

OPINION OF ADVOCATE GENERAL
TIZZANO

delivered on 25 April 2002 ¹

1. Are the authorities of a Member State, on grounds of public policy, entitled to restrict the right of residence of workers from other Member States to a single part of the national territory? This is the question which the French Conseil d'État (Council of State) referred to the Court of Justice by order of 29 December 2000 pursuant to Article 234 EC with reference to Articles 6, 8a and 48 of the EC Treaty (now, respectively, Articles 12, 18 and 39 EC), to the principle of proportionality and to Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health ² (hereinafter 'Directive 64/221').

the first subparagraph of Article 6 of the Treaty which provides: 'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

3. The principle of the freedom of movement of persons laid down in Article 8a(1) of the Treaty also has general scope; according to that provision: 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.'

Legal framework

Community legislation

2. In respect of the relevant Community rules, the general principle is laid down in

4. As regards the free movement of workers, those principles are specifically implemented in Article 48 of the Treaty which provides:

¹ — Original language: Italian.

² — OJ, English Special Edition 1964, p. 117.

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

...

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

- (a) to accept offers of employment actually made,
- (b) to move freely within the territory of Member States for this purpose;
- (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

5. The scope and detailed rules for the application of the derogations under Article 48(3) are set out in Directive 64/221 which deals in particular with 'all measures concerning entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health' (Article 2(1)). Of relevance to the case in issue, Article 3 of the directive provides in particular that '[m]easures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned' (paragraph 1); and that '[p]revious criminal convictions shall not in themselves constitute grounds for the taking of such measures' (paragraph 2). There are also specific procedural safeguards favouring Community citizens affected by similar measures (Articles 6 to 9).

National legislation

- (d) to remain in the territory of a Member State after having been employed in

6. As for national legislation, Decree No 46-448 of 18 March 1946, most

recently amended by Decree No 93-1285 of 6 December 1993, governs the conditions for entry and residence by foreign nationals in French territory (hereinafter 'Decree No 46-448'). Article 2 of the decree provides *inter alia*:

residence permit or any alternative permit held by the person concerned either to the *département* or to one or more districts within it. The decision by the Minister for the Interior and Decentralisation or by the prefect is indicated on the residence permit of the person concerned.

'Without prejudice to the provisions of Article 1, foreign nationals shall reside and move freely throughout French territory.

The foreign nationals referred to in the previous subparagraph may not travel outside the area of validity of their residence permit without authorisation from the superintendent of the national police, or from the municipal police of their place of residence.

The Minister for the Interior may, nevertheless, by decree, specify *départements* where foreign nationals, from the date of publication of that decree, may not establish their residence without first obtaining authorisation from the prefect of the place to which the foreign national wishes to move.

Any foreign national establishing his residence or staying in a district in breach of this article will be subject to the penalties laid down for category 5 offences.'

The residence permit of non-nationals resident in those *départements* shall carry a special indication which validates them for the *département* in question.

Facts and procedure

If, owing to his attitude or antecedents, a foreign national without a residence permit is made subject to special supervision, the Minister for the Interior may prohibit him from residing in one or more *départements*. In the same circumstances, the prefect may restrict the geographical validity of the

7. According to the order for reference, Mr Aitor Oteiza Olazabal, a Spanish national from San Sebastian (Basque Country), is a member of the terrorist organisation ETA

(*Euskadi Ta Askatasuna*). In July 1986 he left Spain and moved to France, where, it appears, he worked as an employee and where his application for political refugee status was refused.

8. In April 1988 Mr Oteiza Olazabal was arrested by the French police in the context of an investigation into the kidnapping of a Bilbao industrialist, of which the ETA organisation (which had claimed responsibility for the offence) was suspected. The Paris Tribunal de grande instance (Regional Court), on 8 July 1991, sentenced Mr Oteiza Olazabal in connection with that incident to eighteen months' imprisonment (of which eight months were suspended) for conspiracy with intent to use terror; as an additional sentence he was prohibited from residing in France for a period of four years.

