OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 20 JANUARY 1982

My Lords,

The Judicial Division of the Council of State (Raad van State) of the Netherlands has referred three questions to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty. These in part ask the Court to give a ruling on the scope of the phrase "favoured EEC citizen" within the meaning of subparagraph (a) of the first paragraph of Article 91 of the Netherlands Aliens Order (Vreemdelingenbesluit). Such a question as framed is clearly not for the Court but for the national court. In substance, however, the questions referred do raise issues of Community law which all parties participating in the proceedings consider to be important.

The effect of the questions may be phrased as follows:

1. Does a national of one Member State who undertakes work, whether or not in paid employment, or provides services in another Member State, to such a limited extent that in so doing he earns income which is less than that which in the last mentioned Member State is regarded as the minimum necessary to enable the cost of subsistence to be met, fall within the provisions of Community law relating to the freedom of movement of workers which are contained in Article 48 of the EEC Treaty, Regulation No 1612/68 of 15 October 1968 and Directives 64/221 of 25 February 1964 and 68/360 of 15 October 1968?

2. Is the answer to the first question different if the individual concerned has recourse to other resources which together with his earned income provide him with what in the Member State is regarded as the minimum necessary to enable the cost of subsistence to be met, or if he chooses to live below the level regarded by the State as the minimum for subsistence?

3. Assuming that question 1 is answered in the affirmative can the right of such a worker to free admission into and residence in the Member State in which he undertakes or wishes to undertake employment or to provide services still be relied upon if it is demonstrated, or is likely, that the chief motive for residing in that Member State is for a purpose other than the undertaking of limited employment or the provision of services?

The Dutch Government and the Danish Government contend that the first question is to be answered in the negative. Mrs Levin, the French and Italian Governments and the Commission contend that it should be answered in the affirmative. Mrs Levin argues that private funds may be taken

into account if the rights referred to depend on receipt of the minimum cost of subsistence: the other parties consider such funds should not be regarded. With varying degrees of emphasis the parties appear to accept that a person who otherwise fulfils the requirements of the legislation may not be deprived of his rights merely because he has additional and subsidiary reasons for wanting to enter a particular Member State.

The issues raised are thus important to the individual, particularly in a time of extensive unemployment and of an increasing dependence on part-time work; and to the Member State which wishes to prevent the rights conferred on workers being abused by someone who is not in any real or genuine sense a worker.

The reference and the written submissions did not give a clear picture of the facts. Further information was given by Mrs Levin's counsel at the hearing which was not challenged, and upon which it seems to me to be right to rely for the purpose of answering the questions. Whether the facts are such will of course be for the national court to find when considering the effect of the Court's answers. For present purposes they appear to be as follows.

Mrs Levin is a British subject, and as I understand it a United Kingdom national: her husband is a South African national. In October 1977, shortly after their marriage, they went to the Netherlands, where both had lived from time to time previously. On 13 January 1978 Mrs Levin applied for the grant of a residence permit. This was refused by the head of police in Amsterdam on 20 March 1979 on the ground that "since the beginning of 1978 the applicant has not undertaken any further employment and accordingly can no longer be treated as a 'favoured EEC citizen' within the meaning of the Aliens Order". It was also said that her accommodation did not meet the standards which could reasonably be required. Mrs Levin's counsel says that in fact from her arrival in the Netherlands until 6 April 1979 she had worked regularly as a chambermaid in various hotels in Amsterdam.

On 9 April 1979 she applied to the Secretary of State for Justice, the respondent in the present proceedings, for the decision to be reconsidered, submitting that the fact that she had not taken up any further employment from the beginning of 1978 to 6 April 1979 was not a ground for refusal, since she and her husband had sufficient resources for their maintenance even without having to work. She added that she had nevertheless taken up paid employment from 9 April 1979 as a precaution, and she disputed what was said about the condition of her accommodation.

The Court has been told by her counsel that she began on 9 April to do part-time work as a chambermaid in an hotel. She worked half days or approximately 20 hours a week and she received a net income of HFL 130 per week.

