

JUDGMENT OF THE COURT

27 September 2001 *

In Case C-257/99,

REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for the Home Department,

ex parte:

Julius Barkoci and Marcel Malik,

on the interpretation of Articles 45 and 59 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, concluded and approved on behalf of the Community by Decision 94/910/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 360, p. 1),

* Language of the case: English.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola (Rapporteur), M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen and F. Macken, Judges,

Advocate General: J. Mischo,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Mr Barkoci, by N. Blake QC and T. Eicke, Barrister, and Mr Malik, by N. Blake and L. Fransman, Barrister, instructed by B. Sheldrick, Solicitor,
- the United Kingdom Government, by M. Ewing, acting as Agent, and E. Sharpston QC,
- the Belgian Government, by P. Rietjens, acting as Agent,
- the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,
- the French Government, by K. Rispal-Bellanger and A. Lercher, acting as Agents,

- the Italian Government, by U. Leanza, acting as Agent, assisted by F. Quadri, avvocato dello Stato,

- the Netherlands Government, by M.A. Fierstra, acting as Agent,

- the Commission of the European Communities, by F. Benyon, M.-J. Jonczy and N. Yerrell, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Barkoci and Mr Malik, represented by N. Blake and T. Eicke; of the United Kingdom Government, represented by G. Amodeo, acting as Agent, and E. Sharpston; of the Irish Government, represented by E. Barrington BL; of the Italian Government, represented by F. Quadri; of the Netherlands Government, represented by M.A. Fierstra; and of the Commission, represented by F. Benyon, M.-J. Jonczy and N. Yerrell, at the hearing on 11 July 2000,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2000,

gives the following

Judgment

- 1 By order of 29 March 1999, received at the Court on 9 July 1999, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), referred to the Court for a preliminary ruling under Article 234 EC seven questions concerning the interpretation of Articles 45 and 59 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, concluded and approved on behalf of the Community by Decision 94/910/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 360, p. 1) ('the Association Agreement').
- 2 Those questions have arisen in a dispute between Mr Barkoci and Mr Malik, who are Czech nationals, and the Secretary of State for the Home Department ('the Secretary of State') in respect of two decisions by which the latter refused to grant them leave to enter the United Kingdom.

The Association Agreement

- 3 The Association Agreement was signed in Luxembourg on 4 October 1993 and, in accordance with the second paragraph of Article 123 thereof, entered into force on 1 February 1995.
- 4 According to Article 1(2), the aims of the Association Agreement are, *inter alia*, to provide an appropriate framework for political dialogue, allowing the

development of close political relations between the Parties, to promote the expansion of trade and harmonious economic relations, in order to foster dynamic economic development and prosperity in the Czech Republic, and to provide an appropriate framework for the Czech Republic's gradual integration into the Community. The 18th recital in the preamble to the Association Agreement states that the ultimate objective of that country is to accede to the Community.

- 5 The provisions of the Association Agreement material to the case before the national court are to be found in Title IV, entitled 'Movement of workers, establishment, supply of services'.
- 6 Article 38(1) of the Association Agreement, which appears in Title IV, Chapter I, entitled 'Movement of workers', provides:

'Subject to the conditions and modalities applicable in each Member State:

- treatment accorded to workers of Czech Republic nationality, legally employed in the territory of a Member State, shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals,
- the legally resident spouse and children of a worker legally employed in the territory of a Member State, with the exception of seasonal workers and of workers coming under bilateral agreements within the meaning of Article 42, unless otherwise provided by such agreements, shall have access to the labour market of that Member State, during the period of that worker's authorised stay of employment.'

7 Article 45(3) and (4) of the Association Agreement, which forms part of Title IV, Chapter II, entitled 'Establishment', provides:

'3. Each Member State shall grant, from entry into force of this Agreement, a treatment no less favourable than that accorded to its own companies and nationals for the establishment of Czech Republic companies and nationals and shall grant in the operation of Czech Republic companies and nationals established in its territory a treatment no less favourable than that accorded to its own companies and nationals.

4. For the purposes of this Agreement:

(a) *establishment* shall mean:

(i) as regards nationals, the right to take up and pursue economic activities as self-employed persons and to set up and manage undertakings, in particular companies, which they effectively control. Self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market of another Party.

The provisions of this chapter do not apply to those who are not exclusively self-employed;

...

(c) *economic activities* shall in particular include activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions.’

8 Article 59(1) of the Association Agreement, which appears in Title IV, Chapter IV, entitled ‘General provisions’, provides:

‘For the purpose of Title IV of this Agreement, nothing in the Agreement shall prevent the Parties from applying their laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons, and supply of services, provided that, in so doing, they do not apply them in a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this Agreement....’

The national legislation

9 Section 11(1) of the Immigration Act 1971 (‘the Immigration Act’) defines ‘entry into the United Kingdom’ as follows:

‘A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom as long as he remains in such area (if any) at the port as may

be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained or temporarily admitted or released while liable to detention ...'

10 The other provisions of national law relevant to the case in the main proceedings are essentially the United Kingdom Immigration Rules (House of Commons Paper 395) (rules on immigration adopted by the Parliament of the United Kingdom of Great Britain and Northern Ireland in 1994) ('the Immigration Rules'), as in force at the time of the facts at issue in the main proceedings, which govern entry to and residence in the United Kingdom.