9. Having served the term of imprisonment, Mr Oteiza Olazabal applied to the French authorities, on the basis that he was a Community citizen, for a residence card which was, however, refused. At the same time, nevertheless, the French authorities decided not to apply the additional sentence imposed by the Paris Tribunal de grande instance, 'tolerating' the presence of Mr Oteiza Olazabal in France and issuing him with temporary, short-term leave to reside (it appears that that leave covered a period between September 1992 and August 1996).

10. In June 1996 Mr Oteiza Olazabal decided to leave the Hauts-de-Seine *département* (Ile-de-France), where he had lived since his arrival in France, and moved to the Pyrénées-Atlantiques *département* (Aquitaine), which borders the autonomous Spanish community of the Basque Country. According to the information provided by Mr Oteiza Olazabal himself, he found work as an employee following the move.

11. In the meantime, on the basis of police reports regarding continuing links with the ETA terrorist organisation, the French Minister for the Interior, by order of 21 March 1996, adopted in implementation of Article 2 of Decree No 46-448, prohibited Mr Oteiza Olazabal from residing in 31 *départements* in the south-west of France, including the Pyrénées-Atlantiques, and in the Parisian region. On the basis of those same reports and again in implementation of Article 2, by order of 25 June 1996 the prefect of Hauts-de-Seine also prohibited Mr Oteiza Olazabal from travelling outside his *département*.

12. Those orders were contested by Mr Oteiza Olazabal before the Tribunal Administratif (Administrative Court) de Paris which annulled them in its ruling of 7 July 1997; that ruling was later upheld by the decision of the Cour Administrative d'Appel (Administrative Court of Appeal) de Paris of 18 February 1999 which dismissed the appeal by the Minister for the Interior. The administrative courts at first

and second instance took into account in particular, as stated by the Court of Justice in *Rutili*,³ that Community law does not allow the adoption of national measures which, on grounds of public policy, are intended to restrict the movement of Community citizens within the territory of a Member State if similar measures may not be adopted in respect of the nationals of that State. So, on the basis that the special supervision measures under Article 2 of Decree No 46-448 may be adopted only in respect of foreign nationals, those courts held that the orders adopted in respect of Mr Oteiza Olazabal in implementation of Article 2 were unlawful.

13. In an attempt to reverse those decisions, the Minister for the Interior therefore made an application to the Conseil d'État which, entertaining doubts concerning the interpretation of the relevant Community rules, suspended proceedings to refer a question for preliminary ruling to the Court of Justice:

measure for the maintenance of public order which, subject to judicial review, restricts that national's residence to a part of the national territory when interests of public order preclude him from residing in the remainder of the territory, or in such circumstances is the only measure restricting residence that can lawfully be taken as against that national a measure excluding him from the whole territory and adopted in accordance with national law?'

14. In the course of the proceedings before the Court, Mr Oteiza Olazabal, the French, Spanish and Italian Governments and the Commission made written submissions. Those same parties, with the exception of the Italian Government, also took part in the hearing on 15 January 2002, in which the Belgian Government also intervened.

Legal analysis

'Do Articles 6, 8a and 48 of the EC Treaty (now Articles 12, 18 and 39 EC), the principle of proportionality applicable in Community law and the provisions of secondary law adopted to implement the Treaty, in particular Council Directive 64/221/EEC of 25 February 1964, preclude a Member State from adopting, as against a national of another Member State to which the provisions of the Treaty apply, a

Introduction

15. By the question referred to the Court for a preliminary ruling, the Conseil d'État seeks essentially to establish whether the Community rules and principles cited by it

3 — Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219.

allow Member States, on grounds of public order, to restrict the movement of nationals of other States to one part of the country or whether the only measure permitted under Community law to protect public order is to expel those persons from the whole of the national territory. Before considering the question, and in order better to clarify its scope, I should make two brief points: (i) on the Community law relevant to this case; and (ii) on the questions which, in the light of *Rutili* cited above, the Court must consider in order to give a helpful answer to the referring court.

