OPINION OF ADVOCATE GENERAL ALBER

delivered on 14 September 2000 [1]

I — Introduction

1. The present reference for a preliminary ruling has its origin in a dispute concerning the entry to and residence in the United Kingdom of a Polish husband and wife who first entered Great Britain on visitors' visas (which have since expired). Following a refusal to extend those visas, the applicants in the main proceedings unsuccessfully applied to the Secretary of State for the Home Department ('the respondent') for leave to remain pursuant to Article 44 of the Europe Agreement with Poland. [2] They now seek, by way of proceedings for judicial review, to derive from that article a right of residence and establishment in the United Kingdom on the basis of the husband's status as a self-employed worker.

1 — Original language: German.

2 — Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 on the conclusion of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part (OJ 1993 L 348, p. 1).

II — Facts

2. The following facts emerge from the order for reference of the High Court of Justice of England and Wales:

The applicant Wieslaw Gloszczuk, who is a Polish national, was granted leave on 15 October 1989 to enter the United Kingdom for six months pursuant to a single-entry visa issued by the British Embassy in Warsaw, subject to the condition that he did not enter employment paid or unpaid and did not engage in any business or profession.

3. On 14 April 1990, Mr Gloszczuk applied to the Immigration and Nationality Directorate ('the IND') for an extension of his visitor's visa. His application was refused on 16 July 1990 on the ground that a visitor's visa could not be granted for a period exceeding six months in total. No appeal was lodged against that decision.

4. Mr Gloszczuk thereafter remained in the United Kingdom without leave, and thus became an 'overstayer', that is to say, a person who, contrary to national immigration law, remains in the United Kingdom after his leave to stay has expired.

5. The applicant Elzbieta Gloszczuk, who is the wife of Mr Gloszczuk and is also a Polish national, was admitted to the United Kingdom on 19 January 1991, also on the basis of a single-entry visa. Since the relevant entry stamp in her passport was illegible, she was deemed under national law to have been granted leave to enter the United Kingdom for six months, on condition that she did not enter employment paid or unpaid and did not engage in any business or profession.

6. Mrs Gloszczuk applied to the IND on 25 February 1991 for an extension of her visitor's visa. By letter of 9 April 1991, the IND informed her that it was premature for such an application to be considered, but that a period of six months was the maximum permissible stay for a visitor. The reason for the refusal was therefore identical to that which had led to the refusal of her husband's application.

7. In response to that letter, Mrs Gloszczuk wrote to the IND on 15 April 1991 stating that, in light of the information received, she would depart from the United Kingdom at the end of her period of leave. This was treated as a withdrawal of her application for an extension of her leave to remain. She did not, however, leave the United Kingdom, remaining there instead with her husband. She thus also became an 'overstayer'.

8. Mr Gloszczuk stated in affidavit evidence that, when he entered the United Kingdom, he did not intend to mislead officials or to stay there. He had come as a visitor but had then decided to extend his stay, since his wife was having problems with her health. Their son, Kevin Gloszczuk, was born on 1 October 1993. The applicants contend that, by reason of those events, they were no longer able to return to Poland.

9. On 31 January 1996 their solicitor wrote to the respondent to inform him that Mr Gloszczuk had been supporting himself and his wife since 1991 by working in the building industry. He applied for recognition of the applicants' right to establish themselves in the United Kingdom for the purpose of working in a self-employed capacity under the terms of Article 44 of the Poland Agreement. Under that provision, he submitted, the applicants had an 'enforceable Community right' and were thus entitled to enter, and to be present in, the United Kingdom without requiring separate 'leave' under national law.

10. By letter of 26 February 1996 the respondent requested further details of Mr Gloszczuk's business activities. The latter informed the respondent, by letter of 15 March 1996, that his business as a self-employed building contractor had been formally established on 27 March 1995. He enclosed accounts for the financial year ending 31 March 1996 showing a net profit of GBP 10 900, together with a letter of 12 March 1996 declaring that he did not intend to seek or take employment in the United Kingdom labour market.

11. The respondent refused the applications of Mr and Mrs Gloszczuk by letter of 25 April 1996. In those refusals, the respondent stated expressly that the applicants had failed to observe the time-limits and conditions attached to the grants of their original leave to enter and that they had made false representations for the purpose of obtaining leave to enter.

12. The applicants contested those decisions by letter of 8 May 1996. They reiterated their claim that the respondent should recognise their right, under Article 44 of the Poland Agreement, to remain in the United Kingdom without 'leave'. [3] The respondent did not reverse his decisions. By letter of 19 July 1996, the applicants accordingly applied for leave to apply for judicial review on the ground that the respondent had failed to respect their right of establishment.

