JUDGMENT OF THE COURT

27 September 2001 *

In Case C-235/99,

REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for the Home Department,

ex parte:

Eleanora Ivanova Kondova,

on the interpretation of Articles 45 and 59 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 358, p. 1),

* Language of the case: English.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola (Rapporteur), M. Wathelet and V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón, R. Schintgen and F. Macken, Judges,

Advocate General: S. Alber,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Ms Kondova, by T. Eicke, Barrister, instructed by J. Coker, Solicitor,

— the United Kingdom Government, by M. Ewing, acting as Agent, and E. Sharpston QC,

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

— the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,

— the Spanish Government, by S. Ortiz Vaamonde, acting as Agent,

— the French Government, by K. Rispal-Bellanger and A. Lercher, acting as Agents,

— the Irish Government, by M.A. Buckley, acting as Agent, A. Barron BL and E. Barrington BL,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Commission of the European Communities, by F. Benyon, M.-J. Jonczy and N. Yerrell, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Kondova, represented by T. Eicke, instructed by J. Coker; of the United Kingdom Government, represented by G. Amodeo, acting as Agent, E. Sharpston and S. Kovats, Barrister; of the German Government, represented by C.-D. Quassowski; of the Greek Government, represented by G. Karipsiadis and T. Papadopoulou, acting as Agents; of the Spanish Government, represented by N. Díaz Abad, acting as Agent; of the French Government, represented by A. Lercher; of the Irish Government, represented by E. Barrington; of the Italian Government, represented by F. Quadri, avvocato dello Stato; of the Netherlands Government, represented by M.A. Fierstra; of the Austrian Government, represented by G. Hesse, acting as Agent; and of the Commission, represented by F. Benyon, M.-J. Jonczy and N. Yerrell, at the hearing on 13 June 2000,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2000,

gives the following

Judgment

1 By order of 18 December 1998, received at the Court on 22 June 1999, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Articles 45 and 59 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 (OJ 1994 L 358, p. 1) ('the Association Agreement').

2 Those questions have been raised in proceedings between Ms Kondova, who is a Bulgarian national, and the Secretary of State for the Home Department ('the Secretary of State') concerning the latter's decision refusing to grant Ms Kondova leave to remain in the United Kingdom.

The Association Agreement

3 The Association Agreement was signed in Brussels on 8 March 1993 and entered into force on 1 February 1995, in accordance with the second paragraph of Article 124 thereof.

4 According to Article 1(2), the objectives of the Association Agreement are, *inter alia*, to provide an appropriate framework for political dialogue between the

Parties, allowing the development of close political relations, to promote the expansion of trade and harmonious economic relations so as to foster dynamic economic development and prosperity in the Republic of Bulgaria, and to provide an appropriate framework for its gradual integration into the Community. According to the 17th recital in the preamble to the Association Agreement, the ultimate objective of the Republic of Bulgaria is to become a member of the Community.

5 The provisions of the Association Agreement material to the case before the national court are to be found in Title IV, entitled 'Movement of workers, establishment, supply of services'.

6 Article 38(1) of the Association Agreement, which appears in Title IV, Chapter I, entitled 'Movement of workers', provides:

'Subject to the conditions and modalities applicable in each Member State:

— the treatment accorded to workers of Bulgarian nationality legally employed in the territory of a Member State shall be free from any discrimination based on nationality, as regards working conditions, remuneration or dismissal, as compared to its own nationals,

— the legally resident spouse and children of a worker legally employed in the territory of a Member State, with the exception of seasonal workers and of workers coming under bilateral Agreements in the sense of Article 42, unless otherwise provided by such Agreements, shall have access to the labour market of that Member State, during the period of that worker's authorised stay of employment.'

7 Article 45 of the Association Agreement, which forms part of Title IV, Chapter II, entitled 'Establishment', provides:

'1. Each Member State shall grant, from entry into force of the Agreement, for the establishment of Bulgarian companies and nationals and for the operation of Bulgarian companies and nationals established in its territory, a treatment no less favourable than that accorded to its own companies and nationals, save for matters referred to in Annex XVa.

...

5. 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 the other Party. The provisions of this chapter do not apply to those who are not exclusively self-employed;

...

...

(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.

...'

8 Article 59(1) of the Association Agreement, which appears in Title IV, Chapter IV, entitled 'General provisions', provides:

'For the purpose of Title IV, 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 as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement....'

The national legislation

9 The provisions of national law relevant to the present case are essentially the United Kingdom Immigration Rules (House of Commons Paper 395) (rules on immigration adopted by the Parliament of the United Kingdom of Great Britain and Northern Ireland in 1994) ('the Immigration Rules'), as in force at the time of the facts at issue in the main proceedings, which govern entry to and residence in the United Kingdom.