(i) Community law relevant to this case

16. As mentioned above, the question referred by the Conseil d'État refers both to Articles 6 and 8a of the Treaty which lay down in general terms the principles of non-discrimination and of free movement and to Article 48 of the Treaty which develops those principles with particular reference to the free movement of workers. It is particularly important, therefore, to establish which of those rules are applicable in this case.

17. It should be observed in this respect that it is clear from the documents submitted by the French court and from the

submissions made to the Court of Justice that, from the time he entered France, Mr Olazabal undertook paid employment in France, exercising his rights under Article 48 of the Treaty in respect of the free movement of workers. That being the case, as the Commission and the French Government also observe, it is Article 48 itself (the detailed rules) which should be taken into account in the case in question rather than the general principles laid down in Articles 6 and 8a of the Treaty (the general rules).

18. It is settled case-law that 'Article 6 of the Treaty which lays down the general principle of the prohibition of discrimination on grounds of nationality, applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific prohibition of discrimination.' Therefore, given that 'in the matter of freedom of movement for workers the principle of non-discrimination has been given effect and specific expression by Articles 48 to 51 of the Treaty and by acts of the Community institutions adopted on the basis of those articles,' the Court has stated that where a case 'falls within the scope of those articles of the Treaty and of the regulations adopted on the basis of them, it is unnecessary to give a ruling on the interpretation of Article 6 of the Treaty.'⁴ Similarly, it must be concluded that it is not necessary to refer

4 — Case C-131/96 *Mora Romero* [1997] ECR I-3659, paragraphs 10 to 12. Also to this effect see, as cited therein, Case C-193/94 *Skanavi and Chrysanthakopoulos* [1996] ECR I-929, paragraph 20 and Case 305/87 *Commission v Greece* [1989] ECR 1461, paragraphs 12 and 13; Case C-419/92 *Scholz* [1994] ECR I-505, paragraph 6; Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 18, Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph 39; Case C-55/00 *Gottardo* [2002] ECR I-413, paragraphs 21 and 22.

to the general principle laid down in Article 8a of the Treaty where free movement is specifically safeguarded by Article 48. In a significant statement relating to the right of establishment, which may be mentioned here by analogy, the Court ruled that 'Article 8a of the Treaty, which sets out generally the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 52 of the Treaty', precisely for the purpose of inferring thus that, 'Since the facts with which the main proceedings are concerned fall within the scope of [Article 52], it is not necessary to rule on the interpretation of Article 8a.'⁵

to parts of its territory is clearly reminiscent (even though there is no explicit reference to that effect) of *Rutili* cited above concerning a partial prohibition on residence (limited to one part of the country) imposed by the French authorities on an Italian worker. As mentioned, furthermore, argument in the national proceedings revolved around *Rutili*, as did the submissions by all the parties intervening in these proceedings, who discussed at length whether it would be appropriate to review that precedent.

19. From the observations above, therefore, it is clearly not necessary to consider the present question with regard to Articles 6 and 8a of the Treaty, given that the main proceedings fall within the scope of application of Article 48.

(ii) The questions which the Court must consider, in the light of *Rutili*, in order to give a helpful answer to the referring court

20. The question by the Conseil d'État regarding the application of derogating measures under Article 48(3) of the Treaty

21. In *Rutili*, in response to a question by the Tribunal administratif de Paris on restrictions on the free movement of workers 'justified' by requirements of public order, the Court stated in particular that, on the one hand, '[r]ight of entry into the territory of Member States and the right to stay there and to move freely within it is defined in the Treaty by reference to the whole territory of these States and not by reference to its internal subdivisions' and, on the other hand, that 'the reservation contained in Article 48(3) concerning the protection of public policy has the same scope as the rights the exercise of which may, under that paragraph, be subject to limitations.' On that basis, the Court therefore concluded that 'prohibitions on residence under the reservation inserted to this effect in Article 48(3) may be imposed only in respect of the whole of the national territory.'⁶

5 — *Skanavi and Chrysanthakopoulos*, paragraph 22.

6 — *Rutili*, paragraphs 46 to 48.

22. The Conseil d'État makes specific reference to that decision, essentially asking the Court to review its position on whether it is possible, on public order grounds, to impose a partial prohibition on residence on workers from other Member States.

