

OULANE

JUDGMENT OF THE COURT (First Chamber)

17 February 2005^{*}

In Case C-215/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank te 's-Gravenhage (Netherlands), made by decision of 12 May 2003, received at the Court on 19 May 2003, in the proceedings

Salah Oulane

v

Minister voor Vreemdelingenzaken en Integratie,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric, J.N. Cunha Rodrigues (Rapporteur), M. Ilešič and E. Levits, Judges,

^{*} Language of the case: Dutch.

Advocate General: P. Léger,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 September 2004,

after considering the observations submitted on behalf of:

- S. Oulane, by M.N.R. Nasrullah, advocaat,

- the Minister voor Vreemdelingenzaken en Integratie, by R. van Asperen, advocaat,

- the Belgian Government, by A. Snoecx, acting as Agent,

- the French Government, by A. Bodard-Hermant, acting as Agent,

- the Italian Government, by A. Cingolo, acting as Agent,

- the Netherlands Government, by J. van Bakel and H.G. Sevenster, acting as Agents,

— the Commission of the European Communities, by M. Condou-Durande and R. Troosters, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 October 2004,

gives the following

Judgment

- 1 The reference for a preliminary ruling concerns the interpretation 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 (OJ 1973 L 172, p. 14).

- 2 The reference was made in the context of proceedings between Mr Oulane, a French national, and the Minister voor Vreemdelingenzaken en Integratie (Minister for Aliens and Integration) concerning his detention for purposes of deportation for his having failed to present an identity card or passport to establish his status as a Community national.

Legal framework

Community legislation

3 Article 4(2) of Directive 73/148 provides:

‘The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

Where such period exceeds three months, the Member State in the territory of which the services are performed shall issue a [residence certificate] as proof of the right of residence.

Where the period does not exceed three months, the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay. The Member State may, however, require the person concerned to report his presence in the territory.’

4 Article 6 of Directive 73/148 provides:

‘An applicant for a residence permit or [certificate] shall not be required by a Member State to produce anything other than the following, namely:

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4.'

National legislation

5 The Vreemdelingenwet (Law on Aliens) of 23 November 2000 (Stbl. 2000, No 495) ('the Law') provides in Article 50:

'1. Officials charged with surveillance of the borders and monitoring of aliens may either on the basis of facts and circumstances which, assessed according to objective criteria, give rise to a reasonable assumption of illegal residence or as part of the effort to combat illegal residence following crossing of borders, stop persons for the purpose of ascertaining their identity, nationality and status with reference to the right of residence

2. If the identity of the person stopped cannot be established immediately, he may be taken to an appropriate place for questioning. He may be kept there for not more than six hours, not counting the time between midnight and 9 a.m. ...'

6 Article 59 of the Law provides that, if necessary by reason of public policy or national security, an alien not legally resident may be taken into detention with a view to deportation.

- 7 Article 8:13, paragraph 1, of the Vreemdelingenbesluit (Decree on Aliens, implementing the Law) of 23 November 2000 (Stbl. 2000, No 497) provides:

‘A Community national shall not be deported unless it appears that such person does not possess a right of residence or that his right of residence has expired.’

- 8 Point B10/24 of the Vreemdelingencirculaire 2000 (Circular on Aliens) (Stcrt. 2000, p. 17) provides:

‘An alien residing in the Netherlands who pleads rights based on the EC Treaty, but who fails to produce a valid identity card or passport shall be given an opportunity to produce that document. A reasonable period of two weeks shall be allowed for that purpose.’

The main proceedings

- 9 On 3 December 2001, Mr Oulane was stopped by the Netherlands authorities on grounds of suspicion of illegal residence. During questioning, Mr Oulane, who did not have any identity documents in his possession, stated that he was a French national staying in the Netherlands for approximately three months on holiday. The

Netherlands authorities detained him with a view to deportation on the grounds, inter alia, that there was a risk that he would seek to evade deportation.