10 The Immigration Rules have the purpose of adapting the legal system of the United Kingdom of Great Britain and Northern Ireland to the provisions on establishment contained in the Agreement and in the other Europe association agreements concluded between the European Communities and the Member States, on the one hand, and the countries of Central and Eastern Europe, on the other.

11 Part 6 of the Immigration Rules, entitled 'Persons seeking to enter or remain in the United Kingdom as a businessman, self-employed person, investor, writer, composer or artist', contains a number of provisions concerning the treatment of applications by 'persons intending to establish themselves in business under the provisions of EC Association Agreements'. Paragraphs 217 and 219, which appear in this part under the title 'Requirements for an extension of stay in order to remain in business under the provisions of an EC Association Agreement', are worded as follows:

'217. The requirements for an extension of stay in order to remain in business in the United Kingdom are that the applicant can show that:

(i) he has established himself in business in the United Kingdom; and

(ii) his share of the profits of the business is sufficient to maintain and accommodate himself and any dependants without recourse to employment (other than his work for the business) or to public funds; and

(iii) he does not and will not supplement his business activities by taking or seeking employment in the United Kingdom other than his work for the business; and

(iv) in addition he satisfies the requirements of... paragraph 219.

...

219. Where a person has established himself as a sole trader or in partnership in the United Kingdom he will need, in addition to meeting the requirements at paragraph 217 above, to show:

(i) that he is a national of... Bulgaria; and

(ii) that he is actively involved in trading or providing services on his own account or in partnership in the United Kingdom; and

(iii) that he, or he together with his partners, is the owner of the assets of the business; and

(iv) in the case of a partnership, that his part in the business does not amount to disguised employment; and

(v) the current financial position in the form of audited accounts for the business.'

12 Paragraph 322 of the Immigration Rules, contained in Part 9 thereof, entitled 'General grounds for the refusal of entry clearance, leave to enter or variation of leave to enter or remain in the United Kingdom', states:

'... the following provisions apply in relation to the refusal of an application for variation of leave to enter or remain or, where appropriate, the curtailment of leave:

...

Grounds on which an application to vary leave to enter or remain in the United Kingdom should normally be refused

(2) the making of false representations or the failure to disclose any material fact for the purpose of obtaining leave to enter or a previous variation of leave;

...'

13 Persons who have obtained leave to remain for a limited period and who knowingly stay in the United Kingdom beyond the period authorised commit the offence referred to in section 24(1)(b) of the Immigration Act 1971 and are liable to deportation under section 3(5) of that Act.

14 The making of false representations in reply to questions put by an immigration officer is also an offence punishable, under section 26(1)(c) of the Immigration Act 1971, by a fine or imprisonment for up to six months, or both.

The main proceedings

15 According to the order for reference, Ms Kondova, a veterinary student, entered the United Kingdom on 17 July 1993. She had obtained entry clearance on 8 June 1993 in Bulgaria, in the form of a visa valid for a single entry into the United Kingdom for the purpose of working at the Friday Bridge International Farm Camp between 17 July 1993 and 7 August 1993. On the basis of the information which she supplied to obtain that entry clearance, corroborated by the responses which she gave to the immigration officer during her interview on arrival, Ms Kondova was given leave to enter the United Kingdom and reside there as an agricultural worker for a period of three months.

16 On 23 July 1993, Ms Kondova made a claim for political asylum. Her claim was refused on 19 April 1994 by the Immigration and Nationality Directorate ('the IND'). Ms Kondova appealed against that refusal to the Special Adjudicator. The order for reference states that, in accordance with national immigration law, no action was taken against her on the expiry of her original leave to enter pending the outcome of her appeal to the Special Adjudicator. Following the dismissal of

her appeal on 24 February 1995, the Immigration Appeal Tribunal refused her leave to appeal on 14 March 1995.

17 On 25 April 1995, the IND wrote to Ms Kondova's solicitors, indicating that, since her appeal had been dismissed, she had no entitlement to stay in the United Kingdom and would have to leave immediately. Ms Kondova did not, however, comply with that instruction. On 25 July 1995, she married Mr Moothien, a Mauritian national who had indefinite leave to remain in the United Kingdom on the basis of an earlier marriage which had ended in divorce. On 2 August 1995, Ms Kondova applied to the Secretary of State for leave to remain in the United Kingdom on the basis of her marriage.

18 Since Ms Kondova had, during an interview, acknowledged that her true intention on arrival in the United Kingdom had been to seek asylum and that she had therefore knowingly misled both the entry clearance officer who had granted her her visa in Bulgaria and the immigration officer who had questioned her on arrival, the Secretary of State concluded that Ms Kondova had entered the United Kingdom illegally. Consequently, on 9 November 1995, she was served with an illegal entrant's notice and, as an alternative to immediate detention, was granted 'temporary admission', subject to a reporting requirement, pending her removal from the United Kingdom.