11 The Immigration Rules have the purpose of adapting the legal system of the United Kingdom of Great Britain and Northern Ireland to the provisions on establishment contained in the Association Agreement and in the other Europe agreements concluded between the European Communities and the Member States, on the one hand, and the countries of Central and Eastern Europe, on the other.

12 Paragraphs 24 to 26 of the Immigration Rules establish a general system of prior entry clearance for certain categories of applicants seeking leave to enter, and provide for mandatory refusal of leave if such entry clearance has not been obtained. Those paragraphs provide:

'24. A visa national and any other person who is seeking entry for a purpose for which prior entry clearance is required under these Rules must produce to the Immigration Officer on arrival a valid passport or other identity document endorsed with a United Kingdom entry clearance issued to him for the purpose for which he seeks entry. Such a person will be refused leave to enter if he has no such current entry clearance...

25. Entry clearance takes the form of a visa (for visa nationals) or an entry certificate (for non-visa nationals). These documents are to be taken as evidence of the holder's eligibility for entry into the United Kingdom, and accordingly accepted as "entry clearances" within the meaning of the Immigration Act 1971.

26. An application for entry clearance will be considered in accordance with the provisions in these Rules governing the grant or refusal of leave to enter...'

13 Paragraph 28 of the Immigration Rules stipulates that a person applying for entry clearance must be outside the United Kingdom at the time of the application, and must apply to the designated post in his or her country of residence.

14 According to the Appendix to the Immigration Rules, nationals of the Czech Republic do not require a visa for the United Kingdom, and the entry clearance required under paragraph 24 of the Immigration Rules takes the form of an entry certificate.

15 Part 6 of the Immigration Rules, entitled 'Persons seeking to enter or remain in the United Kingdom as a businessman, self-employed person, investor, writer, composer or artist', contains a number of provisions concerning the treatment of

applications by 'persons intending to establish themselves in business under the provisions of EC Association Agreements'. Paragraphs 211, 212 and 214 to 216, which feature in this part, are worded as follows:

'211. For the purpose of paragraphs 212 to 223, a business means an enterprise as:

— a sole trader; or

— a partnership; or

— a company registered in the United Kingdom.

212. The requirements to be met by a person seeking leave to enter the United Kingdom to establish himself in business are that:

(i) he satisfies the requirements of... paragraph 214; and

(ii) the money he is putting into the business is under his control and sufficient to establish himself in business in the United Kingdom; and

- (iii) until his business provides him with an income he will have sufficient additional funds to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and
- (iv) his share of the profits of the business will be sufficient to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and
- (v) he does not intend to supplement his business activities by taking or seeking employment in the United Kingdom other than his work for the business; and
- (vi) he holds a valid United Kingdom entry clearance for entry in this capacity.

213. ...

214. Where a person intends to establish himself in self-employment or in partnership in the United Kingdom he will need, in addition to meeting the requirements at 212 above, to show:

- (i) that he is a national of... the Czech Republic; and
- (ii) that he will be actively involved in trading or providing services on his own account or in partnership in the United Kingdom; and

(iii) that he, or he together with his partners, will be the owner of the assets of the business;...

...

...

215. A person seeking leave to enter the United Kingdom to establish himself in business may be admitted for a period not exceeding 12 months with a condition restricting his freedom to take employment provided he is able to produce to the Immigration Officer, on arrival, a valid United Kingdom entry clearance for entry in this capacity.

...

216. Leave to enter the United Kingdom as a person seeking to establish himself in business is to be refused if a valid United Kingdom entry clearance for entry in this capacity is not produced to the Immigration Officer on arrival.'

16 Paragraph 321 of the Immigration Rules provides that an applicant who holds an entry clearance which was duly issued to him and is still current may be refused leave to enter only where the Immigration Officer is satisfied that false representations were employed or material facts not disclosed, either in writing or orally, for the purpose of obtaining the entry clearance, or if a change of

circumstances since it was issued has removed the basis of the holder's claim to admission.

The dispute in the main proceedings

- 17 According to the order for reference, Mr Barkoci arrived in the United Kingdom on 14 October 1997 and, claiming asylum, sought leave to enter for an indefinite period in order to work. He stated that he wished to establish himself in the United Kingdom because, as a member of the Roma community, he could not find work in the Czech Republic, his place of origin. Pending further examination of his case, he was detained under the applicable provisions of the Immigration Act.
- 18 Following rejection of his application for asylum by the Secretary of State on 11 November 1997, Mr Barkoci appealed against that decision, stating that he did not wish to seek leave to enter the United Kingdom under any other provision of the Immigration Rules. On 3 December 1997, Mr Barkoci was released on bail pending his appeal.
- 19 Following dismissal of that appeal, Mr Barkoci was informed that directions had been set for his removal from the United Kingdom. However, in view of the fact that, on 9 March 1998, he had submitted an application to remain in the United Kingdom, pursuant to the Association Agreement, with a view to establishing himself there as a self-employed gardener, the arrangements made by the Secretary of State for his removal were cancelled.
- 20 The order for reference states further that Mr Malik, who also belongs to the Roma community, arrived in the United Kingdom on 18 October 1997 from the

Czech Republic and applied for asylum. He was likewise detained pending further examination of his case. His application was rejected by the Secretary of State by decision of 17 November 1997. Mr Malik's appeal against that decision was dismissed by the Special Adjudicator on 23 January 1998.