In the absence of a reply, her application dated 9 April 1979 was deemed to have been rejected and she appealed to the Council of State against that rejection, on the basis that at the time of the decision appealed against, she was a national of another Member State pursuing an activity as an employed

person, and that even if her income were not sufficient for her subsistence she had private resources to support herself. The respondent contended that her employment did not provide her with an income sufficient for her subsistence — which was contended to be the minimum statutory wage prevailing in the Netherlands — so that she could not claim to be a "favoured EEC citizen". Moreover, it was said that she had not come to the Netherlands "in order to" take up employment, but to enable her husband to live in the Netherlands as the spouse of an EEC national, pursuant to Article 91 (i) (c) of the Aliens Order, which appears designed to give effect to Article 10 of Council Regulation No 1612/68.

The material placed before the Court in some respect has ranged wider than the questions referred, for example in relation to someone who wishes to look for work rather than someone who has secured a job or who actually does work. Moreover the first question referred does itself raise an issue which does not appear to arise on the facts — namely the position of someone who works without being in paid employment. It seems to me right to limit this opinion to the case of a national of a Member State who does undertake employment for which he is paid or is to be paid and not to consider other situations which may one day fall for consideration. For that reason, and also because I am not satisfied that it is in any event right to have regard to it, I do not think it right to have regard for the purpose of this case, to the interpretative declaration recorded in the minutes of the Council to which the Court was referred (by which it was accepted that a person may remain in the territory of a Member State in search of employment for a period of three months on condition that he does not become a burden on public funds). This case is limited to the question as to whether a minimum income and minimum hours of work may be prescribed.

Although the provisions of Community law referred to in the first question are very familiar to the Court, it seems to me that it may assist to summarize the particular provisions which are relevant to the questions posed.

Chapter I of Title III ("Free movement of persons, services and capital") of the EEC Treaty deals with "workers" as opposed to those who are self-employed and who set up and manage undertakings, or those who provide services as covered by Chapters II and III. Article 48 requires "freedom of movement for workers to be secured", such freedom entailing the abolition of any discrimination based on nationality as regards employment remuneration and other conditions of work or employment.

The rights conferred by Article 48 (3) are (a) to accept offers of employment actually made; (b) to move freely within the territory of Member States "for this purpose" (which I take to be for the purpose of accepting (and performing) offers of employment actually made); (c) to stay in a Member State for the purposes of employment subject to provisions which apply to nationals of that State; (d) to remain in a Member

State after having been employed in that State subject to conditions to be laid down by the Commission. *Ex facie* such rights are subject only to limitation on grounds of public policy, public security or public health.

These provisions have to be read in the context of Articles 2 and 3 of the Treaty. Article 3 lists as one of the activities of the Commmunity "the abolition as between Member States of obstacles to freedom of movement of persons". Those activities are for the purposes set out in Article 2 which includes the approximatation of the economic policies of Member States, a harmonious development of economic activities and an accelerated raising of the standard of living.

The recitals to Council Regulation No 1612/68 stress that freedom of movement constitutes a fundamental right of workers and their families and that mobility of labour must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions. They affirm the right of "all workers" in the Member States to "pursue the activity of their choice". "such right must be enjoyed without discrimination by permanent, seasonal and frontier workers". Article 1 states that a national of a Member State has the right "to take up an activity as an employed person and to pursue such an activity" in a Member State subject to the same rules as a national of that Member State employed there; a national of a Member State in particular is to have the right "to take up available employment in the territory of another Member State". By Article 3 national rules and practices are not to apply "where they limit applications for and offers of employment or the right of foreign nationals to take up and pursue employment or subject these to conditions not applicable in respect of their own nationals".

Council Directive No 68/360 requires the abolition of restrictions on the movement and residence of nationals of Member States and their families to whom Regulation No 1612/68 applies. In the heading to the Directive these are called "workers of Member States and their families". By Article 4 a right of residence and a residence permit are to be granted to a worker who can produce only (a) the document with which he entered the territory and (b) a confirmation of engagement from the employer or a certificate of employment. Such residence permit must be for at least five years unless the worker "is employed" for a period of more than three months and not more than a year, when a temporary residence permit may be granted limited to the expected period of employment (Article 6). A right of residence is to be recognized without a permit being issued to a worker "pursuing an activity as an employed person" where the activity is not expected to last for more than three months.

The word "worker" is not expressly defined in any relevant provision. The Dutch and Danish Governments submit that Article 48 and the implementing

provisions establish freedom of movement only for workers who are of importance to the economic life of Member States, or who contribute by their economic activity to the development of the Community and not for nationals of Member States in general, or those who engage in no economic activity or whose economic activity is insignificant.