19 On 2 January 1996, Ms Kondova commenced working as a self-employed cleaner.

20 By letter of 4 July 1996, Ms Kondova applied for leave to remain in the United Kingdom pursuant to the Association Agreement. She stated that she wished to

establish herself in a business offering general household care services and that her husband, who was in employment, would support her as much as possible until her business began to generate sufficient profit. She enclosed with that letter an estimate of anticipated monthly income and expenditure, confirmation of her financial resources and a letter confirming that she would be engaged exclusively in a self-employed capacity. On 11 July 1996, Ms Kondova withdrew her earlier application for leave to remain in the United Kingdom on the basis of her marriage.

21 This new application was refused by the Secretary of State on 24 July 1996 pursuant to paragraph 217(ii) of the Immigration Rules on the ground that he was not satisfied that the profits which Ms Kondova would receive from her proposed business would be sufficient to maintain and accommodate her without recourse to employment other than her household services business, or to public funds. The Secretary of State accordingly issued instructions on 26 July 1996 to proceed with Ms Kondova's removal as an illegal entrant to the United Kingdom.

22 Ms Kondova was arrested on 10 September 1996 and detained in a police station with a view to effecting her removal from the United Kingdom. The Secretary of State explained before the High Court that, under national law, detention of an illegal entrant is sometimes used in order to effect removal from the United Kingdom and that Ms Kondova's immigration history, such as her unsuccessful asylum claim and a claim to residence based on a questionable marriage, gave serious grounds for doubting that she would voluntarily comply with arrangements for her removal.

23 On 24 September 1996, Ms Kondova applied for leave to seek judicial review of the Secretary of State's decision refusing her leave to remain in the United Kingdom. She was released on 10 October 1996, one month after her original detention.

24 By letter of 23 October 1996, the Secretary of State, while confirming the calculation of profitability on which the refusal of Ms Kondova's application had been based, invited her to provide realistic projections to show that the activity which she proposed to exercise would be able to generate sufficient profits to meet her outgoings in the long term. In that letter he accepted that Ms Kondova's income could, in the short term, be supplemented by funds provided by her husband.

25 In a new calculation of the long-term profitability of her business, set out in a letter of 4 November 1996, Ms Kondova used the same hourly rates and outgoings data as she had supplied to the Secretary of State on 4 July 1996. However, since a different basis was used for the duration of her working week, the new calculation led to the result that Ms Kondova's business would be profitable.

26 In those circumstances, the Secretary of State wrote to Ms Kondova on 3 December 1996 to inform her that, in the light of the new calculation of the profitability of her business, he was prepared to grant her, pursuant to his discretionary power, leave to remain in the United Kingdom under the provisions of the Association Agreement, notwithstanding the fact that she had entered that Member State illegally. The Secretary of State further invited her to withdraw her application for judicial review. Ms Kondova, however, sought to protect her position, in particular with regard to her claim for damages. She accordingly set out, in a letter of 15 January 1997, a list of terms on the basis of which she would be prepared to withdraw her application.

27 The Secretary of State, by letter of 21 January 1997, stated that he was not prepared to consent to those terms.

28 On 22 January 1997, leave was granted for Ms Kondova's application for judicial review, as amended following the Secretary of State's decision of 3 December 1996. By that application, Ms Kondova seeks, first, a declaration that she is and was at all material times entitled to leave to remain in the United Kingdom in order there to exercise her rights of establishment and residence under the Association Agreement and that the original decisions of the Secretary of State were unlawful inasmuch as they were in breach of her right of establishment, and, second, compensation for the damage caused to her by denial of her directly effective rights under the Association Agreement and by her unlawful detention in breach of those rights.

The questions submitted for a preliminary ruling

29 Since it formed the view that resolution of the dispute required an interpretation of the Association Agreement, the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), decided to stay proceedings and to refer the following five questions to the Court for a preliminary ruling:

'1. Does Article 45 of the Association Agreement between the EEC and the Republic of Bulgaria... confer rights of establishment upon a Bulgarian national who, under national immigration law, is treated as having entered the territory of that Member State illegally?

2. If the answer to the first question is "yes", does Article 45 of the Agreement have direct effect within the national legal systems of Member States, notwithstanding the provisions of Article 59 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 45 of the Agreement, without violating the proviso contained in the penultimate sentence of Article 59(1) of the Agreement and, *inter alia*, the principle of proportionality?

   (ii) does Article 59, in any and if so what circumstances, permit the refusal of an application under Article 45 of the Agreement made by someone whose initial entry into that Member State was otherwise unlawful?