23. I shall return to that question shortly. At this point, however, I should like to stress that in *Rutili*, immediately following its statement, cited above, of the scope of the derogation under Article 48(3), the Court continued as follows: 'In the case of partial prohibitions on residence, limited to certain areas of the territory, persons covered by Community law must, under Article 7 of the Treaty and within the field of application of that provision, be treated on a footing of equality with the nationals of the Member State concerned',⁷ with the result that 'measures restricting the right of residence which are limited to part only of the national territory may not be imposed by a Member State on nationals of other Member States who are subject to the provisions of the Treaty except in the cases and circumstances in which such measures may be applied to nationals of the State concerned.'⁸

24. Although that passage is not mentioned in the question by the Conseil d'État, which

appears to neglect the possible discriminatory implications of the derogating measures authorised by Article 48(3) of the Treaty, I believe nevertheless that it is particularly important in resolving the dispute in the main proceedings. As mentioned, the rulings by the administrative courts of first and second instance were based on that passage, holding that the restrictive measures adopted in respect of Mr Oteiza Olazabal were unlawful precisely because the special supervision measures provided for in Decree No 46-448 may not be applied to French nationals also. That aspect will have to be taken into consideration when the Court considers the question, analysing it in the light of the facts and the rules involved in the main proceedings in order to give a helpful answer to the referring court.

25. In the next few pages, therefore, I shall establish especially whether, under Article 48(3) of the Treaty, Member States may, on grounds of public order, restrict residence by nationals of other Member States to one part of the national territory. If the response is in the affirmative, it will then be necessary to consider whether those restrictive measures may be adopted, as stated in *Rutili*, only 'in the cases and circumstances in which such measures may be applied to nationals of the State concerned.' Essentially, it requires an assessment of whether, in order to apply derogating measures under Article 48(3) of the

7 — *Rutili*, paragraph 49.

8 — *Rutili*, paragraph 53.

Treaty — concerning either the entire territory or only a part of it — the general prohibition on arbitrary discrimination holds; that is, whether, in the context of the free movement of workers, the condition mentioned in the second sentence of Article 36 and Article 73d(3) of the Treaty (now Articles 30 and 58 EC) relating to the free movement of goods and capital under which restrictions on free movement on grounds of public interest ‘shall not constitute a means of arbitrary discrimination’ is valid.

sole duty of establishing, in general terms, whether such prohibitions may lawfully be imposed in implementation of Article 48(3), or whether the only exception to the principle of the free movement of workers permitted under Article 48(3) on grounds of public policy consists in expelling workers from other Member States from the whole of the national territory.

Admissibility of partial restrictions on residence justified on grounds of public order

26. Having clarified that point, to turn to the substance of the questions, what the Court must establish in particular is whether, pursuant to Article 48(3) of the Treaty, to the provisions of Directive 64/221 and to the principle of proportionality, Member States may, on grounds of public order, impose partial prohibitions on residence (limited to one part of the national territory) on nationals of other Member States who have exercised their rights as workers to freedom of movement. I must point out in this respect that the Court has no duty to assess whether the specific public order grounds relied on by the French authorities in this case may justify the partial prohibition on residence imposed on Mr Oteiza Olazabal; it has the

27. As I stated earlier, the Court has already ruled in answer to that question in *Rutili* that, ‘prohibitions on residence under the reservation inserted to this effect in Article 48(3) may be imposed only in respect of the whole of the national territory’ and not ‘its internal subdivisions.’⁹ In *Rutili* it appears the Court considered, in general terms, that Member States may not derogate from the principle of the free movement of workers by imposing prohibitions on residence limited to one part of the national territory. All the intervening parties in these proceedings, however, are of the opposite opinion, maintaining in principle that such derogating measures are admissible, although, as will shortly become clear, they are not in agreement on the requirements for the adoption of such measures.