- 21 On 22 January 1998 Mr Malik submitted an application under the Association Agreement to become established in the United Kingdom in order to provide domestic and commercial cleaning services. He was accordingly granted temporary admission by the immigration authorities.
- 22 Since neither Mr Barkoci nor Mr Malik had been granted leave to enter the United Kingdom, whether in the form of prior entry clearance or of an entry certificate, they were deemed, in accordance with section 11(1) of the Immigration Act, not to have entered the United Kingdom. Their applications for leave to remain were for that reason treated as applications for initial leave to enter the United Kingdom under the Association Agreement.
- 23 In those circumstances, the immigration officer who examined the applications submitted by Mr Barkoci and Mr Malik merely verified whether they clearly and manifestly satisfied the other conditions laid down in paragraph 212 of the Immigration Rules so that the requirement of entry clearance under paragraph 212(vi) could be waived by a discretionary administrative act and leave to enter the United Kingdom granted outside the Immigration Rules.
- 24 However, in view of the business plans submitted by Mr Barkoci and Mr Malik to the immigration authorities as well as of the answers which they gave during interviews in connection with those plans, the immigration officers stated that

they were not satisfied as to the financial viability of the applicants' businesses or that they intended to carry them on in a genuinely self-employed capacity. In particular, Mr Malik expressly stated that he would continue to live on social benefits until his business provided him with sufficient income.

- 25 Consequently, by decisions of 9 March and 6 March 1998 respectively, the competent immigration officers refused to grant to Mr Barkoci and Mr Malik leave to enter the United Kingdom, in accordance with paragraph 216 of the Immigration Rules, on the ground that they were not in possession of the entry clearance required under paragraph 212(vi) of those Rules.
- 26 Temporary admission was, however, granted to Mr Barkoci and Mr Malik pending the setting of removal directions. That granted to Mr Barkoci on 9 March 1998 imposed for the first time a prohibition on his taking up employment and/or becoming established in a self-employed capacity within the United Kingdom.
- 27 In contrast, the temporary admission granted to Mr Malik on 22 January 1998, that is to say, on a date prior to that of the decision refusing him leave to enter, did not include any such prohibition.
- 28 On 24 July 1998, Mr Barkoci and Mr Malik were granted leave to apply for judicial review of the two decisions of the Secretary of State refusing them entry. Their removal was consequently deferred in the light of these new proceedings.

The questions submitted for preliminary ruling

- 29 Since it formed the view that, in those circumstances, the resolution of the dispute required an interpretation of the Association Agreement, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), decided to stay proceedings and to refer the following seven questions to the Court for a preliminary ruling:

'Direct effect and interpretation of the Agreement

1. Does Article 45 of the Agreement have direct effect within the national legal systems of Member States, notwithstanding the provisions of Article 59 of the Agreement?

2. If the answer to Question 1 is "yes", how is the proviso in the penultimate sentence of Article 59(1) of the Agreement (and in particular the words "benefits accruing to any Party under the terms of a specific provision of this Agreement") to be interpreted; and, more generally, to what extent may a Member State apply its laws and regulations regarding entry, stay and establishment of natural persons to persons invoking Article 45 of the Agreement, without violating this proviso?

3. If the answer to Question 1 is "no", is a natural person who is a national of the Czech Republic nonetheless entitled, in domestic legal proceedings brought for the purposes of challenging a decision of the relevant national authorities to refuse him admission to establish himself in business pursuant to the Agreement, to invoke Article 45 of the Agreement in order to challenge

the lawfulness of a Member State's laws and regulations regarding entry, stay and establishment of natural persons, and if so on what legal basis?

Requirement to obtain prior permission before travelling

4. If the answer to Question 1 or Question 3 is “yes”, do Articles 45 and/or 59 of the Agreement permit a Member State to require a person who wishes to travel to a Member State purely to establish himself as a self-employed person under the Agreement to apply for and obtain prior “entry clearance” (that is, prior permission to travel to that State for that specific purpose)?

5. If the answer to Question 4 is “yes”:
 - (a) is a Member State entitled to make the grant of such prior entry clearance conditional upon satisfying substantive requirements relating to establishment such as those contained in paragraph 212 of HC 395; and

 - (b) may a Member State refuse admission into its territory to a person seeking to establish himself as a self-employed person under the Agreement on the sole ground that such prior entry clearance has not been obtained?

6. Where such a person has not been granted permission to enter the territory of the Member State on any other basis, is the answer to Question 5 affected (and if so how) by any of the following factors:
 - i. the fact that, on initial arrival at the border of the Member State, the person did not seek admission pursuant to the Agreement but on some other basis, which was subsequently rejected;
 - ii. the length of time which has elapsed between the applicant's initial arrival at the border of the Member State and the date of his subsequent application for establishment as a self-employed person pursuant to the Agreement;
 - iii. the extent of any restrictions placed on the applicant by the national authorities during that time, pursuant to powers contained in national immigration law, as to his liberty or employment/occupation;
 - iv. the fact that the applicant has had access to the social welfare system of the Member State and has depended upon it financially whilst establishing himself as a self-employed person?