4. If the answer to the second question is "yes", does Article 45 and/or Article 59 of the Agreement permit the application of a provision of national law under which the competent national authorities may require a Bulgarian national seeking to exercise rights as a self-employed person to demonstrate —

   (a) that his share of the profits of the business (disregarding any alternative source of support) will be sufficient to maintain and accommodate himself and any dependants without recourse to employment (as opposed to self-employment) or to public funds, and

   (b) that until his business provides him with such an income (disregarding any alternative source of support) he will have sufficient additional funds

to maintain and accommodate himself and any dependants without recourse to employment (as opposed to self-employment) or to public funds?

5. If the answer to the preceding questions is that a Bulgarian national who is an illegal entrant may rely upon directly effective rights of establishment under the Agreement, then

(a) what factors, under such an Agreement, should the national court take into account in determining whether any breach by the competent authorities of that person's directly effective rights was sufficiently serious to give rise to a right to reparation in damages against the Member State concerned; and, in particular,

(b) in the state of Community law at the relevant time (i.e., when the decisions of August/September 1996 to refuse the Applicant's application for leave to remain as a self-employed person, and/or the decision to detain the Applicant, were taken), did the approach adopted by the competent national authorities constitute a "grave and manifest disregard" of a superior rule of law?'

The second question

30 By its second question, which it is appropriate to examine first, the referring court is asking essentially whether Article 45(1) of the Association Agreement is to be construed as meaning that it can be relied on by an individual before a national court of the Member States notwithstanding the fact that the authorities of the

host Member State remain competent to apply to a Bulgarian national invoking that provision their own national rules and regulations regarding entry, stay and establishment, in accordance with Article 59(1) of the Association Agreement.

31 It should be noted at the outset that, according to settled case-law, a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when, having regard to its wording and to the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, *inter alia*, Case C-262/96 *Sürül* [1999] ECR I-2685, paragraph 60).

32 In order to ascertain whether Article 45(1) of the Association Agreement meets those criteria, it is first necessary to consider the wording of that provision.

33 In this regard, Article 45(1) lays down, in clear, precise and unconditional terms, a prohibition preventing Member States from discriminating, on grounds of their nationality, against, *inter alios*, Bulgarian nationals wishing to pursue within the territory of those States economic activities as self-employed persons or to set up and manage undertakings there which they effectively control.

34 This rule of equal treatment lays down a precise obligation to produce a specific result and, by its nature, can be relied on by an individual before a national court to request it to set aside the discriminatory provisions of a Member State's legislation making the establishment of a Bulgarian national subject to a condition which is not imposed on that Member State's own nationals, without any further implementing measures being required for that purpose (see, to that effect, *Sürül*, cited above, paragraph 63).

35 Examination of the purpose and nature of the Agreement of which Article 45(1) forms part does not invalidate this finding that the principle of non-discrimination there laid down is capable of directly governing the situation of individuals.

36 According to the 17th recital in its preamble and Article 1(2), the objective of the Association Agreement is to establish an association designed to promote the expansion of trade and harmonious economic relations between the Contracting Parties, in order to foster dynamic economic development and prosperity in the Republic of Bulgaria, with a view to facilitating its accession to the Community.

37 Moreover, the fact that the Association Agreement is intended essentially to promote the economic development of the Republic of Bulgaria and therefore involves an imbalance in the obligations assumed by the Community towards the non-member country concerned is not such as to prevent recognition by the Community of the direct effect of certain provisions of that Agreement (see, to that effect, *Sürül*, paragraph 72).

38 Nor is the finding that Article 45(1) of the Association Agreement is directly applicable invalidated by an examination of Article 59(1) thereof, which provides only that the authorities of the Member States remain competent to apply, while respecting the limits laid down by the Association Agreement, their national laws and regulations regarding entry, stay and establishment. Consequently, Article 59(1) does not concern the Member States' implementation of the provisions of the Association Agreement governing establishment and is not intended to make implementation or the effects of the obligation of equal treatment laid down in Article 45(1) subject to the adoption of further national measures.

39 It follows that the answer to the second question must be that Article 45(1) of the Association Agreement is to be construed as establishing, within the scope of application of that Agreement, a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals. The direct effect which that provision must therefore be recognised as having means that Bulgarian nationals relying on it have the right to invoke it before the courts of the host Member State, notwithstanding the fact that the authorities of that State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment, in accordance with Article 59(1) of that Agreement.