13. By letter dated 12 February 1997 the applicants called on the respondent to reconsider their claim and enclosed further material. The IND specifically invited the applicants, by letter of 17 February 1997, to comment on the allegation that they had both made false representations and/or failed to disclose material facts when seeking entry. The applicants replied on 19 February 1997, stating that they could hardly remember what had transpired at that time. The questioning had taken place through interpreters, but it was unknown whether these had been approved interpreters or fellow passengers.

14. By letter of 4 March 1997 the respondent confirmed his decisions of 25 April 1996. He did so on the basis that the Europe Agreement with Poland confers rights only on those who are lawfully present in a Member State. However, he pointed out, the applicants were not lawfully present in the United Kingdom because they were 'overstayers'. As further grounds, he stated that the applicants had obtained their original leave to enter on the basis of false representations and that they had failed to observe the time-limits attached to that leave by remaining in the United Kingdom after its expiry. Account was also taken of the fact that Mr Gloszc-

3 — According to the information given by the referring court, it is common ground in the main proceedings that the entitlement (if any) of Mrs Gloszczuk and her son is dependent on Mr Gloszczuk's right of residence and/or establishment.

zuk had violated the express condition on which he had originally been granted leave to enter the United Kingdom inasmuch as he had already been working prior to applying on 31 January 1996 to become established in order to work in a self-employed capacity.

15. Leave to move for judicial review was granted by the referring court on 28 October 1997.

III — The questions submitted for preliminary ruling

16. Since the applicants in this case have invoked a right of residence and establishment derived from the Europe Agreement with Poland — the wording of the articles cited in the questions submitted is set out in points 18 to 21 below — the High Court of Justice of England and Wales has submitted to the Court the following questions on the interpretation of that Agreement:

'(1) Does Article 44 of the Association Agreement between the EEC and the Republic of Poland ("the Agreement": OJ 1993 L 348, p. 2) confer rights of establishment upon a Polish national whose presence within the territory of a Member State is unlawful under national immigration law by reason of a breach of an express condition, imposed upon his admission to the territory as a visitor, relating to the permitted duration of his stay within that Member State when that breach arose prior to his becoming a self-employed person and his application to take up and pursue activities under Article 44 of the Agreement?

(2) If the answer to the first question is "yes", does Article 44 of the Agreement have direct effect within the national legal systems of Member States, notwithstanding the provisions of Article 58 of the Agreement?

(3) If the answer to the second question is "yes",

(i) to what extent may a Member State apply its laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons, and supply of services, to persons invoking Article 44 of the Agreement, without violating the proviso contained in the penultimate sentence of Article 58(1) of the Agreement and, *inter alia*, the principle of proportionality?

(ii) does Article 58, in any and if so what circumstances, permit the refusal of an application under Article 44 of the Agreement made by someone whose presence in the Member State is otherwise unlawful?'

IV — Relevant provisions of the Europe Agreement with Poland

17. The Europe Agreement with Poland [4] (hereafter also referred to as 'the Poland Agreement') was concluded having regard to 'the commitment of the Community and its Member States and of Poland to strengthening the political and economic freedoms which constitute the very basis of the association'. [5] The 15th recital in the preamble to the Agreement further provides:

'[The Contracting Parties] RECOGNI[SE] the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective'.

18. Article 1(1) of the Poland Agreement provides that 'an association is hereby established between the Community and its Member States on the one part and Poland on the other part'.

19. The aims of this association are set out in Article 1(2). They concern the provision of an appropriate framework for political dialogue between the Parties, promotion of the expansion of trade and harmonious economic relations, and provision of an appropriate framework for Poland's gradual integration into the Community.

20. Title IV of the Agreement governs 'Movement of workers, establishment [and] supply of services'.

21. The provisions governing the right of establishment are set out in Chapter II of that Title.

Article 44, in particular, provides as follows in this regard:

'...

4 — Reference cited in footnote 2.

5 — Third recital in the preamble.

3. Each Member State shall grant, from entry into force of this Agreement,[6] a treatment no less favourable than that accorded to its own companies and nationals for the establishment of Polish companies and nationals... and shall grant [for] the operation of Polish 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 or confer a right of access to the labour market of another Party. The provisions of this chapter do not apply to those who are not exclusively self-employed;

(ii) ...

(b) ...

(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.

...'.