10 On 7 December 2001, he presented a French identity card to the authorities. They then accepted that he was a Community national and no longer contested his status as a tourist. By decision of 10 December 2001, the Minister voor Vreemdelingen-zaken en Integratie lifted the detention order.

11 On 27 July 2002 Mr Oulane was arrested by the railway police in Rotterdam Central station, in a goods tunnel closed to the public. As he had no identity documents in his possession, he was questioned and detained for deportation. In the course of questioning, he stated that he had been in the Netherlands for 18 days and that he wished to return to France. The Netherlands authorities relied on public policy to justify the detention on the grounds that it was reasonable to assume that Mr Oulane would attempt to evade deportation.

12 On 2 August 2002 Mr Oulane was deported to France.

The questions referred for a preliminary ruling

13 Before the Rechtbank te 's-Gravenhage Mr Oulane challenged the legality of the detention measures and claimed damages.

- 14 Considering that the outcome of the proceedings called for an interpretation of Community law, the Rechtbank te 's-Gravenhage decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'As regards the first proceedings:

- (1) As a consequence of the abolition of entry controls at internal borders, must the third paragraph of Article 4(2) of Directive 73/148/EEC ... be interpreted as meaning that the right of residence granted therein of a person who claims to be a national of another Member State and a tourist has to be recognised by the authorities of the Member State in which that person invokes his right of residence only from such time as he has presented his valid identity card or passport?
- (2) If the answer to Question 1 is in the affirmative, does Community law as it stands at present, in particular in regard to the principle of non-discrimination and the freedom to provide services, provide grounds for making an exception thereto so that the authorities of a Member State must still afford to that person the opportunity to present his valid identity card or passport?
- (3) Is it material to the answer to Question 2 that the national law of the Member State in which that person invokes his right of residence imposes on its own nationals no general duty to provide evidence of identity?
- (4) If the answer to Question 2 is in the affirmative, does Community law as it stands at present lay down any requirements in regard to the period within

which that Member State must afford the opportunity for the person concerned to present a valid identity card or passport before it imposes an administrative penalty in the form of an order in respect of the presumed unlawful residence?

- (5) Does an administrative penalty in the form of an order, as referred to in the fourth question, namely the imposition of a detention order with a view to deportation pursuant to Article 59 of the Law before the period referred to in that question has elapsed constitute a penalty which impinges disproportionately on freedom to provide services?

- (6) If the answer to Question 1 is in the negative, as Community law stands at present, is freedom to provide services impeded where a detention order with a view to deportation under Article 59 of the Law is, in the interest of public policy, imposed on a person claiming to be a national of another Member State and a tourist for as long as he does not demonstrate his right of residence by presenting a valid identity card or passport, even where there is no obvious present and serious danger to public policy?

- (7) If that freedom is impeded in the manner described in the sixth question, is the period within which that Member State afforded an opportunity to present a valid identity card or passport material for the purposes of establishing whether or not the impediment is justified?

- (8) If that freedom is impeded in the manner described in the sixth question is it relevant, for the purposes of establishing whether that impediment is justified, whether or not the Member State subsequently pays compensation in respect of the period during which the person was detained pending production of proof

of nationality by means of a valid passport or identity card, as is customary in that Member State in the case of unlawful detention as an illegal alien?

- (9) Where a Member State itself lays down no general duty to provide evidence of identity, does Community law as it stands at present preclude, in particular in light of the prohibition on discrimination, a Member State from imposing, in connection with the internal control of aliens, a measure such as detention as an illegal alien with a view to deportation under Article 59 of the Law in respect of a person who claims to be a tourist for as long as that person does not demonstrate his alleged right of residence by presenting a valid identity card or passport?

As regards the second proceedings:

- (10) So long as a national of a Member State does not himself invoke the right of residence as the recipient of services vis-à-vis the Member State in whose territory he is residing, does Community law as it stands at present preclude that Member State from not regarding that person as a national protected by a right of residence under Community law?