The first, third and fourth questions

40 By its first, third and fourth questions, which can be examined together, the national court is asking essentially whether, having regard to Article 59(1) of the Association Agreement, Article 45(1) of that Agreement is capable of conferring on a Bulgarian national a right of establishment and a concomitant right to reside in the Member State within the territory of which he has remained and carried on professional activities as a self-employed person in breach of national immigration legislation, where that breach took place before he claimed a right of establishment under Article 45(1). The national court asks, in particular, whether the requirement of financial self-sufficiency based on self-employment, without additional recourse to employment or financial assistance provided by public authorities, which the legislation of the Member State concerned lays down for the exercise of the right of establishment by Bulgarian nationals, is compatible with the abovementioned provisions of the Association Agreement.

41 In order to give a helpful reply to those questions so reformulated, it is necessary to examine the extent to which the host Member State may, without infringing

the condition set out at the end of the first sentence of Article 59(1) of the Association Agreement, apply its laws and regulations regarding entry, stay and establishment to Bulgarian nationals invoking Article 45(1) of that Agreement.

42 It should be noted in this regard that, according to Article 45(5)(a) and (c) of the Association Agreement, the principle of non-discrimination set out in Article 45(1) concerns the right to take up and pursue, in a self-employed capacity, activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the professions, and the right to set up and manage undertakings.

43 The right of a Bulgarian national to take up and pursue economic activities not coming within the labour market presupposes that that person has a right to enter and remain in the host Member State. That being so, the scope of Article 45(1) of the Association Agreement falls to be determined.

The scope of Article 45(1) of the Association Agreement and the possible extension to that provision of the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC)

44 Ms Kondova submits that the right which she invokes under Article 45(1) of the Association Agreement is equivalent to the right of establishment governed by Article 52 of the Treaty. She argues that the absence of any reference to a right of residence in the wording of Article 52 has not prevented the Court from ruling that that provision confers directly on the nationals of a Member State the right

to enter the territory of another Member State and to remain there, irrespective of whether leave to remain has been granted by the host Member State (Case 48/75 *Royer* [1976] ECR 497, paragraphs 31 and 32).

45 According to Ms Kondova, in order to benefit from the rights of establishment and residence conferred directly by Article 45(1) of the Association Agreement, it is sufficient that the activities of the Bulgarian national concerned should be effective and genuine. The decisions of the Secretary of State which she has challenged indicate that her professional activities were far from being purely marginal or ancillary.

46 Ms Kondova acknowledges that the rights in question are subject to the limitation laid down in Article 59(1) of the Association Agreement. However, provisions concerning entry, stay and establishment of natural persons can be adopted by Member States only on condition that they do not restrict those rights in any unreasonable or excessive way. An interpretation which subjected exercise of the right to become established in a Member State without suffering discrimination to an absolute discretion on the part of the competent authorities in that Member State would, she submits, have the result of rendering nugatory the chapter in that Agreement on establishment.

47 Ms Kondova submits in particular that, since United Kingdom legislation does not require nationals of that Member State to demonstrate that they have sufficient funds to support themselves before authorising them to pursue an activity as self-employed persons, to impose such a requirement on Bulgarian nationals constitutes an interference with their directly effective right of establishment.

48 Consequently, according to Ms Kondova, the application by the competent authorities of the host Member State of national immigration rules under which

Bulgarian nationals are required to obtain leave to enter and remain is in itself such as to render ineffective the rights recognised by Article 45(1) of the Association Agreement.

49 In reply, the United Kingdom Government, the other Governments which have submitted observations to the Court and the Commission submit that the purpose and general scheme of the Association Agreement require that Articles 45(1) and 59(1) thereof be construed together. They argue in particular that, since Article 38 of the Association Agreement has excluded all right of access to the labour market of the host Member State, a national system of control based on the obligation to seek prior leave to enter and remain is necessary in order to ensure that the establishment provisions of that Agreement are not invoked by Bulgarian nationals who actually intend to gain access to the labour market by that route, as employed workers.

50 The Court must observe that, according to its case-law established in the context of the interpretation of both the provisions of the Treaty and those of the agreement establishing an association between the European Economic Community and Turkey (OJ 1973 C 133, p. 1), the right to the same treatment as nationals in regard to establishment, as defined by Article 45(1) of the Association Agreement, in wording similar or identical to that of Article 52 of the Treaty, does indeed mean that rights of entry and residence, as corollaries of the right of establishment, are conferred on Bulgarian nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen, or activities of the professions in a Member State (*Royer*, cited above, paragraphs 31 and 32, and Case C-37/98 *Savas* [2000] ECR I-2927, paragraphs 60 and 63).

51 It must, however, also be borne in mind that, according to settled case-law, a mere similarity in the wording of a provision of one of the Treaties establishing the Communities and of an international agreement between the Community and a non-member country is not sufficient to give to the wording of that agreement the same meaning as it has in the Treaties (see Case 270/80 *Polydor and RSO*

Records [1982] ECR 329, paragraphs 14 to 21; Case 104/81 *Kupferberg* [1982] ECR 3641, paragraphs 29 to 31; Case C-312/91 *Metalsa* [1993] ECR I-3751, paragraphs 11 to 20).