22. Chapter IV of Title IV of the Agreement sets out general provisions. Article 58(1) lays down the following rule:

'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 [such] as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this Agreement....'

6 — Pursuant to its Article 121, the Poland Agreement, which was signed on 16 December 1991, entered into force on 1 February 1994, and thus only at a date by which the applicants had already been residing in the United Kingdom for more than three years.

V — Submissions of the parties

23. The applicants submit that Article 44 of the Poland Agreement confers a right of establishment and an associated right of residence — which is also valid for family members — on Polish nationals seeking to take up and pursue economic activities as self-employed persons in a Member State. This right, they argue, exists independently of the applicants' entry status. It cannot in any event be made dependent on the grant of leave to remain or any other form of permission lying within the discretion of the Member State.

24. Article 44 of the Poland Agreement, they argue, contains a sufficiently clear and precise obligation not conditional on the adoption of implementing measures to be of direct effect. This is in no way affected by the rule in Article 58 of the Agreement.

25. Member States are free to apply their own laws and regulations regarding entry, stay and establishment of natural persons to persons seeking to invoke their right of establishment and residence under Article 44 of the Poland Agreement only to the extent to which such application does not discriminate on grounds of nationality and does not in any way infringe the right in question. Consequently, Article 58 of the Agreement does not provide any additional legal basis for refusal of an application under Article 44. Should such a refusal none the less be possible under Article 58 of the Agreement, account must be taken of the principle of proportionality.

26. The United Kingdom Government takes the view that Article 44 of the Poland Agreement does not confer any right of establishment on Polish nationals whose presence within the territory of a Member State is unlawful under national immigration law. In the alternative, it submits that Article 44 does not have direct effect, as evidenced by the fact that there is a special Article 58. A Polish national may invoke a right to equal treatment in matters of establishment only if he or she has complied with national laws and regulations regarding entry and stay within the meaning of Article 58 of the Agreement.

27. A Member State is thus entitled to continue to apply its rules regulating entry, stay and establishment to Polish nationals, on condition that it does not do so in a manner which makes the exercise of the right of free establishment impossible or very difficult. This satisfies the principles of non-discrimination and proportionality. Under Article 58 of the Poland Agreement, a Member State can thus demand proof from a Polish national, who, following his entry, is unlawfully staying within the

territory of that Member State for reasons other than those of establishment, that he does in fact intend to take up or pursue an economic activity as a self-employed person and that this activity will be financially successful. In the event of unlawful residence, refusal of an application based on Article 44 of the Agreement will therefore be correct in law.

28. The Belgian, German, Spanish, French, Irish, Netherlands and Austrian Governments, together with the Commission, essentially reach the same conclusion in their observations as the United Kingdom Government, albeit by in part different lines of argument. The submissions of these parties and the further submissions of the applicants and the United Kingdom Government will — to the extent necessary — be examined in the analysis.

VI — Analysis

29. All of the questions submitted in this reference for a preliminary ruling seek clarification as to whether a person may invoke a direct right of establishment under Article 44 of the Poland Agreement, and a separate right of residence derived therefrom, as against the Member State in question, in particular where the person in question had already been unlawfully residing in the Member State for three years when he or she made the application and had even been doing so before the Agreement came into force.

30. It ought, however, to be pointed out once more — see footnote 2 in point 12 above — that in the present case Mr Gloszczuk alone may invoke a right to carry on an activity as a self-employed person, whereas the applicant Mrs Gloszczuk can at best claim a right of residence in her capacity as a family member. Since the same legal consequences would follow if their claims should be upheld, reference may be made to both applicants in the examination which follows.

(1) Questions 1 and 2

31. It should first be noted — as the Commission and the Irish Government have also proposed — that the order of the questions submitted should be changed and that it is first necessary to examine whether the applicants can at all rely before the national court directly on Article 44 of the Agreement and whether they can derive from that article the right of residence which they seek to acquire. Should that not be the case from the outset, all of the remaining questions submitted in this refer-

ence would necessarily be merely hypothetical in nature.

of Europe and seek at some future time to join the European Union.

(a) The jurisdiction of the Court of Justice

32. Before we examine the individual provisions of the Europe Agreement, it is necessary to consider whether the Court has jurisdiction.

35. There is to date an extensive body of case-law of the Court on the Association Agreement with Turkey. Since that Agreement is quite similar to the Agreement with Poland which falls to be applied in the present case, reference can be made in what follows — at least in part — to the relevant case-law. This concerns both questions of jurisdiction and interpretation, with the result that recourse can also be had, at least in part, to that case-law within the context of the present reference regarding the Europe Agreement.