28. In support of that argument, it is claimed essentially that if Member States are entitled, on grounds of public order, to adopt in respect of a worker of another Member State a measure as stringent as

9 — *Rutili*, paragraphs 46 to 48.

expulsion from the whole of the national territory, it must therefore be possible to adopt measures which are less restrictive in terms of free movement, such as partial prohibitions on residence. Moreover, such a situation would respect the principle of proportionality, in that it would allow the national authorities to temper any restrictive measures according to the actual requirements of protecting public order. The intervening parties also emphasise that the statements in *Rutili* on the scope of the derogation permitted by Article 48(3) of the Treaty is not supported by the text of the Treaty and the secondary legislation. According to the Commission, in particular, while it is the case that, under Article 6 of Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families,¹⁰ a residence permit issued to workers of other Member States must be valid throughout the territory of the Member State, it is also the case that Article 10 of that directive provides for derogation on grounds of public policy from all the provisions of the directive, including the provisions of Article 6.

whole territory of these States',¹¹ as is confirmed (if confirmation were necessary) by Article 6 of Directive 68/360. I fail to understand, however, why the derogations permitted by Article 48(3) of the Treaty should necessarily have the same scope as the rights mentioned in that provision and why placing a partial limitation on those rights should therefore be ruled out. However, I would point out that in laying down the rights arising from the free movement of workers, Article 48(3) operates subject to 'limitations justified on grounds of public policy', without in any sense requiring that those limitations should cover all the rights mentioned and that they should have the same scope. In the absence of any express indication to the contrary, it may apparently be taken that if Member States may actually prevent the entry and residence in their own territory of workers from other Member States, completely precluding their exercise of the right to free movement, then they may indeed adopt less restrictive provisions in respect of those workers, such as, for example, prohibitions on residence limited to a part of the national territory.¹²

29. Those observations are, in my view, convincing. There is no doubt that '[r]ight of entry into the territory of Member States and the right to stay there and to move freely within it is defined in the Treaty [Article 48 in particular] by reference to the

30. Besides being more faithful to the text of the legislation, and also more logical,

11 — *Rutili*, paragraph 46.

12 — See to this effect the Opinion of Advocate General Mayras in *Rutili* where it is observed: 'since the national authorities are entitled to rely upon the reservation relating to public policy to refuse certain Community workers entry to their territory or to deport those who have been permitted to reside there, but whose personal conduct justifies their expulsion, would it not, therefore, be unreasonable to deprive Member States of the right to take, in the case of those workers, less drastic measures which do no more than prohibit residence in part of their territory?'

10 — Council Directive of 15 October 1968, OJ, English Special Edition 1968, p. 485.

that solution finds its basis specifically in Community principles and case-law. Indeed, the option to temper any restrictive measures in accordance with the actual requirements of protecting public order appears to be fully consistent with the principle of proportionality which, in accordance with established case-law, must be respected by Member States in any derogation from the fundamental freedoms safeguarded by the Treaty.¹³ In fact, only in this way may the restrictions be made proportionate to the actual requirements of protecting public order without going beyond what is strictly necessary for that purpose.¹⁴

31. The hypothesis advanced here appears, furthermore, to be supported by certain precedents where the Court held, in the case of important requirements of public policy, that national measures restricting the exercise of fundamental freedoms in respect of just one part of the territory of the Member State concerned might be justified. So, for example, in *Albore*, cited by the French Government, the Court held

that although the fact of making the purchase by foreign nationals of immovable property 'situated in the provinces adjoining land frontiers' subject to special administrative authorisation constituted a restriction on the free movement of capital which, in principle, breached Article 73b of the EC Treaty (now article 56 EC), such a restriction might nevertheless be permitted 'if it were demonstrated, for each area to which the restriction applies, that non-discriminatory treatment of the nationals of all the Member States would expose the military interests of the Member State concerned to real, specific and serious risks which could not be countered by less restrictive procedures.'¹⁵ Another example to that effect is found in *Ditlev Bluhme* where the Court held that, in accordance with Article 36 of the Treaty, on grounds of the protection of health and life of animals, a restriction on the free movement of goods based on prohibiting the keeping of bees on a particular island (the Danish island of Laesø) which did not belong to a local species¹⁶ could be justified. In more general terms, the possibility of derogating only 'partially' from the fundamental freedoms safeguarded by the Treaty has implicitly been accepted in all the cases where the Court has considered as justified various restrictive measures adopted by local authorities and applicable only within the jurisdiction of those authorities.¹⁷

13 — See, amongst many others, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 38; Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 36; Case C-128/89 *Commission v Italy* [1990] ECR I-3239, paragraph 18; Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, paragraphs 41 and 42.