Articles 2 and 3 of the Treaty clearly support the argument that a "worker" must be engaged in an activity of an economic nature. The Court has adopted this approach in Case 118/75 *Watson* v *Belmann* (1975) ECR 1185 and in Case 13/76 *Dona* v *Mantero* (1976) ECR 1333. In the latter case the Court concluded (at p. 1340) that having regard to the objectives of the Community "the practice of sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty".

The contention of the two Governments, however, does not go far to resolve the problems which are raised in the present case.

What is contended essentially by the Dutch and the Danish Governments respectively is that a person can only rely on the provisions of Article 48 if he earns an amount equal to the means of subsistence considered necessary by the Member State in which he works — or if he works for a number of hours regarded or prescribed as normal for full-time work in the relevant sector. In the absence of a definition in Community legislation of "a worker" national criteria may be adopted to decide both the minimum wage and the minimum number of hours. It is suggested that only in this way can the category of worker be kept within bounds, and such groups as full-time students and pensioners be excluded from the category, even if they do a few hours' paid work each week.

In construing Article 48 and the subsidiary provisions two principles seem to me clear. In the first place the meaning of "worker" is a matter of Community law and unless there are compelling reasons to the contrary, a "worker" should be defined in such a way as to avoid as far as possible variations between Member States. This principle is established by what was said in Case 75/63 *Hoekstra (née Unger)* v *Bestuur der Bedrijfsvereniging voor Detailhanden en Ambachten* (1964) ECR 177 at p. 184:

"Articles 48 to 51 of the Treaty, by the very fact of establishing freedom of movement for 'workers', have given a Community scope to this term. If the definition of this term were a matter within the competence of national law, it would therefore be possible for each Member State to modify the meaning of the concept of the 'migrant worker' and so to eliminate at will the protection afforded by the Treaty to certain categories of person. Moreover, nothing in Articles 48 to 51 of the Treaty leads to the conclusion that these provisions have left the definition of the term 'worker' under national legislation."

That case was concerned with the social security entitlements of migrant workers under Regulation No 3 then in force: what was said seems to me to be equally applicable to the present case. If a person can only qualify as a "worker" if he

works for the number of hours or receives a wage, specified as the minimum by the law of the State in which he is employed, his status and his rights can vary from one Member State to another.

In the second place where no words of limitation have been expressed the Court should be slow to introduce them in order to cut down the ordinary and natural meaning of the word "worker". The Court has, on a number of occasions, stressed that Article 48 establishes one of the foundations of the Community so that any derogations from the principle must be strictly construed (see for example Case 152/73 *Sotgiu* v *Bundespost* (1974) ECR 153 at p. 162; Case 36/75 *Rutili* v *Minister of the Interior* (1975) ECR 1219 at pp. 1229 and 1231.) This is the case so far as express limitations are concerned; a fortiori should qualifications not be introduced for which no express provision is made unless they are intrinsically part of the definition of worker. This approach seems to me to be consistent with the fact that in Article 3 (3) of Council Directive 68/360 a Member State must issue a residence permit to someone who can produce a certificate of employment and an entry document. The only factor which is dealt with in that Directive so as to affect the residence permit is the length of the period of employment. There is no provision as to the type of work, the number of hours worked or the wage which must be shown before a residence permit can be required. It is also consistent, as I read it, with Council Directive 64/221 dealing with limitations on freedom of movement and residence on grounds of public policy, public security and public health which may be imposed. These are circumscribed and it is expressly provided in Article 2 (2) of that Directive that such grounds shall not be invoked to service economic ends. Moreover, Council Regulation No 1612/68 emphasizes the right of *all* workers to pursue the activity of their choice and specifically mentions permanent, seasonal and frontier workers.

Is it then possible to say that a "worker" within the meaning of the legislation can only be someone who earns at least a particular wage or who works for at least a minimum number of hours?

It seems to me to be too restrictive an interpretation to read "worker" as meaning only a full-time worker. I find it impossible to accept the argument that a part-time worker as such is not a worker within the meaning of Article 48. Such a result would in present circumstances exclude a very large, and probably increasing number of persons from the rights conferred by Article 48 and the Regulation and Directives to which reference has been made. The group includes not only women, the elderly and disabled who, for personal reasons might wish only to work part time, but also women and men who would prefer to work full time but are obliged to accept part-time work. In the absence of clear words, excluding part-time workers from such rights, I do not believe that they were intended to be deprived of those rights.