33. The Court has consistently ruled that association agreements form an integral part of the Community legal order and involve an extensive jurisdiction on the part of the Court of Justice. [7]

34. That case-law also holds good for Europe Agreements. The designation of the agreement with Poland as a Europe Agreement cannot to that extent have any other significance in law. While the first agreements concluded with non-member countries were described as association agreements, subsequent ones were designated as cooperation agreements. The agreements concluded with the States of central and eastern Europe, in contrast, were designated as Europe Agreements. The notion of a Europe Agreement takes account of the fact that the States of central and eastern Europe are also politically part

36. That said, there are none the less certain differences between the Association Agreement with Turkey, on the one hand, and the Europe Agreement with Poland, on the other, which make it quite impossible to transpose the entire case-law on the Association Agreement with Turkey to the Europe Agreement with Poland. This must also be examined in each individual case in view of the appreciable differences regarding the relevant secondary legislation. The Court has also consistently held that an international treaty must be interpreted not solely by reference to the terms in which it is worded but also in the light of its objectives. [8]

7 — Case 12/86 *Demirel* v *Stadt Schwäbisch Gmünd* [1987] ECR 3719, paragraphs 7 to 12, and Case C-192/89 *Sevince* v *Staatssecretaris van Justitie* [1990] ECR I-3461, paragraphs 8 to 12.

8 — Case C-416/96 *El-Yassini* v *Secretary of State for the Home Department* [1999] ECR I-1209, paragraph 47.

37. There are, however, no differences between the Association Agreement with Turkey and the Europe Agreement with Poland in regard to the jurisdiction of the Court. Both are agreements within the meaning of Article 238 of the EC Treaty (now Article 310 EC). In its established case-law on agreements concluded pursuant to Article 238 of the EC Treaty, the Court has ruled that it has comprehensive jurisdiction in this regard to interpret such agreements. [9]

38. The Court's case-law on the Agreement with Turkey can thus be applied, at least with regard to jurisdiction, for the purpose of interpreting and construing provisions of the Europe Agreements, with the result that the Court does have jurisdiction to reply to the questions submitted to it in this case.

(b) Direct applicability of the provisions of the Europe Agreement

39. Concerning the question of the direct applicability of individual provisions in Association Agreements, the Court has also applied to such agreements the principles which it has developed in regard to the provisions of directives. [10] In view of the related origin of Association and Europe Agreements, as described above, and their similar objectives, those rules can be transposed.

40. Provisions are to be regarded as being directly applicable when, regard being had to their wording and to the purpose and nature of the agreement itself, they contain a clear and precise obligation which is not subject, in its implementation, to the adoption of any subsequent measure. [11]

41. Since the rights which the applicants invoke can be derived, if at all, only from Article 44(3) of the Poland Agreement, Article 44(3) alone will, in what follows, be examined in regard to direct effect, but with account being taken of the effect of other provisions of the Agreement.

42. Article 44(3) of the Poland Agreement falls to be examined in the light of the principles laid down by the Court:

As the Governments of Belgium, Italy, Spain and France in particular also submit,

9 — *Demirel*, cited above in footnote 7, paragraph 8, and Case C-53/96 *Hermès* v *FHT* [1998] ECR I-3603, paragraphs 22 to 29 and references cited therein.

10 — Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641, paragraphs 22 to 26, and *Demirel*, cited above in footnote 7, paragraphs 7 to 12.

11 — See, *inter alia*, Case C-262/96 *Sürül* v *Bundesanstalt für Arbeit* [1999] ECR I-2685, paragraph 60 and further references therein.

the right of establishment as described in Article 44(3) of the Agreement, but also only the right of establishment as such, is a clear and unambiguous equal-treatment clause which is unconditional and directly applicable. It prohibits Member States, once the Poland Agreement has come into force, from applying to Polish nationals wishing to establish themselves under the terms of the Agreement less favourable treatment than that accorded to their own nationals.

43. In comparison with other provisions of this Agreement, Article 44(3) does not constitute a rule which is purely programmatic in character and the direct applicability of which depends on decisions still to be taken by the Association Council. [12] That, for instance, is the case with regard to the areas of free movement of workers under Article 39(1) and the supply of services under Article 55(3) of the Agreement, since these refer expressly to measures still to be taken.