7. If a Member State is not entitled to refuse entry to a person seeking to establish himself under the Agreement on the sole basis that prior entry clearance has not been obtained, is it legitimate for the competent authorities to grant such a person leave to enter only if his application clearly and

manifestly satisfies the same substantive criteria as would have been applied had he sought prior entry clearance?’

The first question

- 30 By its first question, the national court is essentially asking whether Article 45(3) of the Association Agreement can be relied on by an individual before a national court in the host Member State notwithstanding the fact that the authorities of that State remain competent to apply to a Czech national who invokes that provision the laws and regulations regarding entry, stay and establishment, in accordance with Article 59(1) of the Association Agreement.
- 31 At the outset, it must be noted that, according to settled case-law, a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, *inter alia*, Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 60).
- 32 In order to ascertain whether Article 45(3) of the Association Agreement meets those criteria, it is first necessary to consider the wording of that provision.
- 33 In this regard, Article 45(3) lays down, in clear, precise and unconditional terms, a prohibition preventing Member States from discriminating, on grounds of their nationality, against, *inter alios*, Czech nationals who might wish to pursue, within

the territory of those States, economic activities as self-employed persons or to set up and manage there undertakings which they would effectively control.

34 This rule of equal treatment lays down a precise obligation to produce a specific result and, by its nature, can be relied on by an individual before a national court to request it to set aside the discriminatory provisions of the legislation of a Member State making the establishment of a Czech national subject to a condition which is not imposed on that Member State's own nationals, without any further implementing measures being required for that purpose (see, to that effect, *Sürül*, cited above, paragraph 63).

35 Examination of the purpose and nature of the Agreement of which Article 45(3) forms part does not invalidate this finding that the principle of non-discrimination there laid down is capable of directly governing the situation of individuals.

36 According to the 18th recital in its preamble and Article 1(2), the purpose of the Association Agreement is to establish an association designed to promote the expansion of trade and harmonious economic relations between the Contracting Parties, in order to foster dynamic economic development and prosperity in the Czech Republic, with a view to facilitating its accession to the Community.

37 Moreover, the fact that the Association Agreement is intended essentially to promote the economic development of the Czech Republic and therefore involves an imbalance in the obligations assumed by the Community towards the non-member country concerned is not such as to prevent recognition by the Community of the direct effect of certain provisions of that Agreement (see, to that effect, *Sürül*, paragraph 72).

- 38 Nor is the finding that Article 45(3) of the Association Agreement is directly applicable invalidated by an examination of Article 59(1) thereof, which provides only that the authorities of the Member States remain competent to apply, while respecting the limits laid down by the Association Agreement, their national laws and regulations regarding entry, stay and establishment. Consequently, Article 59(1) does not concern the Member States' implementation of the provisions of the Association Agreement governing establishment and is not intended to make implementation or the effects of the obligation of equal treatment laid down in Article 45(3) subject to the adoption of further national measures.
- 39 It follows that the answer to the first question must be that Article 45(3) of the Association Agreement is to be construed as establishing, within the scope of application of that Agreement, a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals. The direct effect which that provision must therefore be recognised as having means that Czech nationals relying on it have the right to invoke it before the courts of the host Member State, notwithstanding the fact that the authorities of that State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment, in accordance with Article 59(1) of that Agreement.

The second, fourth, fifth and seventh questions

- 40 By its second, fourth, fifth and seventh questions, which can be examined together, the national court is asking essentially whether, having regard to Article 59(1) of the Association Agreement, Article 45(3) of that Agreement is capable of conferring on a Czech national a right to enter a Member State in which he wishes to become established in self-employment pursuant to that Agreement.

41 In particular, the national court asks whether the provisions of the Association Agreement mentioned in the preceding paragraph preclude national rules which:

- require a Czech national, prior to his departure to the host Member State, to obtain entry clearance, grant of which is subject to verification of substantive requirements such as those laid down in paragraph 212 of the Immigration Rules; and

- provide that the competent authorities of that State, in the exercise of their discretion with regard to applications for entry for purposes of establishment submitted pursuant to that Agreement at the point of arrival in that State by Czech nationals lacking entry clearance, can grant leave to enter on a basis other than the Immigration Rules only if the application clearly and manifestly satisfies the same substantive criteria as those applied to the application for entry clearance.

42 In order to give a helpful reply to those questions so reformulated, it is necessary to examine the extent to which the host Member State may, without infringing the condition set out at the end of the first sentence of Article 59(1) of the Association Agreement, apply its laws and regulations regarding entry, stay and establishment to Czech nationals invoking Article 45(3) of that Agreement.

43 It should be noted in this regard that, according to Article 45(4)(a) and (c) of the Association Agreement, the principle of non-discrimination set out in Article 45(3) concerns the right to take up and pursue as self-employed persons activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions, and the right to set up and manage undertakings.

- 44 The right of a Czech national to take up and pursue economic activities not coming within the labour market presupposes that that person has a right to enter and remain in the host Member State. That being so, the scope of Article 45(3) of the Association Agreement falls to be determined.