52 According to that case-law, the extension of the interpretation of a provision in the Treaty to a comparably, similarly or even identically worded provision of an agreement concluded by the Community with a non-member country depends, *inter alia*, on the aim pursued by each provision in its own particular context. A comparison between the objectives and context of the agreement and those of the Treaty is of considerable importance in that regard (see *Metalsa*, cited above, paragraph 11).

53 The Association Agreement is designed simply to create an appropriate framework for the Republic of Bulgaria's gradual integration into the Community, with a view to its possible accession, whereas the purpose of the Treaty is to create an internal market, establishment of which involves 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, after amendment, Article 3(1)(c) EC)).

54 It also follows from the wording of Article 59(1) of the Association Agreement that the rights of entry and residence conferred on Bulgarian nationals as corollaries of the right of establishment are not absolute privileges, inasmuch as their exercise may, where appropriate, be limited by the rules of the host Member State concerning entry, stay and establishment of Bulgarian nationals.

55 It follows that the interpretation of Article 52 of the Treaty, as reflected in the Court's case-law, cannot be extended to Article 45(1) of the Association Agreement.

56 The argument put forward by Ms Kondova, to the effect that application by the competent authorities of a Member State of the national immigration rules requiring Bulgarian nationals to obtain leave to enter is in itself liable to render ineffective the rights granted to such persons by Article 45(1) of the Association Agreement, cannot therefore be accepted.

57 That said, it is none the less the case that, as follows from Article 59(1) of the Association Agreement, the power of the host Member State to apply its domestic rules regarding entry, stay and establishment of natural persons to applications made by Bulgarian nationals is expressly subject to the condition of not nullifying or impairing the benefits accruing to the Republic of Bulgaria under that Agreement.

58 The question thus arises as to whether the restrictions which the immigration legislation of the host Member State imposes on the right of establishment, which is a right conferred directly on Bulgarian nationals by Article 45(1) of the Association Agreement, and on the rights to enter and remain which are its corollaries are compatible with the express condition laid down by Article 59(1) of that Agreement.

Whether the restrictions imposed on the right of establishment by the host Member State's immigration legislation are compatible with the condition set out in Article 59(1) of the Association Agreement

59 It is necessary in this regard to determine whether the immigration rules applied by the competent national authorities are appropriate for achieving the objective in view or whether they constitute, in regard to that objective, measures which would strike at the very substance of the rights which Article 45(1) of the

Association Agreement grants to Bulgarian nationals by making exercise of those rights impossible or excessively difficult.

60 It should first be noted that, since Article 45(1) of the Association Agreement applies only to those persons who are exclusively self-employed, in accordance with the final sentence of Article 45(5)(a)(i) of that Agreement, it is necessary to determine whether the activity contemplated in the host Member State by persons covered by that provision is an activity performed in an employed or a self-employed capacity.

61 Application of a national system of prior control to check the exact nature of the activity envisaged by the applicant has a legitimate aim in so far as it makes it possible to restrict the exercise of rights of entry and stay by Bulgarian nationals invoking Article 45(1) of the Association Agreement to persons to whom that provision applies.

62 However, as follows from Articles 45(1) and 59(1) of the Association Agreement, the host Member State cannot refuse to a Bulgarian national admission and residence for the purpose of establishment in the territory of that Member State, for instance on grounds of the nationality of the person concerned or his country of residence, or because the national legal system provides for a general limitation on immigration, or make the right to take up an activity as a self-employed person in that State subject to confirmation of a proven need in the light of economic or labour-market considerations.

63 With particular regard to the substantive requirements, such as those set out in paragraphs 217 and 219 of the Immigration Rules, these, as the United Kingdom Government and the Commission have pointed out, pursue the objective of allowing the competent authorities to verify that a Bulgarian national wishing to become established in the United Kingdom genuinely intends to take up an activity as a self-employed person without at the same time entering into

employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. Further, substantive requirements such as those set out in paragraphs 217 and 219 of the Immigration Rules are appropriate to ensure that such an objective is achieved.

64 Furthermore, as the United Kingdom Government has correctly pointed out, following the entry into force of the Association Agreement and the other Europe association agreements concluded with the countries of Central and Eastern Europe, the national rules on immigration of nationals of non-member countries intending to establish themselves as self-employed persons were re-examined and amended. Thus, in particular, the requirement of possession of investment capital of GBP 200 000 continues to be imposed on persons who cannot invoke rights under Europe association agreements, but this requirement is no longer applicable to Bulgarian nationals.