14 — See, for example, in this respect Case 104/75 *De Peijper* [1976] ECR 613, paragraphs 16 to 18; *Bond van Adverteerders* cited above, paragraph 36; *Gourmet International Products* cited above, paragraph 42.

15 — Case C-423/98 *Albore* [2000] ECR I-5965, paragraph 22.

16 — Case C-67/97 [1998] ECR I-8033, paragraph 38.

17 — See to this effect, for example, Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad* [1991] ECR I-4151, paragraph 26, where, with reference to a rule of the autonomous Spanish community of Catalonia prohibiting the advertising within the territory of the Community of particular alcoholic drinks, the Court stated, 'where that legislation, even if it constitutes a measure having equivalent effect within the meaning of Article 30 of the EEC Treaty, can be justified under Article 36 of that Treaty on grounds of the protection of public health.'

32. The arguments set out above therefore indicate a review of the statement in paragraph 48 of *Rutili* that, 'prohibitions on residence under the reservation inserted to this effect in Article 48(3) may be imposed only in respect of the whole of the national territory.' Clarification in that respect appears all the more needed when one considers that the categorical statement is limited, or even impliedly negated by the following passage in *Rutili* cited above, in which, without even referring back to Article 48, the Court ruled that, 'measures restricting the right of residence which are limited to part only of the national territory [i.e. partial prohibitions on residence], may not be imposed by a Member State on nationals of other Member States who are subject to the provisions of the Treaty except in the cases and circumstances in which such measures may be applied to nationals of the State concerned.'¹⁸

grounds of public policy in respect of nationals of other Member States, as the imposition on such persons of partial prohibitions on residence is also possible.

Whether it is possible to impose partial prohibitions on residence under rules which permit the adoption of such restrictive measures in respect of foreign nationals only

34. Having established, in principle, that pursuant to the derogations set out in Article 48(3) of the Treaty, partial prohibitions on residence may be imposed on workers from other Member States, it must also be established whether those restrictive measures may be adopted only, to take the wording of *Rutili*, 'in the cases and circumstances in which such measures may be applied to nationals of the State concerned', or whether they may be adopted even where similar prohibitions are not laid down for nationals.

33. In the light of all the above arguments, I must therefore conclude on this point that, on a proper interpretation of Article 48(3) of the Treaty, Directive 64/221 and the principle of proportionality, a total prohibition on residing in the national territory is not the only measure restricting the free movement of workers which Member States may adopt on

Arguments of the parties

35. With reference to that question, Mr Oteiza Olazabal maintains that the Court should not diverge from the decision on *Rutili* and should therefore rule any partial

¹⁸ — *Rutili*, paragraph 53.

prohibition on residence imposed on workers of other Member States on the basis of rules applicable only to foreign nationals, such as Decree No 46-448, to be inadmissible. In particular he maintains, since there is no provision for the adoption of a similar measure in respect of French nationals, that the imposition of such a prohibition constitutes discrimination based on nationality which is clearly in breach of Community law.

cerned, the fact that the individual is associated with some body or organisation the activities of which the Member State considers socially harmful but which are not unlawful in that State, *despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with these same bodies or organisations.*²⁰ Nor, the French and Spanish Governments add, may the prohibition on discrimination on the basis of nationality set out in Article 48(2) be relied on against this decision, given that Article 48(3) permits derogation from that prohibition precisely on grounds of public policy.