The scope of Article 45(3) of the Association Agreement and the possible extension to that provision of the interpretation given to Article 52 of the EC Treaty (now, after amendment, Article 43 EC)

- 45 Mr Barkoci and Mr Malik submit that the right which they invoke under Article 45(3) of the Association Agreement is equivalent to the right of establishment governed by Article 52 of the Treaty. They argue that the absence of any reference to a right of entry in the wording of Article 52 has not prevented the Court from ruling that that provision confers directly on the nationals of a Member State the right to enter the territory of another Member State and to remain there, irrespective of whether leave to enter has been granted by the host Member State (Case 48/75 *Royer* [1976] ECR 497, paragraphs 31 and 32).
- 46 According to Mr Barkoci and Mr Malik, in order to benefit from the rights of establishment and residence conferred directly by Article 45(3) of the Association Agreement, it is sufficient that the activities of the Czech national concerned should be real and genuine, without it being possible for specific requirements relating to minimum income to be imposed on him. The decisions of the Secretary of State challenged by Mr Barkoci and Mr Malik respectively indicate that the professional activities which they were exercising, at the period when no restriction on their right to pursue such activities had been imposed on them, were far from being purely marginal or ancillary.
- 47 Mr Barkoci and Mr Malik acknowledge that the rights in question are subject to the limitation laid down in Article 59(1) of the Association Agreement. However,

provisions concerning entry, stay and establishment of natural persons can be adopted by Member States only on condition that they do not restrict those rights in any unreasonable or excessive way. An interpretation which subjected exercise of the right to become established in a Member State without suffering discrimination to an absolute discretion on the part of the competent authorities in that Member State would, they submit, have the result of rendering nugatory the chapter in that Agreement on establishment.

- 48 For that reason, according to Mr Barkoci and Mr Malik, the application by the competent authorities of the host Member State of national immigration rules which require Czech nationals to obtain leave to enter and stay is in itself such as to render ineffective the rights recognised by Article 45(3) of the Association Agreement.
- 49 In reply, the United Kingdom Government, the other Governments which have submitted observations to the Court and the Commission argue that the purpose and general scheme of the Association Agreement require that Articles 45(3) and 59(1) be construed together. They submit in particular that, since Article 38 of the Association Agreement has excluded all right of access to the labour market of the host Member State, a national system of control based on the obligation to seek prior leave to enter and stay is necessary in order to ensure that the establishment provisions of the Agreement will not be relied on by Czech nationals who actually intend to gain access to the labour market by that route, as employed workers.
- 50 It must be pointed out that, according to the case-law established in the context of the interpretation of both the provisions of the Treaty and those of the agreement establishing an association between the European Economic Community and Turkey (OJ 1973 C 133, p. 1), the right to the same treatment as nationals in regard to establishment, as defined by Article 45(3) of the Association Agreement, in wording similar or identical to that of Article 52 of the Treaty, does indeed mean that a right of entry and residence are conferred, as corollaries of the right of establishment, on Czech nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen, or

activities of the professions in a Member State (see *Royer*, cited above, paragraphs 31 and 32, and Case C-37/98 *Savas* [2000] ECR I-2927, paragraphs 60 and 63).

- 51 It must, however, also be borne in mind that, according to settled case-law, a mere similarity in the wording of a provision of one of the Treaties establishing the Communities and of an international agreement between the Community and a non-member country is not sufficient to give to the wording of that agreement the same meaning as it has in the Treaties (see Case 270/80 *Polydor and RSO Records* [1982] ECR 329, paragraphs 14 to 21; Case 104/81 *Kupferberg* [1982] ECR 3641, paragraphs 29 to 31; Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraphs 11 to 20).
- 52 According to that case-law, the extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the Community with a non-member country depends, *inter alia*, on the aim pursued by each provision in its own particular context. A comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard (see *Metalsa*, cited above, paragraph 11).
- 53 The Association Agreement is designed simply to create an appropriate framework for the Czech Republic's gradual integration into the Community, with a view to its possible accession, whereas the purpose of the Treaty is to create an internal market, establishment of which involves the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital (see Article 3(c) of the EC Treaty (now, after amendment, Article 3(1)(c) EC)).
- 54 It also follows from the wording of Article 59(1) of the Association Agreement that the rights of entry and residence conferred on Czech nationals as corollaries of the right of establishment are not absolute privileges, inasmuch as their

exercise may, where appropriate, be limited by the rules of the host Member State regarding entry, stay and establishment of Czech nationals.

55 It follows that the interpretation of Article 52 of the Treaty, as reflected in the Court's case-law, cannot be extended to Article 45(3) of the Association Agreement.

56 The argument put forward by Mr Barkoci and Mr Malik, to the effect that application by the competent authorities of a Member State of the national immigration rules requiring Czech nationals to obtain leave to enter is in itself liable to render ineffective the rights granted to such persons by Article 45(3) of the Association Agreement, cannot for that reason be accepted.

57 That said, it is none the less the case that, as follows from Article 59(1) of the Association Agreement, the power of the host Member State to apply its domestic rules regarding entry, stay and establishment of natural persons to applications submitted by Czech nationals is expressly subject to the condition that this does not nullify or impair the benefits accruing to the Czech Republic under that Agreement.

58 The question thus arises as to whether the restrictions which the immigration legislation of the host Member State imposes on the right of establishment, which is a right conferred directly on Czech nationals by Article 45(3) of the Association Agreement, and on the rights to enter and remain which are its corollaries are compatible with the express condition laid down by Article 59(1) of that Agreement.