44. No indications can be gleaned from the wording of Article 44(3) of the Poland Agreement or from articles applicable to Article 44(3) as to Association Council decisions still to be taken in this area. In contrast, the provisions of the Agreement with Turkey indicated, in regard to the free movement of Turkish workers, that the exact timetable and the order for implementation of those provisions would have to be laid down in future Association Council decisions. [13] Many of the provisions in the Association Agreement with Turkey acquired direct effect only after they had been formulated in secondary legislation by the Association Council. [14]

45. The purpose and object of the Europe Agreement with Poland are also not at variance with the direct applicability of Article 44(3) of the Poland Agreement. The immediate aims of the Agreement, which are also listed in Article 1(2) — see point 19 above — can be inferred from the recitals in the preamble.

46. The incidental fact that this Europe Agreement is intended essentially to promote the economic development of Poland and that therefore an imbalance arises between the various obligations assumed by the Community does not, according to the Court's settled case-law on similar association agreements, prevent the Community from recognising some of its provisions as having direct effect. [15]

12 — Article 3(2) of the Poland Agreement provides as follows with regard to the Association Council: 'At ministerial level, political dialogue shall take place within the Association Council. This shall have general responsibility for any matters the parties might wish to put to it.' Further provisions on the Association Council are to be found in Articles 102 to 107 of the Poland Agreement.

13 — See *Demirel*, cited above in footnote 7, paragraph 16.

14 — See the judgment in *Sevince*, cited above in footnote 7, paragraph 27 et seq.

15 — Judgments in Case C-469/93 *Amministrazione delle Finanze dello Stato* v *Chiquita Italia* [1995] ECR I-4533, paragraph 34, and of 11 May 2000 in Case C-37/98 *The Queen* v *Secretary of State for the Home Department*, ex parte *Savas* [2000] ECR I-2927, paragraph 53.

47. However, a further indication as to the direct applicability of Article 44(3) of the Poland Agreement arises from the fact that Article 44(3) does not give the host Member State any discretion in taking a decision on the right of establishment for a Polish national.

48. Contrary to the applicants' submissions, however, the rights derived from Article 44(3) of the Poland Agreement do not correspond to the right of establishment under Article 52 of the EC Treaty (now Article 43 EC), which the settled case-law of the Court has confirmed to be directly applicable. [16] That, however, is no longer the issue in the present case. First, the wording of the two provisions is not the same, [17] and, second, the difference in treatment can be explained by the discrete objectives pursued by those respective instruments.

49. Whereas the Poland Agreement concerns the gradual integration of Poland and accession to the European Union is not at all something which will come about automatically, the objectives of the EC Treaty are much wider and more far-reaching in their scope. Those objectives involve the creation of an internal market, the establishment of which necessarily implies 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, following amendment, Article 3(1)(c) EC).

50. It thus follows that, regard being had to its wording as well as to its meaning and purpose, Article 44(3) of the Poland Agreement is directly effective in regard to the right of self-employed Polish nationals to establish themselves for the purpose of working in a self-employed capacity. There is, however, still no reference in this to a right of residence. In order to be able to determine to what extent Article 44(3) confers a separate right of residence which is independent of national law, it is necessary to clarify the scope of that provision.

(c) The scope of Article 44(3) of the Poland Agreement

51. The applicants argue essentially in both their written observations to the Court and in the oral procedure that the right of establishment laid down in Article 44(3) of the Poland Agreement confers on them at the same time an implied right of residence in the Member State in question, irrespective of the fact that, at the time of their application under Article 44(3) of the Poland Agreement, they had already been residing in the host Member State for three years contrary to national immigration law.

16 — Case 2/74 *Reyners* v *Belgium* [1974] ECR 631.

17 — The Court has also consistently ruled that the fact that an article in an association agreement is worded similarly to a provision of the EC Treaty does not in any way automatically mean that those provisions must be interpreted identically (see in this connection Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraphs 11 to 20).

52. The applicants' arguments that the unlawful nature of their residence in the Member State is immaterial in regard to an application relating to Article 44(3) of the Poland Agreement are unconvincing. They fail to take account of the fact that, within the context of that provision, a clear distinction needs to be drawn between the right of residence and the right of establishment.

53. According to the unambiguous wording of Article 44(3) of the Poland Agreement, that provision relates solely to the right of establishment of Polish nationals in a Member State. At no point does the Agreement mention an implied right of residence which may be derived from that right of establishment.