65 In addition, the national legislation at issue in the main proceedings includes rules allowing a person intending to become established in the host Member State under the provisions of a Europe association agreement to request leave to remain in that State as a self-employed worker notwithstanding the fact that the person had originally been admitted for a different purpose. Consequently, provisions such as those contained in paragraphs 217 and 219 of the Immigration Rules facilitate the establishment of Bulgarian nationals in the host Member State and must be regarded as being compatible with the Association Agreement.

66 It ought, however, to be borne in mind that Ms Kondova's application for leave to remain made under the Association Agreement was rejected by the Secretary of State on grounds not related to the substantive requirements laid down by the national immigration legislation for the establishment of Bulgarian nationals.

67 The fact that the Secretary of State, as indicated in paragraph 26 above, declared, on the basis of the second calculation of the long-term profitability of Ms Kondova's activity, which was submitted to him on 4 November 1996, that he was prepared to exercise his discretion and consequently grant her leave to remain in the United Kingdom under Article 45(1) of the Association Agreement does not affect the earlier finding that Ms Kondova had entered the United Kingdom illegally, given the fact that she had made false representations both to the official who issued her with her visa in Bulgaria and to the immigration officer who questioned her on her arrival in the United Kingdom.

68 That being so, the Secretary of State's decision of refusal, which is the subject of judicial review in the main proceedings, must be regarded as having been based on that latter finding.

69 It is therefore necessary to examine whether Article 59(1) of the Association Agreement allows the competent authorities of the host Member State to refuse leave to remain, applied for by a Bulgarian national invoking Article 45(1) of that Agreement, on the ground that the applicant's presence within the territory of that State is irregular by reason of false representations made for the purpose of obtaining initial leave to enter, where that irregularity occurred before that person became self-employed and claimed the right of establishment under the Association Agreement.

70 That was indeed the situation of Ms Kondova, who had remained unlawfully in the United Kingdom since March 1995 and claimed a right of establishment under the Association Agreement only in July 1996.

The power of the competent authorities of the host Member State to refuse leave to remain, sought by a Bulgarian national invoking Article 45(1) of the Association Agreement, on the sole ground that her presence within the territory of that State was illegal

71 Ms Kondova argues that Article 45 of the Association Agreement contains no prior conditions about legality of residence. Nothing in that article therefore suggests that a right of establishment cannot be conferred on Bulgarian nationals on the ground that the immigration legislation of the Member State concerned has been infringed.

72 Consequently, Ms Kondova argues, a Member State may reject an application submitted under Article 45(1) of the Association Agreement by a person whose presence within its territory is otherwise illegal only after it has taken into account the substantive requirements established by that Agreement.

73 In order to rule on whether this argument is well founded, it is necessary to bear in mind that, as pointed out in paragraphs 60 to 65 above, a system of prior control, such as that established by the Immigration Rules, under which the host Member State makes the granting of leave to enter and remain subject to verification by the competent immigration authorities that the applicant genuinely intends to pursue in that Member State a viable activity as a self-employed person and no other, is in principle compatible with Article 45(1) of the Association Agreement, read in conjunction with Article 59(1) thereof.

74 Under such a system of prior control, if it turns out that a Bulgarian national who submitted in due and proper form a prior request for leave to reside for purposes of establishment satisfied the substantive requirements laid down for that purpose by the immigration legislation of the host Member State, compliance with the express condition set out in Article 59(1) of the Association Agreement obliges the competent national authorities to recognise that person as having a right of

establishment in a self-employed capacity and to grant that person, for that purpose, leave to enter and remain.

75 However, should it turn out that, as in the case in the main proceedings, the requirement concerning submission of a prior request for leave to remain for purposes of establishment has not been met, the competent immigration authorities of the host Member State may in principle refuse that leave to a Bulgarian national invoking Article 45(1) of the Association Agreement, irrespective of whether the other substantive conditions laid down by the national legislation have been satisfied.

76 Furthermore, as the Commission has correctly pointed out, the effectiveness of such a system of prior control rests in very large measure on the correctness of the representations made by the persons concerned at the time when they apply for an entry visa from the competent authorities in their State of origin or when they arrive in the host Member State.

77 In those circumstances, as the Advocate General states in point 84 of his Opinion, if Bulgarian nationals were allowed at any time to apply for establishment in the host Member State, notwithstanding a previous infringement of its national immigration legislation, such nationals might be encouraged to remain illegally within the territory of that State and submit to the national system of control only once the substantive requirements set out in that legislation had been satisfied.

78 An applicant might then rely on the clientele and business assets which he may have built up during his unlawful stay in the host Member State, or on funds accrued there, perhaps through taking employment, and so present himself to the national authorities as a self-employed person now engaged in, or likely to be engaged in, a viable activity, whose rights ought to be recognised pursuant to the Association Agreement.