Whether the restrictions imposed on the right of establishment by the host Member State's immigration legislation are compatible with the condition set out in Article 59(1) of the Association Agreement

- 59 It is necessary in this regard to determine whether the immigration rules applied by the competent national authorities, under which a Czech national is required, prior to his departure to the host Member State, to obtain entry clearance, grant of which is subject to verification of substantive requirements such as those laid down in paragraph 212 of the Immigration Rules, are appropriate for achieving the objective in view or whether they constitute, in regard to that objective, measures which would affect the very substance of the rights granted to Czech nationals by Article 45(3) of the Association Agreement, by making exercise of those rights impossible or excessively difficult.
- 60 Mr Barkoci and Mr Malik, together with the Commission, argue that the fact of refusing admission to a Czech national seeking to become established in a Member State on the purely formal ground that, prior to his departure to that State, he did not obtain entry clearance, manifestly goes beyond the limits which the Association Agreement imposes on the competent authorities of that State in regard to the desired objective where that national satisfies the other substantive conditions which national immigration rules impose with regard to the exclusive and viable nature of the activity which he contemplates exercising in a self-employed capacity.
- 61 In order to rule on whether that argument is well founded, it should first be noted that, since Article 45(3) of the Association Agreement applies only to those persons who are exclusively self-employed, in accordance with the final sentence of Article 45(4)(a)(i) of that Agreement, it is necessary to determine whether the activity contemplated in the host Member State by persons covered by that provision is an activity performed by an employed or a self-employed person.
- 62 Application of a national system of prior control to check the exact nature of the activity envisaged by the applicant has a legitimate aim in so far as it makes it

possible to restrict the exercise of rights of entry and stay by Czech nationals invoking Article 45(3) of the Association Agreement to persons to whom that provision applies.

- 63 With particular regard to the substantive requirements, such as those set out in paragraph 212 of the Immigration Rules, these, as the United Kingdom Government and the Commission have pointed out, pursue exclusively the objective of allowing the competent authorities to verify that a Czech national wishing to become established in the United Kingdom genuinely intends to take up an activity in a self-employed capacity without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. Further, substantive requirements such as those set out in paragraph 212 of the Immigration Rules are appropriate to ensure that such an objective is achieved.
- 64 Within the context of such a system of prior control, should it turn out that a Czech national who has submitted in due and proper form an application for leave to enter for the purpose of becoming established satisfies the substantive requirements laid down for that purpose by the immigration legislation of the host Member State, compliance with the express condition set out in Article 59(1) of the Association Agreement will oblige the competent national authorities to accord him the right to become established as a self-employed worker and to grant him, for that purpose, leave to enter and stay.
- 65 In addition, such a system of control involves carrying out detailed investigations which, particularly on grounds of language, it would be difficult for an immigration officer to conduct at the point of entry into the United Kingdom. Consequently, the requirement that verification of the substantive conditions be carried out in the Czech Republic allows easier access to information concerning the situation of Czech nationals wishing to become established in the United Kingdom.

- 66 It follows that national rules requiring a Czech national, prior to his departure to the host Member State, to obtain entry clearance, grant of which is subject to verification of substantive requirements such as those laid down in paragraph 212 of the Immigration Rules, must be regarded as being compatible with the Association Agreement.
- 67 Further, with regard to the power of the competent authorities in the host Member State to refuse leave to enter requested by a Czech national when he arrives in the territory of that State on the sole ground that he failed in his country of residence to obtain entry clearance for purposes of establishment, it must be remembered that, as pointed out in paragraphs 22 and 23 above, although Mr Barkoci and Mr Malik had never applied for entry clearance for the United Kingdom, the competent national immigration authorities had none the less, pursuant to their discretionary powers, carried out an individual examination of their admission applications submitted five months and three months respectively after they had been physically admitted to the United Kingdom, in order to determine whether leave to enter could be granted them on a basis other than that of the Immigration Rules, on the ground that the other conditions set out in paragraph 212 of the Immigration Rules had been clearly and manifestly satisfied.
- 68 Such an examination of the individual situation of Czech nationals lacking entry clearance, as carried out in the case in the main proceedings, appears to be in accordance with the flexible practice demonstrated by the United Kingdom authorities in this area. At the hearing, the United Kingdom Government pointed out that the Secretary of State normally exercises his discretion in regard to applications for admission for purposes of establishment, submitted pursuant to the Association Agreement, at the point of entry to the United Kingdom.
- 69 That being so, and without even addressing the question whether Article 59(1) of the Association Agreement allows the competent authorities of the host Member

State to refuse admission to its territory for a Czech national who does not hold entry clearance, it will be sufficient to examine whether the application by the United Kingdom authorities of national immigration legislation, including the exercise of the Secretary of State's discretion to determine whether the condition relating to possession of entry clearance may be set aside in individual instances, appears on the whole to be in accordance with the condition set out at the end of the first sentence of Article 59(1) of the Association Agreement.