54. Since the Court, in deriving freedom-conferring rights from rights of residence, has consistently chosen the objectives of the relevant instrument as the criterion for its examination, [18] that criterion must also be applied in deriving rights of residence from the right of establishment set out in Article 44(3) of the Poland Agreement. It follows from the deliberate restriction of the area regulated by the Agreement that Article 44(3) establishes merely a prohibition of discrimination and a requirement of treatment equivalent to that accorded to nationals, but does not establish a right of residence going beyond that.

18 — Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 16.

55. The Court has, in its established case-law on the Association Agreement with Turkey, repeatedly held that, as Community law stands at present, the provisions in question do not encroach upon the competence retained by the Member States, in particular the competence to adopt rules regulating the entry and residence of Turkish nationals within their territory. [19]

56. The same must hold good for the interpretation of Article 44(3) of the Poland Agreement. Contrary to the opinion expressed by the applicants, this case-law is transposable to the Poland Agreement. The contention that the Poland Agreement goes further on this point than the Association Agreement with Turkey is untenable, as demonstrated by the following comparison of the two Agreements in respect of the right of establishment:

— The Association Agreement with Turkey

57. Under Article 2(1) and the second recital in the preamble, the aim of the Agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Parties. As soon as the operation of the Agreement

19 — Case C-171/95 *Tetik* v *Land Berlin* [1997] ECR I-329, paragraph 21, Case C-237/91 *Kus* v *Landeshauptstadt Wiesbaden* [1992] ECR I-6781, paragraph 25, and *Savas*, cited above in footnote 15, paragraph 58.

allows Turkey fully to accept obligations under the Treaty establishing the Community, the Contracting Parties are to examine the possibility of Turkey acceding to the Community (Article 28 of the Agreement).

58. Article 41 of the additional protocol annexed to this Association Agreement provides that the Contracting Parties are to refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services.

59. However, most of the rights thus far derived from the Association Agreement with Turkey are based on the very specific decisions of the Association Council adopted to date.

— The Europe Agreement with Poland

60. Article 1(2) of the Poland Agreement provides that its objectives include the provision of an appropriate framework for political dialogue and the gradual integration of Poland into the Community, the expansion of trade and the promotion of harmonious economic relations. The 15th recital in the preamble also stresses that the Europe Agreement serves Poland's ultimate objective of becoming a member of the Community.

61. Under Article 44(3) of the Poland Agreement, Member States must, with regard to establishment, grant Polish nationals treatment which is no less favourable than that accorded to their own nationals.

62. A comparison of the two Agreements makes it clear that neither has the objective of seeking to abolish all obstacles to the free movement of persons. Further, both refer only to an expansion of trade and the provision of a framework for gradual integration into the Community, but do not discuss any framework corresponding to the EC Treaty.

63. Article 58 of the Poland Agreement, for which there is no comparable provision in the Association Agreement with Turkey, makes it in this connection all the more evident, through its express mention of the terms 'entry' and 'stay', that these areas of regulation are to remain within the competence of the Member States, and thus makes clear what is already obvious from the case-law on the Association Agreement with Turkey.

64. In particular, however, it is the Association Council decisions adopted to date under the Association Agreement with Turkey which make clear that, in the areas of free movement and the right of establishment, the Association Agreement with Turkey is considerably more advanced than the Poland Agreement. It is also obvious from this fact that no more rights can be

conferred on Polish nationals to enable them to work in a self-employed capacity than those which may be conferred on Turkish nationals under the Association Agreement with Turkey.

65. In view of the comparative speed with which Poland is endeavouring to secure entry to the Community, the applicants have sought to attribute to the Poland Agreement a broader scope than that of the Association Agreement with Turkey. This line of argument, however, fails to take account of the fact that a vital distinction must be drawn between the political and the juridical significance of an agreement.

66. Notwithstanding the partial applicability of the case-law on the Association Agreement with Turkey, as established above, the Court's settled case-law concerning an implied right of residence for Turkish workers under the Association Agreement concluded with Turkey [20] is to that extent not applicable to the present case, which involves the right of establishment of self-employed Polish nationals. According to that case-law, the rights accorded to Turkish workers in the area of employment necessarily imply that the persons concerned are entitled to residence, since the right of access to the labour force and the right to work as an employed person would otherwise be deprived of all effect. This implied right of residence was, however, derived solely and exclusively from Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association. No rules similar to this decision exist in regard to the Europe Agreement with Poland.