- (11) Is the term “recipient of services” in the context of freedom to provide services to be construed as meaning that, even where a person stays in another Member State for a long period, possibly longer than six months, is arrested there for an offence, is unable to give a fixed abode or residence and, furthermore, has no money or luggage, residence in another Member State itself provides sufficient grounds for having to assume that tourist and other services associated with short-term residence are received such as, for example, accommodation and the consumption of meals?

On the questions referred for a preliminary ruling*The first question*

- 15 By its first question, the national court asks essentially whether the third paragraph of Article 4(2) of Directive 73/148 should be interpreted as meaning that the recognition by a Member State of a right of residence of a recipient of services who is a national of another Member State is subject to that person's presenting an identity card or a passport.
- 16 It should be recalled, as a preliminary point, that the principle of freedom of movement of persons is one of the foundations of the Community. Accordingly, provisions enshrining that principle must be given a broad interpretation (see, inter alia, Case C-357/98 *Yiadom* [2000] ECR I-9265, paragraph 24).
- 17 According to settled case-law, the right of nationals of a Member State to enter the territory of another Member State and reside there for the purposes intended by the Treaty is a right conferred directly by the Treaty or, as the case may be, by the provisions adopted for its implementation (Case 48/75 *Royer* [1976] ECR 497, paragraph 31; Case C-376/89 *Giagounidis* [1991] ECR I-1069, paragraph 12).
- 18 It follows that issuance of a residence permit to a national of a Member State is 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 (see, inter alia, Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 40).

- 19 As regards more specifically nationals of a Member State who reside in another Member State as recipients of services, Article 6 of Directive 73/148 provides that the host Member State may make the issuance of a residence certificate subject to presentation of the identity card or passport with which they entered its territory. The third paragraph of Article 4(2) of that directive further provides that where the period of the service does not exceed three months, the identity card or passport is sufficient to cover his stay.
- 20 Those conditions were left unchanged in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77)
- 21 It follows that a Member State may require recipients of services who are nationals of other Member States and who wish to reside in their territory to provide evidence of their identity and nationality.
- 22 As rightly pointed out by the Commission of the European Communities, the requirement of presenting a valid identity card or passport is aimed, first, at simplifying the resolution of problems relating to evidence of the right of residence not only for citizens but also for national authorities and, second, at establishing the maximum that Member States may require of the persons concerned with a view to recognising their right of residence.

23 However, the requirement that such evidence be provided in all cases only by presentation of a valid identity card or passport clearly goes beyond the objectives of Directive 73/148.

24 The presentation of a valid identity card or passport for the purpose of proving that a person is a Community national is an administrative formality the sole objective of which is to provide the national authorities with proof of a right which the person in question has directly by virtue of their status.

25 If the person concerned is able to provide unequivocal proof of his nationality by means other than a valid identity card or passport, the host Member State may not refuse to recognise his right of residence on the sole ground that he has not presented one of those documents (see, to that effect, in the context of third-country nationals, Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 62).

26 Accordingly, the answer to the first question should be that the third paragraph of Article 4(2) of Directive 73/148 is to be interpreted as meaning that the recognition by a Member State of the right of residence of a recipient of services who is a national of another Member State may not be made subject to his production of a valid identity card or passport, where his identity and nationality can be proven unequivocally by other means.

- 27 In the light of the answer to the first question, it is not necessary to answer the second and fourth questions.

The third question

- 28 By its third question, which remains pertinent even without an answer to the second question, the national court asks essentially whether it is contrary to Community law for nationals of a Member State to be required in another Member State to present a valid identity card or passport in order to prove their nationality, when the latter State does not impose a general duty on its own nationals to provide evidence of identity.
- 29 The order for reference indicates that, according to national case-law, the Netherlands legislation does not provide for a universal, general identification requirement, but for limited requirements restricted to specific situations. One of those requirements relates to the monitoring of aliens.
- 30 Under that case-law, a person who states in response to questioning that he has Netherlands nationality must provide proof of his identity. His identity may be established, apart from by means of an identity card, a valid passport or even a driving licence issued in the Netherlands, through a check of the data available from the local Netherlands authorities. However, if a person states that he is a national of

another Member State but is not able to produce a valid identity card or passport, the national authorities detain him until he can produce those documents.