If Member States can discriminate in favour of their nationals in relation to part-time work by excluding nationals of other Member States, particularly if national legislation is to decide what constitutes full-time work in that particular State, there could inevitably be substantial restrictions on the mobility of labour which the Treaty sets out to eradicate.

It is suggested in the alternative that, as a matter of construction, a minimum number of hours must be done, or a minimum amount be earned, before a person is a "worker", such minima presumably being fixed or defined by the Court as being applicable throughout the Community. No universal criteria as to the number of hours or an amount of pay were suggested which would divide the genuine part-time worker from the person who took a job for a few hours a week as a front in order to benefit from the rights conferred on workers and I do not find it possible to read into the legislation any requirement of fixed minima.

It seems to me that a person who is offered employment and who accepts it is a worker for the purpose of the legislation even though he earns less than the wage which is regarded as the minimum necessary in the State in question to enable the cost of subsistence to be met. On the first question I find the arguments of counsel for the French Government and the Commission cogent and convincing and like them I would answer the first question in the affirmative. Accordingly I agree with their submissions that the existence of private means to enable them to bring what they earn up to the minimum subsistence level is not a relevant factor.

It is contended by the Dutch Government that if the answer to the first question is in the affirmative, the worker must show that to work is his main purpose or his dominant intention, before he can rely on the provisions in issue. It is stated expressly in Article 48 (3) (b) that the right to move freely within the territory of a Member State must be *for the purpose of* accepting (or performing) an offer of employment actually made. His right to stay is only granted *for the purpose* of employment. Article 1 of Directive 64/221 applies only to a national who resides in or travels to a Member State *"in order to* pursue an activity as an employed ... person". The preamble to Regulation No 1612/68 speaks of the right of workers to move freely within the Community *"in order to* pursue activities as employed persons". Article 2 of Directive 68/360 imposes on Member States the duty to permit workers to leave their territory *"in order to* take up activities as employed persons".

All these in my opinion indicate that the worker must show that he wishes to enter and reside for the purpose of employment. Such a purpose must be a genuine purpose and a substantial purpose. The fact that the hours are fewer than a full-time job in a particular Member State, and that wages are below

what is thought to be the minimum subsistence level, do not per se prevent the purpose being a genuine or substantial purpose. Individual commitments or disabilities or age may prevent more being done: there may be, even through a part-time job which is offered, an increase in the standard of living of the applicant and his family; a hope of more hours and pay later may exist. On the other hand the person whose only real purpose in entering is to study, or to retire, or to do nothing which can genuinely be called employment, may not be entering for the purposes of employment even if as a device he takes on a few hours' work each week or from time to time. The fact that only a few hours are worked may be relevant in deciding whether work is the genuine and substantial purpose of the application to reside. The fewer hours worked, the more difficult it may be to establish that work is such a genuine and substantial purpose. Equally although a low income cannot in my view of itself constitute a ground of public policy, public security or public health which justifies a limitation being imposed under Article 48 (3) of the Treaty, it may be a factor to be taken into account with other factors such as a criminal record, which justify a limitation being imposed.

On the other hand although the purpose of working must be a genuine and substantial purpose, I do not think that it has to be shown to be the dominant or principal purpose. The legislation does not of itself require this, and it would be difficult in practice to apply. A person may wish to work in a particular country principally because his wife's family lives there, or because he wants his children to benefit from a particular system of education, or for cultural or health reasons. The fact that this is the initial, principal motivation does not prevent the purpose of work from being a genuine and substantial one.

I would accordingly answer the questions referred on the following lines:

1. A national of one Member State who, on the territory of another Member State undertakes paid work under a contract of employment, qualifies as a "worker" within the meaning of Article 48 of the EEC Treaty and its implementing legislation, and is entitled accordingly to be issued with a residence permit of the kind mentioned in Article 4 of Council Directive 68/360 even though such employment is so limited in extent as to yield an income lower than that which is regarded in that State as the minimum necessary to enable the cost of subsistence to be met.

2. . . .

3. The right of such a national to admission into and residence in the Member State pursuant to Article 48 and its implementing legislation is dependent on it being shown that the work in the Member State is a genuine and substantial purpose of such national although it need not be his chief purpose.