36. The submissions by all the intervening governments, however, are to the contrary and maintain that measures such as those in issue may, however, be justified on the basis of the derogation laid down in Article 48(3). They essentially maintain that, if Community workers are entitled to carry out activities in a Member State other than their own by virtue of the rights conferred on them by the Treaty, the restrictions on those rights on grounds of public policy, authorised by Article 48(3), may be applied only to those who exercise those rights, and therefore only to workers of other Member States. They refer in particular in that respect to *Van Duyn*,¹⁹ regarding the refusal to allow a Dutch national intending to work in England at the Church of Scientology to enter the country. The Court ruled in that decision that 'a Member State, in imposing restrictions justified on grounds of public policy, is entitled to take into account, as a matter of personal conduct of the individual con-

37. Finally, the Commission takes yet another point of view, although sharing with the intervening governments the idea that measures adopted on the basis of Article 48 of the Treaty in respect of workers of other Member States may not, by their very nature, be considered discriminatory. In the Commission's view, that premiss does not imply that measures of this kind necessarily conform to Community law since, to apply the derogation in question, they must still observe the various conditions laid down in the Court's case-law. In this respect, the Commission

19 — Case 41/74 [1974] ECR 1337.

20 — *Van Duyn*, paragraph 24; emphasis added.

recalls in particular that in *Adoui and Cornuaille* the Court stated that the adoption of such measures may not be based on assessments of certain conduct which would have the effect of applying 'an arbitrary distinction to the detriment of nationals of other Member States.'²¹ On the basis of *Adoui and Cornuaille*, which it considers overruled the previous judgment in *Van Duyn*, the Commission therefore takes the view that a Member State may not impose partial prohibitions on residence on nationals of other Member States if the national rules do not provide for the adoption of restrictive measures or other concrete measures to combat the conduct in issue in respect of their own nationals in the same situation.

that 'measures restricting the right of residence which are limited to part only of the national territory may not be imposed by a Member State on nationals of other Member States who are subject to the provisions of the Treaty, *except in the cases and circumstances in which such measures may be applied to nationals of the State concerned.*'²²

Appraisal

38. For my part, I believe, in relation to that specific question, that the Court should uphold *Rutili*, reiterating essentially

39. Indeed, that response appears to me to be in line with the spirit and the purpose of the Treaty, based rightly on the notion that derogations to the free movement of workers permitted under Article 48(3) on grounds of public order — as with the grounds relating to the other fundamental freedoms — may not constitute *arbitrary discrimination* and that therefore, *in the absence of objective justification*, they may not result in measures which are more stringent and restrictive in respect of nationals of other Member States than nationals of that State. In other words, I believe, on grounds of principle and logical coherence, that Article 48(3) of the Treaty must necessarily be interpreted as extending to Article 48(3) the principle laid down in Articles 36 and 73d of the Treaty, in respect of the free movement of goods and capital, that the derogations in question 'shall not... constitute a means of arbitrary discrimination'.

21 — Joined Cases 115/81 and 116/81 [1982] ECR 1665, paragraph 7. It must be observed in this regard that in other linguistic versions of the judgment, the reference is to 'arbitrary discrimination' rather than 'arbitrary distinction'. That imprecision does not appear, however, to be of particular importance, given that an 'arbitrary distinction' between nationals of different Member States is, in my opinion, equivalent to an 'arbitrary discrimination'.

22 — *Rutili*, paragraph 53; emphasis added.

40. An interpretation such as this is, moreover, in line with Community case-law. In fact, *Adoui and Cornuaille* should, in my opinion, be read in that way; as the Commission observed, *Adoui and Cornuaille* signalled an important and clear reversal of direction in relation to the earlier *Van Duyn* case.

nationals of other Member States.’²³ In order to avoid such consequences, the Court continued, ‘conduct may not be considered as being of a sufficiently serious nature to justify restrictions on the admission to or residence within the territory of a Member State of a national of another Member State in a case where the former Member State does not adopt, with respect to the same conduct on the part of its own nationals, repressive measures or other genuine and effective measures intended to combat such conduct.’²⁴ On that basis, the Court therefore concluded that ‘a Member State may not, by virtue of the reservation relating to public policy contained in Articles 48 and 56 of the Treaty, expel a national of another Member State from its territory or refuse him access to its territory by reason of conduct which, when attributable to the former State’s own nationals, does not give rise to repressive measures or other genuine and effective measures intended to combat such conduct.’²⁵

41. *Adoui and Cornuaille* sought to establish whether, pursuant to the derogations laid down in Articles 48 and 56 of the Treaty, the Belgian authorities might refuse residence permits to two French nationals who were engaging in an activity (prostitution) in Belgium held to be contrary to public policy, but not sanctioned or restricted in any way in respect of Belgian nationals. In considering that question, the Court observed especially that the derogations relating to public order allow Member States to adopt ‘measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto.’ On those grounds, the Court held ‘that difference of treatment, which bears upon the nature of the measures available, must *therefore* be allowed’; it went on to say that ‘the authority empowered to adopt such measures must not base the exercise of its powers on assessments of certain conduct which would have the effect of applying an *arbitrary distinction* to the detriment of

42. That ruling, subsequently upheld on a number of occasions,²⁶ establishes therefore that, in derogating on grounds of public policy from the principle of free movement of workers, Member States may not apply any arbitrary (or unjustified) ‘discrimination’ or ‘distinction’²⁷ against nationals of other Member States, either in

23 — Paragraph 7; emphasis added.

24 — *Adoui and Cornuaille*, paragraph 8.

25 — *Adoui and Cornuaille*, paragraph 9.

26 — See Case 249/86 *Commission v Germany* [1989] ECR 1263, paragraph 19; Case C-171/96 *Pereira Roque* [1998] ECR I-4607, paragraphs 50 to 51; Case C-268/99 *Jany* [2001] ECR I-8615, paragraphs 61 to 62.

27 — As observed above (see footnote 21), both expressions are used in different language versions of the judgment.

respect of the conduct sanctioned or in respect of measures applicable. It was seen in that case that the Court held the restriction of a *particular conduct* to be in breach of that principle only if the conduct related to nationals of other Member States. However, it has not extended that rule to 'disparity of treatment relating to *the nature of measures which may be adopted*', for the sole reason that in that case the issue was the refusal to issue a residence permit, a measure, according to the principles of international law, which may not be adopted in respect of nationals. It may therefore be inferred *a contrario* that Member States are in breach of Community law, giving rise to arbitrary discrimination or distinction, if, in the absence of objective justification, they reserve different and more stringent treatment for nationals of other Member States including as to 'the nature of measures which may be adopted'.

on residence on nationals of other Member States under Article 48(3) of the Treaty only in respect of conduct contrary to public policy which, in the same cases and circumstances would give rise to restrictive measures or other concrete and effective measures to combat that conduct in respect also of nationals of the State concerned;

- on the other hand, that, in the absence of objective justification, the national authorities may not impose partial prohibitions on residence on the nationals of other Member States if, in the same cases and circumstances, those prohibitions may not be imposed on their own nationals.

43. To apply that case-law to this case, and therefore to restrictions on the free movement of workers due to partial prohibitions on residence, it may be inferred:

- on the one hand, that national authorities may impose partial prohibitions

44. It may be concluded, therefore, that, unless objective justifications exist, Member States, on grounds of public policy, may impose partial prohibitions on residence on nationals of other Member States who have exercised their right to freedom of movement of workers only in the same cases and circumstances governing the application of those measures to their own nationals.

Conclusion

In the light of the above considerations, I therefore propose that the Court should reply to the Conseil d'État as follows:

'Article 48(3) of the Treaty, the provisions of Council Directive 64/221/EEC of 25 February 1964 and the principle of proportionality must be interpreted as meaning that a complete ban from the national territory does not constitute the only measure restricting the free movement of workers which Member States may adopt on grounds of public policy in respect of nationals of other Member States, it also being possible to impose on those nationals prohibitions on residence limited to one part of the national territory. However, unless objective justifications exist, the Member States may, on the same grounds of public policy, impose partial prohibitions on residence on nationals of other Member States who have exercised their rights as workers to freedom of movement only in the same cases and circumstances as apply to the imposition of such measures on their own nationals.'