31 Thus, as noted by the national court, the practical result is that nationals of other Member States residing in the Netherlands for the purposes provided for in the Treaty must always be in possession of proof of identity, whereas no such requirement is imposed on Netherlands nationals.

32 The Court notes that such a system gives rise to an obvious difference of treatment as between Netherlands nationals and nationals of other Member States. Such different treatment is prohibited by the Treaty.

33 In the area of freedom to provide services, Article 49 EC is a specific expression of the principle of equal treatment provided for in Article 12 EC, which prohibits all discrimination on grounds of nationality (see Case C-3/88 *Commission v Italy* [1989] ECR 4035, paragraph 8, and Case C-388/01 *Commission v Italy* [2003] ECR I-721, paragraph 13).

34 Community law does not prevent a Member State from carrying out checks on compliance with the obligation to be able to produce proof of identity at all times, provided that it imposes the same obligation on its own nationals as regards their identity card (Case 321/87 *Commission v Belgium* [1989] ECR 997, paragraph 12; Case C-24/97 *Commission v Germany* [1998] ECR I-2133, paragraph 13).

35 Accordingly, the answer to the third question should be that it is contrary to Article 49 EC for nationals of a Member State to be required in another Member State to present a valid identity card or passport in order to prove their nationality, when the latter State does not impose a general obligation on its own nationals to provide evidence of identity, and permits them to prove their identity by any means allowed by national law.

The fifth, sixth, seventh, eighth and ninth questions

36 By the fifth, sixth, seventh, eighth and ninth questions, the national court asks essentially whether a detention order with a view to deportation in respect of a national of another Member State, imposed on the basis of failure to present a valid identity card or passport, even when there is no threat to public policy, constitutes a restriction on the freedom to provide services and, if so, whether that restriction may be justified.

37 It should be remembered at the outset that the principle of freedom to provide services laid down in Article 49 EC includes the freedom for recipients of services to go to another Member State in order to receive a service there, without being hindered by restrictions, and that tourists must be regarded as recipients of services (Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 16).

38 As the Court has held, the Member States may still impose penalties for breach of the requirement to present an identity card or passport, provided that the penalties are comparable to those which apply to similar national infringements and are

proportionate (see, to that effect, Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, paragraph 44).

- 39 The Kingdom of the Netherlands does not impose on its nationals any general requirement regarding identification and allows them to prove their identity by any means.
- 40 Moreover, detention and deportation based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens impair the very substance of the right of residence directly conferred by Community law and are manifestly disproportionate to the seriousness of the infringement (Case 157/79 *Pieck* [1980] ECR 2171, paragraphs 18 and 19; Case C-265/88 *Messner* [1989] ECR 4209, paragraph 14; *MRAX*, paragraph 78).
- 41 A detention order can only be based on an express derogating provision, such as Article 8 of Directive 73/148, which allows Member States to place restrictions on the right of residence of nationals of other Member States in so far as such restrictions are justified on grounds of public policy, public security or public health (see, to that effect, Case C-388/01 *Commission v Italy*, paragraph 19).
- 42 The questions referred are, however, based on the assumption that there was no genuine and serious threat to public policy. Failure to comply with legal formalities pertaining to aliens' access, movement and residence does not by itself constitute a threat to public policy or security (see *Royer*, paragraph 47, and *MRAX*, paragraph 79).

43 Moreover, as rightly stated by the Advocate General in paragraph 103 of his Opinion, the fact that there may be a subsequent award of damages for illegal detention is irrelevant.

44 In the light of the foregoing, the answer to the fifth, sixth, seventh, eighth and ninth questions should be that a detention order with a view to deportation in respect of a national of another Member State, imposed on the basis of failure to present a valid identity card or passport even when there is no threat to public policy, constitutes an unjustified restriction on the freedom to provide services and is therefore contrary to Article 49 EC.

