the directive. The national court, in submitting those questions, refers on the one hand to certain aspects of the case-law of the Court resulting from the judgment of 8 April 1976 in Case 48/75, *Royer,* [1976] ECR 497), and on the other to the concept of "a fair hearing" contained in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The interpretation of Article 8 of the directive

8 The questions submitted on the interpretation of Article 8 seek to establish in substance whether the legal remedies made available in the Member State

pursuant to that article include, in addition to appeals to the administrative courts for the annulment of a measure adopted under the policy on aliens, appeals to other courts and whether the submission of such appeals has suspensory effect so that the appellant is entitled to remain on the territory of the State throughout the proceedings which he has instituted.

9 According to Article 8: "The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration."

10 That provision defines the decisions referred to by the directive as "acts of the administration" and imposes upon the Member States the obligation to make available to any person affected by such acts the same legal remedies as are available to nationals in respect of acts of the administration. Accordingly a Member State cannot, without being in breach of the obligation imposed by Article 8, render the right of appeal for persons covered by the directive conditional on particular requirements as to form or procedure which are less favourable than those pertaining to remedies available to nationals in respect of acts of the administration. A remedy must thus be available to any person covered by the directive against any decision which may lead to expulsion before the decision is executed.

11 Article 8 does not specify the courts from which such remedies may be sought. The resolution of that point depends upon the organization of the courts of each Member State. It follows that if, in a Member State, remedies against acts of the administration may be sought from the ordinary courts, the persons covered by Directive No 64/221 must be treated in the same way as nationals with regard to rights of appeal to such courts in respect of acts of the administration. This means that if, in a Member State, the adminstrative courts were not empowered to grant a stay of execution of an administrative decision but such power was recognized to the ordinary courts that State would be obliged to permit persons covered by the directive to

apply for a stay of execution to such courts on the same conditions as nationals of that State. It must nevertheless be emphasized that such rights depend essentially on the organization of the courts and the division of the jurisdiction of judicial bodies in the various Member States since the only obligation imposed upon the Member States by Article 8 is to grant to persons protected under Community law rights of appeal which are not less favourable than those available to nationals of the State concerned against acts of the administration.

12 On the other hand Article 8 contains no specific obligation concerning any suspensory effect of applications available to persons covered by the directive. If that provision requires that the person concerned should be able to appeal against the measure affecting him it must be inferred, as the Court stated in its judgment in the *Royer* case (paragraph 60 of the decision), that the decision ordering explusion may not be executed — save in cases of urgency — before the party concerned is able to complete the formalities necessary to avail himself of the remedy. However, it cannot be inferred from that provision that the person concerned is entitled to remain on the territory of the State concerned throughout the proceedings initiated by him. Such an interpretation, which would enable the person concerned unilaterally, by lodging an application, to suspend the measure affecting him, is incompatible with the objective of the directive which is to reconcile the requirements of public policy, public security and public health with the guarantees which must be provided for the persons affected by such measures.

13 Accordingly, the reply to be given to the questions submitted must be that Article 8 covers all the remedies available in a Member State in respect of acts of the administration within the framework of the judicial system and the division of jurisdiction between judicial bodies in the State in question. Article 8 imposes on the Member States the obligation to provide for the persons covered by the directive protection by the courts which is not less than that which they make available to their own nationals as regards appeals against acts of the administration including, if appropriate, the suspension of the acts appealed against. On the other hand there may not be inferred from Article 8 an obligation for the Member States to permit an alien to remain in

their territory for the duration of the proceedings, so long as he is able nevertheless to obtain a fair hearing and to present his defence in full.

The interpretation of Article 9 of Directive No 64/221

14 With regard to the interpretation of Article 9 the Court of Justice is requested on one hand to clarify the rights which must be made available to persons concerned regarding suspension of measures of the policy on aliens in order to permit them to make effective use of the remedies to which they are entitled and on the other to settle whether the determination of the urgency referred to in Article 9 falls within the exclusive competence of the administrative authority or whether, in cases of dispute, it may be examined by the courts.

15 The provisions of Article 9 of Directive No 64/221 are complementary to those of Article 8. Their object is to ensure a minimum procedural safeguard for persons affected by one of the measures referred to in the three specific cases set out as follows in Article 9 (1): "Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect". In the first case mentioned a complaint to a "competent authority" which is not the same as that empowered to take the decision is intended to compensate for the absence of any right of appeal to the courts. In the second case the intervention of the competent authority is intended to enable a detailed examination to be made of the situation of the person concerned, including the appropriateness of the measure contemplated, before the decision is finally taken. In the third case that procedure is intended to permit the person concerned to request and to obtain, if appropriate, a stay of the execution of the measure envisaged in such a way as to compensate for the absence of a right to obtain a stay of execution from the courts.