67. In the meantime, the Court has also applied this case-law, which really concerns only Turkish employed workers, to provisions relating to the right of establishment of Turkish nationals in a Member State. [21] The Court has, however, expressly stressed in this regard that the implied right of residence applies only in the particular context of the Association Agreement with Turkey. [22] From this it follows clearly and unequivocally that, as Community law stands at present, those principles cannot apply in the context of the Europe Agreement with Poland — that is to say, so long as no corresponding decisions have been adopted by the Association Council.

68. The definition of the term 'establishment' in Article 44(4) of the Poland Agreement [23] also makes it clear that a strict distinction needs to be drawn under that Agreement between Polish employed workers and Polish self-employed workers, with the result that rights which may apply to employed persons are in no way also unconditionally applicable to self-employed persons.

20 — *Savas* and *Kus* (cited in footnotes 7 and 19) and Case C-434/93 *Bozkurt* v *Staatssecretaris van Justitie* [1995] ECR I-1475, paragraph 28.

21 — *Savas*, cited above in footnote 15, paragraph 63.

22 — *Savas*, cited above in footnote 15, paragraph 49.

23 — Article 44(4) of the Poland Agreement states: '... Self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market or confer a right of access to the labour market of another Party. The provisions of this chapter do not apply to those who are not exclusively self-employed;...'.

69. The following consideration also demonstrates that the right of establishment which Polish nationals are recognised as having under Article 44(3) of the Poland Agreement cannot form the basis for any implied right of residence. Even in cases where self-employed Turkish nationals have been recognised as having a right of residence pursuant to Decision No 1/80 of the Association Council, the Court has none the less derogated from that principle in cases where, at the time of their application, applicants were residing in the Member State in question contrary to national immigration law.[24] In the cases in point, the Turkish nationals concerned had obtained their original authorisation to reside in a Member State only by providing false information.

70. Now, it would be entirely contrary to the system if persons from non-member countries with regard to which the EC has not concluded any implementing decisions quite so specific as Decision No 1/80 of the Association Council under the Association Agreement with Turkey were to be placed in a better position than nationals of countries such as Turkey.

71. It can thus be held that the right of establishment granted by Article 44(3) of the Poland Agreement and a potential right of residence must, at the present stage of implementation of the Europe Agreement with Poland, be strictly distinguished one from the other.

(d) Unlawful residence even before the Poland Agreement entered into force

72. Although their visitors' visas had expired and were not extended, the applicants remained in the United Kingdom in contravention of national immigration law. Account must be taken in this connection of the fact that their residence was unlawful even before the Europe Agreement entered into force.[25] In that regard, any rights to which the applicants would have been entitled by virtue of their original leave to remain are also irrelevant. Article 44(3) of the Poland Agreement provides no support for the argument that earlier infringements of national law may be remedied by that provision.

73. Neither the history of its adoption nor the Poland Agreement itself suggest that the Contracting Parties intended, at the time of its conclusion, to legalise unlawful instances of residence arising before it entered into force.

74. Since, as has already been explained, the Poland Agreement does not confer any implied right of residence even on persons who have been unlawfully present in a Member State only after the entry into force of the Agreement, this must *a fortiori* be the case with regard to persons who were already unlawfully present in that

24 — *Savas*, cited above in footnote 15, paragraph 60, and Case C-285/95 *Kol* v *Land Berlin* [1997] ECR I-3069, paragraph 29.

25 — See footnote 6 above.

Member State before the Agreement entered into force.

75. Were this not so, Article 44(3) might even encourage Polish nationals initially to enter a Member State under false pretences and then, in contravention of national provisions, to apply for authorisation to reside, over the granting of which the Member State in question would — given the right to such authorisation under an Association Agreement — no longer have any influence.

76. The scope of Article 44(3) of the Poland Agreement therefore goes only so far as to grant a right to equal treatment, with reference solely to establishment, to a Polish national who is already lawfully resident in the host State, that is to say, whose presence is in accordance with the national rules governing entry and residence.

77. Since it is thus established that Article 44(3) of the Poland Agreement confers only a right of establishment, but no right of residence, it follows that the effect of Article 58 of the Poland Agreement can relate, if at all, only to the right of establishment. The question, however, is to what extent Article 58 of the Poland Agreement can restrict Member States in defining the right of establishment.

78. Article 58 of the Poland Agreement states that nothing in the Agreement is to prevent a Member State from applying its laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services, provided that, in so doing, it does not apply them in such a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement.

79. A comparison with the wording of Article 44(3) of the Agreement demonstrates that Article 58 is addressed only to the Community, the Member States and Poland; individual Polish nationals cannot derive any direct rights from that provision. This also explains why Article 58 of the Poland Agreement can have no bearing on the essentially direct applicability of Article 44(3) of the Agreement, as explained above.