Whether the manner in which the Secretary of State exercises his discretion is compatible with the condition set out in Article 59(1) of the Association Agreement

70 It is in the first instance important to bear in mind that, as pointed out in paragraphs 62 to 66 above, a system of prior control such as that established by the Immigration Rules, under which the host Member State makes the grant of prior entry clearance and, subsequently, of leave to enter subject to verification by the competent immigration authorities that the applicant genuinely intends exclusively to pursue in that Member State a viable activity as a self-employed person, is in principle compatible with Article 45(3) of the Association Agreement, read in conjunction with Article 59(1) thereof.

71 Moreover, by reason of the implementation of the safeguards inherent in examination of the individual situation of a Czech national who does not have entry clearance, leave to enter may be granted to such a person on a basis other than that of the Immigration Rules where the substantive requirements governing establishment imposed by the immigration legislation of the host Member State are clearly and manifestly satisfied and rejection of the application solely on the

ground that the national in question did not obtain prior entry clearance would merely be formalistic.

72 To the extent to which the competent immigration authorities in the host Member State adopt a policy of setting aside the mandatory requirement of entry clearance, it appears to be in line with the logic of the system of prior control, as well as being justified in regard to the Association Agreement, that, in the exercise of their discretion as to an applicant's individual position, those authorities carry out an examination into the soundness of an application to become established submitted pursuant to that Agreement at the point of entry into that Member State which is less extensive than that carried out in the case of an application for entry clearance submitted by the Czech national in his country of residence.

73 Consequently, the need for Czech nationals to demonstrate clearly that their claim to become established in the host Member State pursuant to the Association Agreement is well founded, without prejudice to the judicial review of the legality of the decision adopted in that regard by the competent national immigration authorities, is not such as to render it impossible or excessively difficult for those nationals to exercise the rights accorded to them by Article 45(3) of the Association Agreement.

74 It follows that Articles 45(3) and 59(1) of the Association Agreement do not preclude the competent immigration authorities of the host Member State from requiring a Czech national, prior to his departure to that State, to obtain entry clearance, grant of which is subject to verification of substantive requirements relating to establishment, such as those set out in paragraph 212 of the Immigration Rules, provided that those authorities exercise their discretion in regard to applications for leave to enter for the purpose of becoming established, submitted pursuant to that Agreement at the point of entry into that State, in such a way that leave to enter can be granted to a Czech national, on a basis other than that of the Immigration Rules, if that person's application clearly and manifestly satisfies the same substantive requirements as those which would have been applied had he sought entry clearance in the Czech Republic.

Whether the requirement that a new application to become established be submitted in due and proper form is compatible with the rule on equal treatment set out in Article 45(3) of the Association Agreement

- 75 Mr Barkoci and Mr Malik argue further that the measure of ‘expulsion’ from the territory of the host Member State threatened against them in this case, despite their actual presence in the United Kingdom, is liable to interfere dramatically with their ability to run an already established business, something which could not be said of any measure that could be imposed on United Kingdom nationals running a similar business.
- 76 It is for that reason necessary to examine whether the requirement that a Czech national who has not obtained entry clearance prior to his departure to the host Member State or leave to enter on a basis other than that of the Immigration Rules at the point of entry into that State must submit a new application for establishment in due and proper form in his State of origin or, as the case may be, in another country is compatible with the rule of equal treatment set out in Article 45(3) of the Association Agreement where such a requirement could not be imposed on nationals of the host Member State.
- 77 It should be borne in mind, as pointed out in paragraph 22 above, that Mr Barkoci and Mr Malik were deemed, in accordance with section 11(1) of the Immigration Act, not to have entered the United Kingdom and that their applications to leave to remain were for that reason treated as applications for initial leave to enter. It must be noted in this regard that, contrary to what Mr Barkoci and Mr Malik contend, in the context of a national system based on appropriate verification measures prior to a Czech national’s departure to the host Member State, temporary physical admission of that person, where he does not have entry clearance for the territory of that State, is in no way equivalent to actual leave to enter that State.

- 78 The analysis of the compatibility with the Association Agreement of a national system for monitoring immigration that is based on the obligation to apply for prior leave to enter cannot be affected by the fact that, while awaiting the outcome of an appeal against a previous decision which, on a separate basis, refused a Czech national entry to the Member State concerned, that person was admitted on a temporary basis to that State, prior to submission of an application to become established, and authorised to work or receive public funds, with a view to respecting human dignity and demonstrating solidarity (see, along these lines, Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 31, and Case C-237/91 *Kus* [1992] ECR I-6781, paragraphs 12 to 17).
- 79 Consequently, Mr Barkoci and Mr Malik cannot effectively rely on the mere fact that they were admitted temporarily to the United Kingdom in order to contend that they had acquired the right to become established in that Member State as self-employed workers, that being a right liable to be adversely affected by the requirement that they submit, in due and proper form, a new application for entry clearance in their State of origin or, as the case may be, in another country.
- 80 In any event, it must also be borne in mind that the Court has held, with regard to the free movement of workers, that the reservation contained in Article 48(3) of the EC Treaty (now, after amendment, Article 39(3) EC) allows Member States, on the grounds set out in that provision, and in particular grounds justified by requirements of public policy, to take measures against nationals of other Member States which they could not apply to their own nationals inasmuch as they have no authority to expel the latter from the national territory or deny them access thereto (see, in this regard, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 22; Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 7; Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 22; Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, paragraph 28; and Case C-171/96 *Pereira Roque* [1998] ECR I-4607, paragraph 37).