16 It follows that a Member State cannot apply the provisions of Article 9 of the directive in such a way that its practical effect is to restrict or render ineffective the legal remedies made available under Article 8 to the persons covered by the directive.

17 With regard to the interpretation of Article 9 considered in isolation, it should be recalled, as the Court of Justice had occasion to point out in its judgment in the *Royer* case (paragraph 59 of the decision), that the procedure of appeal to a "competent authority" referred to in that article must precede the decision ordering explusion, save in cases of urgency. In particular if a Member State has applied Article 9 in order to compensate for the fact that the appeals to the courts which are available do not carry suspensory effect that provision would be rendered nugatory if, always save in cases of urgency, execution of the expulsion order contemplated were not suspended until that authority has given its opinion (*Royer* case, paragraph 61 of the decision).

18 It follows from Article 9 therefore that as soon as the opinion in question has been obtained and notified to the person concerned an expulsion order may be executed immediately, subject always to the right of that person to stay on the territory for the time necessary to avail himself of the remedies accorded to him under Article 8 of the directive.

19 Finally, with regard to the matter of urgency, the first subparagraph of Article 9 (1) shows that determination of the existence of urgency in cases which have been properly justified, is a matter for the administrative authority and that expulsion from the territory may then be effected even before the "competent authority" has been able to give its opinion.

20 The reply to the questions submitted must thus be that the procedure concerning the consideration of the decision and concerning the opinion referred to in Article 9 which is intended to mitigate the effect of deficiencies in the remedies referred to in Article 8, is not intended to confer upon the courts additional powers concerning suspension of the measures referred to by the directive or to empower them to review the urgency of an expulsion order. The performance of those duties by the national courts is governed by Article 8 of the directive. The scope of that provision nevertheless may not be restricted by measures taken by a Member State under Article 9 of the directive.

The requirement of a "fair hearing" (Article 6 of the European Convention for the Protection of Human Rights)

21 The national court, apparently considering that the rights at issue in this case are in the nature of "civil" rights, further asks whether, apart from the provisions of Directive No 64/221, it is necessary to ensure compliance in the Community legal system with the requirements of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms under which "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

22 It does not appear necessary to consider that question in this case since Directive No 64/221 may be considered as fulfilling, with regard to the measures to which it refers, according to the third recital of the preamble thereto, the requirement of the "fair hearing" set out in Article 6 of that Convention at least with regard to the arrangements for appeals to the courts contained in Article 8 of the directive as has been stated above. It is accordingly unnecessary to give a reply here to that aspect of the questions submitted by the national court.

Costs

23 The costs incurred by the Government of the Kingdom of Belgium, the Government of the French Republic, the Government of the Kingdom of Denmark and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in thes summary proceedings pending before the President of the Tribunal des Première Instance, Liège, 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 President of the Tribunal de Première Instance, Liège, in summary proceedings, by an order of 18 June 1979, hereby rules:

1. **Article 8 of Council Directive No 64/221 of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health covers all the remedies available in a Member State in respect of acts of the administration, within the framework of the judicial system and the division of jurisdiction between judicial bodies in the State in question.**

   That provision imposes on the Member States the obligation to provide for the persons covered by the directive protection by the courts which is not less than that which they make available to their own nationals as regards appeals against acts of the administration, including, if appropriate, suspension of the acts appealed against.

   On the other hand there may not be inferred from Article 8 of Directive No 64/221 an obligation for the Member States to permit an alien to remain in their territory for the duration of the proceedings, so long as he is able nevertheless to obtain a fair hearing and to present his defence in full.

2. **The procedure concerning the consideration of the decision and concerning the opinion referred to in Article 9 of Directive No 64/221, which is intended to mitigate the effect of deficiencies in the remedies referred to in Article 8, is not intended to confer upon the courts additional powers concerning suspension of the measures referred to by the directive or to empower them to review the urgency of an expulsion order.**

The performance of these duties by the national courts is governed by Article 8 of the directive.

The scope of that provision nevertheless may not be restricted by measures taken by a Member State under Article 9 of the directive.

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 5 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 31 JANUARY 1980 [1]

Mr President,
Members of the Court,

1. The Community provisions which the Court has been requested to interpret in these proceedings for a preliminary ruling are Articles 8 and 9 of Council Directive No 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. In considering those provisions regard must be had for the basic principles of a fair hearing which are to be inferred from Article 6 of the European Convention for the Protection of Human Rights since the point at issue is what procedures must be made available to nationals of Member States who have been ordered to leave the territory of a Member State other than their own in which they are residing or have requested permission to settle.

The facts of the case can be summarized as follows.

1 — Translated from the Italian.