80. With particular regard to the implementation of the Europe Agreement with Poland, Member States must also be authorised to carry out certain checks on the entry, residence and establishment of Polish nationals.

81. The fact that Articles 58 and 44(3) are both to be found in Title IV of the Poland Agreement does not, contrary to the argument put forward by the applicants, provide any support whatever for their contention that Article 44(3) has the effect of

conferring a right of residence or that it may not be restricted in this regard by measures taken by the Member States. On the contrary, this systematic position of Article 58 demonstrates *a fortiori* that Member States continue to be entitled to regulate the entry and residence of Polish nationals also in regard to the right of establishment.

82. Further, the Contracting Parties agreed, when signing the 'Joint Declaration on Article 58 of the Agreement' annexed to the Final Act of the Agreement, that the sole fact of requiring a visa for natural persons of certain Parties and not for those of others is not to be regarded as nullifying or impairing benefits under a specific commitment.

83. These rules of interpretation, established by the Parties themselves and forming part of the Agreement, make once again clear what the objectives of the Agreement are and demonstrate that all of the Parties intended to recognise the Member States as continuing to have the right autonomously and independently to regulate the provisions governing entry and residence.

84. Article 45(1) of the Poland Agreement, furthermore, makes it clear that, subject to Article 44(3), each Contracting State may regulate the establishment and operation of companies and nationals on its territory, in so far as those regulations apply in a non-discriminatory manner. In this way, not only Article 58 but also Article 45(1) of the Poland Agreement show that the Member States continue to retain a not inconsiderable regulatory power in regard to the right of establishment.

85. The answer to Questions 1 and 2 submitted by the referring court should therefore be as follows:

Article 44 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, has direct effect for the establishment of Polish nationals in regard to guaranteeing equal treatment with nationals of the Member States of the European Communities, but does not confer any legal entitlement to entry or residence.

(2) Question 3

86. Even if it is unnecessary to reply to Question 3 on the ground that Question 1 has been answered in the negative, the question ought none the less to be addressed by way of alternative submis-

sion. Question 3 essentially involves the issue of whether the provisions of the Poland Agreement on entry and residence constitute an obstacle to the United Kingdom's own provisions and concerns the degree to which the entry and residence provisions are applicable within the context of granting a right of establishment.

87. Since the provisions of an Association or Europe Agreement form an integral part of the Community legal order, [26] those provisions take precedence over national law, though it should also be noted that they do so only to the extent to which they actually overlap.

88. The provisions germane to the present case are not, however, at variance with national law. The relevant provisions in the United Kingdom's rules on entry and residence give effect only to the legitimate and permissible interests of that Member State, namely to regulate uncontrolled access of nationals of non-member countries and to prevent abuse of advantages granted to persons entering in the proper manner.

89. Nor is it apparent in any provision that entry or residence in the Member State is to be refused solely on the ground of Polish nationality.

90. The articles in question grant the authorities a partial discretion, as was in fact initially exercised here in the pre-litigation procedure. In applying individual measures, the Member State is of course also bound to comply with the principle of proportionality. However, in the case where an applicant has entered the country solely by deceiving the national authorities, that person cannot invoke the principle of proportionality. That would, in particular, run counter to the objectives of the Agreement. Nor is it disproportionate, in that connection, to require the applicants to first leave and then re-apply in Poland for residence in conjunction with an application for establishment.

91. It would not be compatible with the principle of proportionality if the assumption of an activity in a self-employed capacity were to be made subject to an examination of national economic or labour-market requirements or if an application for establishment were to be turned down on the ground that the legal order of the Member State in question provides for a general restriction on immigration.

92. The Court has consistently held that Member States also have the right to take measures designed to prevent in advance any abuse of rights granted to specific persons. [27]

26 — See point 33 above.

27 — Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 17.

93. The Poland Agreement thus does not, in the present case, stand in the way of application of a Member State's legislative and administrative provisions — in particular those governing entry and residence — to Polish nationals.

VII — Conclusion

94. I propose that the questions submitted should be answered as follows:

(1) Article 44 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, has direct effect for the establishment of Polish nationals in regard to guaranteeing equal treatment with nationals of the Member States of the European Communities, but does not confer any legal entitlement to entry or residence.

(2) A Member State can also apply its legal and administrative rules on entry and residence to persons who, within the context of establishment, can or could invoke equal treatment under Article 44 of the Poland Agreement, on condition that it does not do so in such a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement.