OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 13 July 1989 *

Mr President,
Members of the Court,

1. The Raad van State (State Council) of the Netherlands has referred to the Court for a preliminary ruling two questions concerning the interpretation, with regard to freedom of movement for workers, of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties of 12 June 1985 (hereinafter referred to as 'the Act of Accession'). [1]

2. The facts related in the decision requesting the preliminary ruling are as follows. Mr Lopes da Veiga, a Portuguese national, has been employed since 12 March 1974 as a seaman on board vessels flying the Dutch flag and operated by a shipping company, Poseidon BV, based at Delfzijl in the Netherlands. Those vessels call on average once or twice a month at ports in the Netherlands. On 31 March 1983 Mr Lopes da Veiga registered himself in the population register of the municipality of The Hague. He spends his periods of leave in the Netherlands. In its observations the Commission points out that Netherlands income tax and social security contributions are deducted from his wages. [2] On 12 April 1983, Mr Lopes da Veiga applied for a residence permit. His application was refused on 28 August 1985 by the Head of Police at The Hague. An administrative appeal made on 21 October 1985 was also rejected on 17 January 1986. On 11 February of the same year, Mr Lopes da Veiga appealed against that last decision to the Raad van State.

3. The Netherlands legislation on the status of aliens (Vreemdelingenwet and Vreemdelingenbesluit, Article 91, paragraphs (1) and (5)) provides that any alien who is a national of a State which has acceded to the European Economic Community and in respect of which the Treaty of Accession or the provisions implementing that Treaty provide for transitional arrangements is to be treated as a Community national enjoying preferential status only in so far as that status ensues from the transitional measures. Moreover, aliens employed on board vessels flying the Dutch flag are not obliged to hold residence permits inasmuch as presence on board a Dutch vessel sailing on the high seas is not considered to constitute residence within Netherlands territory for the purposes of the legislation relating to the status of aliens. Persons coming within that category are authorized to stay in the Netherlands during their periods of leave.

4. Before the Raad van State, the Netherlands State Secretary for Justice argued that Mr Lopes da Veiga did not work in the territory of the Netherlands and that, under the transitional provisions laid down in the Treaty of Accession, freedom of movement for workers would not apply until 1 January 1993.

* Original language: French.

1 — OJ L 302, 15.11.1985, p. 23.

2 — Observations of the Commission, at p. 2 of the French translation.

5. The Raad van State has therefore referred to the Court for a preliminary ruling two questions which in substance seek to determine, first, whether Article 7 *et seq.* of Regulation (EEC) No 1612/68 (hereinafter referred to as 'the regulation') [3] apply to a national of a State which has acceded to the Community who is employed on board a vessel flying the flag of a Member State by an employer established in that State but who does not hold a residence permit and, secondly, whether such a national may rely on Article 4 of Directive 68/360 (hereinafter referred to as 'the directive'). [4]

6. In my view, the first question appears in fact to raise three separate points: Do the transitional arrangements laid down in the Act of Accession allow an individual to rely on the provisions of Community law relating to freedom of movement for workers in the situation arising in the present case? Must a person who works on board a sea-going vessel flying the flag of a Member State for an employer established in that State be considered as working in the territory of a Member State? Finally, how does the fact that no residence permit has been issued by the responsible authority of that State affect the situation? I propose to examine each of those three questions in turn.

7. An examination of the transitional provisions laid down in the Act of Accession enables the first question to be answered without any great difficulty. Article 215 of the Act of Accession provides that Article 48 of the EEC Treaty is only to apply, in relation to freedom of movement of workers between Portugal and the other Member States, subject to Articles 216 to 219. Article 216(1) defers until 1 January 1993 the application in Member States of Articles 1 to 6 of the regulation in respect of Portuguese nationals. An interpretation *a contrario* therefore leads to the conclusion that Article 7 *et seq.* of the regulation, which are not referred to in Article 216(1) of the Act of Accession, have been applicable since the entry into force of that Act on 1 January 1986. That interpretation is supported by the fact that Article 217 of the Act of Accession lays down special provisions for the application until 31 December 1990 of Article 11 of the regulation, which leads to the inescapable conclusion that Article 7 *et seq.* already apply.

8. The Court has itself already adopted such a line of reasoning. In its judgment of 30 May 1989 in *Commission* v *Hellenic Republic*, which concerned the corresponding provisions in the Act concerning the Conditions of Accession of the Hellenic Republic to the European Communities and the Adjustments to the Treaties, [5] the Court held that:

'Those [transitional] provisions suspended ... the operation of Articles 1 to 6 and 13 to 23 of Regulation No 1612/68 of the Council ..., implementing the rights guaranteed by Articles 48 and 49 of the Treaty, but not the application of Articles 48 and 49, in particular, in regard to workers from other Member States who were lawfully employed in the Hellenic Republic before 1 January 1981 and continued to be employed there after that date or those who were lawfully employed there for the first time after that date.'

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

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

5 — OJ L 291, 19.11.1979, p. 17.

The Court concluded in that case that:

'Article 9 ... of Regulation No 1612/68 ... is applicable to such workers [from 1 January 1981]'.[6]

9. I would add that in its judgment in *Peskeloglou*, which was also delivered in connection with the Act concerning the Conditions of Accession of the Hellenic Republic, the Court held that the provision suspending the application of certain articles of the regulation derogated from the principle of freedom of movement for workers and therefore required a restrictive interpretation.

10. As the Commission has observed,[7] the rationale of those transitional arrangements is to prevent a sudden deterioration in the labour market due to large influxes of workers following accession by a new Member State. That is why the suspension of Articles 1 to 6 of the regulation relates to the provisions of Title I on 'Eligibility for employment'; it cannot be extended to Title II on 'Employment and equality of treatment'. As soon as the Act of Accession has come into force workers who are nationals of the new Member State and who are already employed in the territory of one of the Member States of the Community must be able to enjoy the freedoms which the Treaty guarantees.

11. The second point requires a definition of the concept of a worker in the territory of a Member State as used in particular in Articles 7, 8 and 9 of the regulation. It is unnecessary to recall that the Court has consistently held that the concept of 'worker' has a Community meaning.[8]

12. Thus, in its judgment in *Kempf*,[9] the Court held that:

'... freedom of movement for workers forms one of the foundations of the Community. The provisions laying down that fundamental freedom and, more particularly, the terms "worker" and "activity as an employed person" defining the sphere of application of those freedoms must be given a broad interpretation in that regard, whereas exceptions to and derogations from the principle of freedom of movement for workers must be interpreted strictly'.

13. The Court has already had occasion to rule on the carrying on of professional activities outside Community territory. In its judgment in *Walrave and Koch*,[10] the Court held that:

'By reason of the fact that it is imperative, the rule on non-discrimination applies in judging all legal relationships in so far as these relationships, by reason either of the place where they are entered into or of the place where they take effect, can be located within the territory of the Community'.[11]

That case, the Court will recall, involved a provision in the rules of the Union cycliste internationale and one question raised was

6 — Judgment of 30 May 1989 in Case 305/87, cited above, paragraph 16.

7 — At p. 10 of the French translation.

8 — Judgments of 23 March 1982 in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, of 11 July 1985 in Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, and of 3 July 1986 in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121, paragraph 16.

9 — Judgment of 3 June 1986 in Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, paragraph 13.

10 — Judgment of 12 December 1974 in Case 36/74 *Walrave* v *Union cycliste internationale* [1974] ECR 1405.

11 — Paragraph 28.

whether it mattered whether the sports competition in question occurred within Community territory or outside it.

14. In its judgment in *Prodest*,[12] the Court confirmed that line of reasoning, explaining that

'... activities temporarily carried on outside the territory of the Community are not sufficient to exclude the application of that principle, as long as the employment relationship retains a sufficiently close link with that territory'.

The Court then went on to state that

'... a link of that kind can be found in the fact that the Community worker was engaged by an undertaking established in another Member State and, for that reason, was insured under the social security scheme of that State, and in the fact that he continued to work on behalf of the Community undertaking even during his posting to a non-member country'.[13]

15. In the field of social security, the Court, in its judgment in *Bozzone*,[14] a case concerning the refusal by a Belgian social security institution to take into account insurance periods completed by an Italian worker in the former Belgian Congo, considered the application of Community law to be justified in view of the legal connection between the worker and the social security institution of the Member State concerned, even though the paid employment which formed the basis of that legal connection was carried on outside the Community. In his Opinion which he delivered in that case,[15] Mr Advocate General Capotorti stated that the decisive criterion was not the place where the activity was carried out but the links existing between the worker and the social security institution of a Member State.

16. It should also be mentioned that Regulation (EEC) No 1408/71 lays down special provisions in order to determine the social legislation applicable to a person pursuing an occupation on board a vessel flying the flag of a Member State (Article 13(2)(b) and Article 14(b)). The legislation relating to social security therefore necessarily applies to workers on board sea-going vessels flying the flag of a Member State.

17. I have already pointed out in the present case that Mr Lopes da Veiga was employed by an undertaking established in the Netherlands, that he paid social security contributions and income tax in that State and, finally, that he had registered himself on the communal register at The Hague. Those circumstances appear in my view to constitute a sufficient connection with the territory of a Member State and it is therefore immaterial that the activity was pursued on the high seas, that is to say, outside the territory of the Community.

18. Moreover, the view expressed by the Netherlands Government to the effect that the carrying on of an activity on board a sea-going vessel precludes reliance upon the principle laid down in Article 48 of the Treaty and the legislation adopted for its implementation is quite separate from the existence of the transitional arrangements in the Act of Accession and would result in the general exclusion, not only of the

12 — Judgment of 12 July 1984 in Case 237/83 *Prodest* v *Caisse primaire d'assurance maladie de Paris* [1984] ECR 3153.

13 — Paragraphs 6 and 7 of the judgment.

14 — Judgment of 31 March 1977 in Case 87/76 *Bozzone* v *Office de sécurité sociale d'Outre-Mer* [1977] ECR 687, paragraph 21.

15 — [1977] ECR 687, at p. 706.

Portuguese national concerned in the present case but of all Community nationals, from the enjoyment of the relevant freedoms guaranteed by the Treaty. In that respect, if the activity in question were assumed to have no connection with the territory of the Netherlands, it is difficult to see with what other territory it could be connected.

19. Mr Advocate General Mischo, in his Opinion delivered in Case 3/87,[16] did wonder whether

'... a worker who embarks, in one Member State, on a vessel registered in another Member State in order to fish in waters beyond the 12-mile limit of that other Member State without ever going ashore, who is not affiliated to the social security scheme of that country, who is paid in the currency of his country of origin and who, at the end of his fishing trip, returns directly to a port in his own country is actually exercising the right to move freely within the territory of another State ... or to stay in another Member State for the purpose of employment there ...',[17]

but the circumstances in the present case are quite different from those in the case considered by Mr Advocate General Mischo.

20. Finally, I would point out that maritime transport is completely subject to the application of Articles 48 to 51 of the Treaty, as the Court has ruled in the case of *Commission* v *French Republic*.[18]

21. The third point concerning the fact that no residence permit has been issued may be dealt with more quickly. The Court has held in a line of decided cases that the issue of a residence permit is purely declaratory in nature. In its judgment in *Royer*, the Court stressed that the right of nationals of a Member State to enter the territory of another Member State and to reside there for the purposes intended by the Treaty

'... is acquired independently of the issue of a residence permit by the competent authority of a Member State ...'

and went on to add that:

'The grant of this permit is therefore to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of Community law'.[19]

22. I accordingly take the view that the first question referred to the Court must be answered in the affirmative.

23. The second question relates to the application of Article 4 of Directive 68/360. Article 218 of the Act of Accession provides that: 'In so far as certain provisions of [the] directive ... may not be dissociated from those of Regulation (EEC) No 1612/68 whose application is deferred pursuant to Article 216, the Portuguese Republic and the other Member States may derogate from those provisions, to the extent necessary for

16 — *The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Agegate Limited*; Opinion delivered on 18 November 1988.

17 — Paragraph 60 of the Opinion.

18 — Judgment of 4 April 1974 in Case 167/73 *Commission* v *France* [1974] ECR 359, paragraphs 32 and 33.

19 — Judgment of 8 April 1976 in Case 48/75 [1976] ECR 497, paragraphs 32 and 33; see also the judgments of 14 July 1977 in Case 8/77 *Sagulo, Brenca and Bakhouche* [1977] ECR 1495, paragraph 4, and of 3 July 1980 in Case 157/79 *Regina* v *Pieck* [1980] ECR 2171, paragraph 8.

the application of the provisions for derogation which are laid down in Article 216 ...'. I have already mentioned that Article 216 suspends the application of Title I of the regulation on 'Eligibility for employment', but not that of Title II on 'Employment and equality of treatment', subject to a number of special provisions for the application of Article 11 of the regulation which are not relevant here. It is thus necessary to examine whether or not Article 4 of the directive, under which Member States are required to issue residence permits to persons to whom the regulation applies (Articles 1 and 4 of the directive), is affected by the suspension of Title I of the regulation.

24. As far as this point is concerned, it seems to me that the issue of a residence permit confirms both the right to enter the territory of a Member State in order to take up an activity in that State as an employed person (Title I of the regulation) and the right to reside in the territory of that State in order to continue working there (Title II of the regulation). Therefore, Article 4 of the directive is linked both to the provisions of Title I of the regulation and to those of Title II. Since Title II is not affected by the transitional provisions laid down in the Act of Accession, those nationals to whom that Title applies must be able to rely on Article 4 of the directive, in accordance with Article 1 of the directive.

25. I would point out, for the sake of completeness, that the direct effect of Article 4 of the directive has been recognized by the Court for a long time. [20]

26. I therefore suggest that the Court should answer the second question along those lines.

27. In conclusion, I propose that the Court should rule as follows:

'(1) Article 216(1) and Article 218 of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic and the Adjustments to the Treaties must be interpreted as meaning that Articles 7 to 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, may, subject to the interim conditions governing the application of Article 11 of that regulation as laid down in Article 217 of the said Act, be relied upon by a Portuguese national working as an employed person on board a vessel flying the flag of a Member State for an employer established in that State, even if no residence permit has been issued by the competent authority of that State.

(2) Such a national may rely on Article 4 of Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families'.

20 — Cases 48/75, 8/77 and 157/79, already cited.