OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 5 July 1988 *

Mr President,
Members of the Court,

1. Having regard to the facts set out in the interim order made by the Judicial Division of the Raad van State, which has made this reference to the Court, I consider that, in order to give a useful answer to that court, any reference to Articles 59 and 60 of the EEC Treaty and, more generally, to the freedom to provide services, with which the second and third preliminary questions are concerned, should be ruled out at once. That freedom essentially concerns the pursuit of an independent professional or trade activity on an occasional and provisional basis.

2. The provisions of Community law relating to the provision of services may not be relied upon in a stable situation of indefinite duration. That consideration applies both to persons providing services and to persons receiving services.

3. The first subparagraph of Article 4 (2) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services [1] provides that the right of residence for persons providing and receiving services 'shall be of equal duration with the period during which the services are provided' and the second subparagraph of Article 4 (2) provides that, where such period exceeds three months, a right of abode shall be issued as proof of the right of residence.

4. Persons receiving services were considered in particular in the judgment in *Luisi and Carbone* in which the requirement relating to the temporary nature of the receipt of services became clear. In that judgment the Court held that

'the freedom to provide services includes the freedom, for the recipients of services, to go to another Member State in order to receive a service there . . . and tourists, persons receiving medical treatment and persons travelling for the purpose of education or business are to be regarded as recipients of services'. [2]

It is therefore clear that an activity pursued on a permanent basis or at any rate without any foreseeable limit in time cannot be covered by the Community provisions relating to the provision of services.

5. However, the first question submitted by the national court is general in scope and must be dealt with from that point of view. In substance, the question is to what extent activities carried out in connection with and during a person's participation in a community based on religion or on another form of philosophy may be described as

* Translated from the French.

1 — OJ L 172, 28.6.1973, p. 14.

2 — Judgment of 31 January 1984 in Joined Cases 286/82 and 26/83 *Luisi and Carbone* v *Ministero del Tesoro* [1984] ECR 377, at p. 403, paragraph 16.

economic activities within the meaning of the Treaty.

6. The possibility that activities carried out in such circumstances might be defined as economic activities covered as such by Community law cannot be ruled out *a priori*. However, it is not sufficient to give an abstract reply to the question raised. Participation in an association such as that described by the national court may entail the pursuit of certain professional or trade activities having the character of economic activities within the meaning of the Treaty. In each case it is for the national court to consider the nature and frequency of the activities in question, the relationship between the person pursuing them and the person who pays for them and in particular to determine whether the remuneration received, in whatever form, constitutes the reward for the work done.

7. In a situation of unlimited duration, the economic activity might be carried on either pursuant to the freedom of workers to move within the Community or pursuant to the freedom of establishment.

8. In its judgment in *Walrave and Koch*, the Court stated, with regard to a different context, that when an economic activity, within the meaning of Article 2 of the Treaty,

'has the character of gainful employment or remunerated service it comes more particularly within the scope, according to the case, of Articles 48 to 51 or 59 to 66 of the Treaty'. [3]

In other words, if an activity is a remunerated professional or trade activity, there is an economic activity.

9. For the reasons indicated above, any reference to the provisions relating to the freedom to provide services must be ruled out in this case. It is clear from that judgment, and this result was confirmed in *Donà*, [4] that the activities of employed persons constitute *ipso facto* economic activities.

10. In determining whether the situation in the case before the national court is governed by the Community provisions relating to the freedom of establishment or those relating to the free movement of workers, it should be borne in mind that, in its judgment in the Lawrie-Blum case, the court stated that the concept of a 'worker'

'must be defined in accordance with objective criteria which distinguish the employment relationship with reference to the rights and duties of the persons concerned. The essential feature of an employment relationship ... is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'. [5]

11. Referring to its judgment in *Levin*, [6] the Court also pointed out that:

'the expressions "worker" and "activity as an employed person" must be understood as

3 — Judgment of 12 December 1974 in Case 36/74 *Walrave and Koch* v *Association union cycliste internationale and Others* [1974] ECR 1405, at p. 1417, paragraph 5.

4 — Judgment of 14 July 1976 in Case 13/76 *Donà* v *Mantero* [1976] ECR 1333.

5 — Judgment of 3 July 1986 in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 17.

6 — Judgment of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035.

including persons who, because they are not employed full time, receive pay lower than that for full-time employment, provided that the activities performed are effective and genuine'.[7]

12. In other words, it is for the national court to determine whether the plaintiff's status within the association in question, the work he does and the remuneration he receives for it render applicable the Community provisions relating to the free movement of workers or to the freedom of establishment, depending on the case.

13. However, in the present case, it is irrelevant to determine which set of provisions applies since Mr Steymann brought his action against the decision refusing to grant him a residence permit.

14. In its judgment in *Royer* the Court in fact held that the provisions relating to those two freedoms are based on the same principles

'in so far as they concern the entry into and residence in the territory of the Member States of persons covered by Community law'.[8]

15. It follows that, in order to resolve the case before it and to determine whether the provisions of Community law relating to the free movement of persons apply to it, the national court must examine the nature of the activities carried out by the plaintiff and ascertain to what extent he is remunerated as a reward for his work and not independently of it.

16. Consequently, I propose that the Court should rule that:

'The professional or trade activity carried out in a Member State by a national of another Member State within, or in the service of, a spiritual community may be regarded by the national court as an economic activity within the meaning of the Treaty if it constitutes the necessary quid pro quo for the remuneration which that person receives, in whatever form, from that community.'

7 — *Lawrie-Blum*, cited above, paragraph 21.

8 — Judgment of 8 April 1976 in Case 48/75 *Royer* [1976] ECR 497, at p. 509, paragraph 12.