The 10th and 11th questions

45 By its tenth and eleventh questions, the national court asks essentially whether the term 'recipient of services' is to be construed as meaning that a national of a Member State may be assumed to be a recipient of tourist services in another Member State solely by virtue of his staying in that Member State for a period of over six months, even where he is unable to give a fixed abode or residence and has no money or luggage.

46 According to the documents in the case-file submitted to the Court, when the claimant in the main proceedings was held as part of the second proceedings he did not claim to be a recipient of services, in particular as a tourist. He merely stated to the national authorities that he had been in the Netherlands for 18 days and that he wished to return to France.

- 47 It is for the Court to provide the national court with all the elements of interpretation of Community law which may enable it to rule on the case before it, whether or not reference is made thereto in the questions referred (see Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8, and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 38).
- 48 In the light of that principle, the Court finds the following.
- 49 Although it is true that the right of nationals of one Member State to reside in another Member State is conferred directly by the Treaty, the host Member State may still require those Community nationals to comply with certain administrative formalities in order to have that right recognised.
- 50 As regards recipients of services, the implementing provisions for that recognition are laid down in Directive 73/148.
- 51 Under Article 4(2) of that directive, the right of residence coincides with the duration of the period during which services are provided. If that period exceeds three months, the Member State where the services are performed issues a residence certificate establishing that right. If it is equal to or under three months, the identity card or passport with which the person concerned entered the territory is sufficient to cover his stay.

- 52 Moreover, Article 6 of Directive 73/148 provides that Member States may not, for the grant of a residence certificate, require the person concerned to present anything other than the aforementioned identity documents and proof that he or she ‘comes within one of the classes of person referred to in Articles 1 and 4’ of the directive.
- 53 It should be borne in mind, first, that evidence of identity and nationality may be provided by other means (see paragraph 25 of this judgment) and, second, that where it is not specified which means of evidence are admissible for the person concerned to establish that he comes within one of the categories referred to in Articles 1 and 4 of Directive 73/148, it must be concluded that evidence may be adduced by any appropriate means (see, to that effect, Case C-363/89 *Roux* [1991] ECR I-273, paragraphs 15 and 16).
- 54 Without prejudice to the questions pertaining to public policy, public security and public health, it is for the nationals of a Member State residing in another Member State in their capacity as recipients of services, to provide the evidence establishing that they are lawfully resident in that other Member State.
- 55 If a national of a Member State is not able to prove that the conditions for a right of residence as a recipient of services within the meaning of Directive 73/148 are fulfilled, the host Member State may undertake deportation subject to the limits imposed by Community law.
- 56 Accordingly, the answer to the 10th and 11th questions should be that it is for nationals of a Member State residing in another Member State in their capacity as recipients of services, to provide evidence establishing that their residence is lawful. If no such evidence is provided, the host Member State may undertake deportation, subject to the limits imposed by Community law.

Costs

- 57 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) rules as follows:

- 1. The third paragraph 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 is to be interpreted as meaning that the recognition by a Member State of the right of residence of a recipient of services who is a national of another Member State may not be made subject to his production of a valid identity card or passport, where his identity and nationality can be proven unequivocally by other means.**
- 2. It is contrary to Article 49 EC for nationals of a Member State to be required in another Member State to present a valid identity card or**

passport in order to prove their nationality, when the latter State does not impose a general obligation on its own nationals to provide evidence of identity, and permits them to prove their identity by any means allowed by national law.

- 3. A detention order with a view to deportation in respect of a national of another Member State, imposed on the basis of failure to present a valid identity card or passport even when there is no threat to public policy, constitutes an unjustified restriction on the freedom to provide services and is therefore contrary to Article 49 EC.**

- 4. It is for nationals of a Member State residing in another Member State in their capacity as recipients of services to provide evidence establishing that their residence is lawful. If no such evidence is provided, the host Member State may undertake deportation, subject to the limits imposed by Community law.**

[Signatures]