- 81 This difference in treatment between a Member State's own nationals and those of other Member States derives from a principle of international law which precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason, and which the Treaty cannot be assumed to disregard in the context of relations between Member States (*Van Duyn*, cited above, paragraph 22, and *Pereira Roque*, cited above, paragraph 38).
- 82 For the same reasons, such a difference in treatment in favour of nationals of the host Member State cannot be considered to be incompatible with Article 45(3) of the Association Agreement.
- 83 It follows from all of the foregoing that the second, fourth, fifth and seventh questions must be answered as follows:
- The right of establishment, as defined by Article 45(3) of the Association Agreement, means that rights of entry and residence, as corollaries of the right of establishment, are conferred on Czech nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen, or activities of the professions in a Member State. However, it follows from Article 59(1) of that Agreement that those rights of entry and residence are not absolute privileges, inasmuch as their exercise may, in some circumstances, be limited by the rules of the host Member State governing the entry, stay and establishment of Czech nationals.
 - Articles 45(3) and 59(1) of the Association Agreement, read together, do not in principle preclude a system of prior control which makes the issue by the competent immigration authorities of leave to enter subject to the condition that the applicant must show that he genuinely intends to take up an activity in a self-employed capacity without at the same time entering into employ-

ment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. Substantive requirements such as those set out in paragraph 212 of the Immigration Rules have as their very purpose to enable the competent authorities to carry out such checks and are appropriate for achieving such a purpose.

- The condition set out at the end of the first sentence of Article 59(1) of the Association Agreement must be construed as meaning that the obligation on a Czech national, prior to his departure to the host Member State, to obtain entry clearance in his country of residence, grant of which is subject to verification of substantive requirements, such as those laid down in paragraph 212 of the Immigration Rules, has neither the purpose nor the effect of making it impossible or excessively difficult for Czech nationals to exercise the rights granted to them by Article 45(3) of the Association Agreement, provided that the competent authorities of the host Member State exercise their discretion in regard to applications for leave to enter for purposes of establishment, submitted pursuant to that Agreement at the point of entry into that State, in such a way that leave to enter can be granted to a Czech national lacking entry clearance on a basis other than that of the Immigration Rules if that person's application clearly and manifestly satisfies the same substantive requirements as those which would have been applied had he sought entry clearance in the Czech Republic.

The third and sixth questions

- ⁸⁴ In light of the answers to the first, second, fourth, fifth and seventh questions, it is unnecessary to reply to the third and sixth questions. The referring court has submitted the third question only in the event of a negative reply to the first question, and the sixth question has been raised only in the situation, which does not obtain here, where leave to enter a Member State has been refused to a Czech

national wishing to become established there pursuant to the Association Agreement on a basis other than that such national does not have prior entry clearance.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), by order of 29 March 1999, hereby rules:

1. Article 45(3) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part, concluded and approved on behalf of the

Community by Decision 94/910/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 must be construed as establishing, within the scope of application of that Agreement, a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals. The direct effect which that provision must therefore be recognised as having means that Czech nationals relying on it have the right to invoke it before the courts of the host Member State, notwithstanding the fact that the authorities of that State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment, in accordance with Article 59(1) of that Agreement.

2. The right of establishment, as defined by Article 45(3) of that Association Agreement, means that rights of entry and residence, as corollaries of the right of establishment, are conferred on Czech nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen, or activities of the professions in a Member State. However, it follows from Article 59(1) of that Agreement that those rights of entry and residence are not absolute privileges, inasmuch as their exercise may, in some circumstances, be limited by the rules of the host Member State governing the entry, stay and establishment of Czech nationals.

3. Articles 45(3) and 59(1) of that Association Agreement, read together, do not in principle preclude a system of prior control which makes the issue by the competent immigration authorities of leave to enter subject to the condition that the applicant must show that he genuinely intends to take up an activity in a self-employed capacity without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. Substantive requirements such as those set out in paragraph 212 of the United Kingdom Immigration Rules (House of Commons Paper 395) have as their very purpose to enable the competent authorities to carry out such checks and are appropriate for achieving such a purpose.

4. The condition set out at the end of the first sentence of Article 59(1) of that Association Agreement must be construed as meaning that the obligation on a Czech national, prior to his departure to the host Member State, to obtain entry clearance in his country of residence, grant of which is subject to verification of substantive requirements, such as those laid down in paragraph 212 of those Immigration Rules, has neither the purpose nor the effect of making it impossible or excessively difficult for Czech nationals to exercise the rights granted to them by Article 45(3) of that Agreement, provided that the competent authorities of the host Member State exercise their discretion in regard to applications for leave to enter for purposes of establishment, submitted pursuant to that Agreement at the point of entry into that State, in such a way that leave to enter can be granted to a Czech national lacking entry clearance on a basis other than that of the Immigration Rules if that person's application clearly and manifestly satisfies the same substantive requirements as those which would have been applied had he sought entry clearance in the Czech Republic.

Rodríguez Iglesias	Gulmann	La Pergola
Wathelet	Skouris	Edward
Puissochet	Jann	Sevón
Schintgen	Macken	

Delivered in open court in Luxembourg on 27 September 2001.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President