79 Such an interpretation would risk depriving Article 59(1) of the Association Agreement of its effectiveness and opening the way to abuse through endorsement of infringements of national legislation on admission and residence of foreigners.

80 Consequently, a Bulgarian national who intends to take up an activity in a Member State as an employed or self-employed person but who gets round the relevant national controls by falsely declaring that he is entering that Member State for the purpose of seasonal work places himself outside the sphere of protection afforded to him under the Association Agreement (see, by analogy, in relation to circumvention of national law by Community nationals improperly or fraudulently invoking Community law, Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24 and the case-law cited there).

81 The fact that the infringement of the host Member State's immigration legislation was committed by the Bulgarian national at a date prior to the entry into force of the Association Agreement is irrelevant where, as in the present case, the irregular situation had not ended at that time and was still continuing when the application for establishment was made. Moreover, as indicated in paragraphs 26 and 27 above, the Secretary of State treated Ms Kondova's application under the Association Agreement as if it was an application for leave to remain and rejected it on the ground that Ms Kondova was in an irregular situation when he took his decision.

82 Consequently, it is compatible with Article 59(1) of the Association Agreement for the competent authorities of the host Member State to reject an application made under Article 45(1) of that Agreement on the ground that, when that application was made, the applicant was residing illegally within its territory by reason of false representations made to those authorities or non-disclosure of material facts for the purpose of obtaining initial leave to enter that Member State on a different basis.

Whether the requirement for a new application for establishment to be submitted in due and proper form is compatible with the rule of equal treatment laid down in Article 45(1) of the Association Agreement and with the condition mentioned in Article 59(1) thereof

83 In considering the question whether the requirement that a Bulgarian national whose presence within the host Member State's territory is irregular must submit a new establishment application in due and proper form in his State of origin or, as the case may be, in another country is compatible with the rule of equal treatment laid down in Article 45(1) of the Association Agreement, where such a requirement could not be imposed on the host Member State's own nationals, it is important to bear in mind that the Court has held, with regard to the free movement of workers, that the reservation contained in Article 48(3) of the EC Treaty (now, after amendment, Article 39(3) EC) allows Member States, on the grounds set out in that provision, and in particular grounds justified by requirements of public policy, to take measures against nationals of other Member States which they could not apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or deny them access to it (see, in this regard, Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 22; Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, paragraph 7; Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 22; Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, paragraph 28; and Case C-171/96 *Pereira Roque* [1998] ECR I-4607, paragraph 37).

84 This difference in treatment between a Member State's own nationals and those of other Member States derives from a principle of international law which precludes a Member State from refusing its own nationals the right to enter its territory and remain there for any reason, and which the Treaty cannot be assumed to disregard in the context of relations between Member States (*Van Duyn*, cited above, paragraph 22, and *Pereira Roque*, cited above, paragraph 38).

85 For the same reasons, such a difference in treatment in favour of nationals of the host Member State cannot be considered to be incompatible with Article 45(1) of the Association Agreement.

86 There is also the question whether, in a situation such as that of Ms Kondova, the requirement to submit a new establishment application in due and proper form in the Bulgarian national's State of origin or, as the case may be, in another country is compatible with Article 45(1) of the Association Agreement and with the condition set out at the end of the first sentence of Article 59(1), read together.

87 The making of false representations breaches the obligation to declare one's intentions honestly. As indicated in paragraph 76 above, that obligation is incumbent on any person applying to become established in the host Member State and compliance with it is necessary to enable the competent national authorities to check that the activity in which the Bulgarian national intends to engage in that State in a self-employed capacity will be exclusive and viable. In view of the seriousness of its breach, the requirement that a new application to become established be submitted by that national in due and proper form in his State of origin or, as the case may be, in another country, which may be laid down by the immigration legislation of the host Member State, cannot be regarded as being unjustified.

88 On the same grounds as those indicated in paragraphs 73 to 82 of the present judgment, the interpretation of the Association Agreement advocated by Ms Kondova, which would allow any illegalities to be regularised in consideration of the fact that the substantive conditions governing establishment imposed by the immigration legislation of the host Member State would then be satisfied, would compromise the effectiveness and reliability of the national system of prior control.

89 However, even in a situation such as that prevailing in the present case, due regard for the condition set out at the end of the first sentence of Article 59(1) of the Association Agreement must mean that the actions of the competent authorities of the host Member State should have neither the purpose nor the

effect of striking at the very substance of the rights of entry, residence and establishment which the Association Agreement grants to Bulgarian nationals.

90 It follows that the decision by the competent authorities of the host Member State to reject an application for establishment submitted by a Bulgarian national on the basis of Article 45(1) of the Association Agreement, because of false representations made to them or non-disclosure of relevant facts for the purpose of obtaining initial leave to enter, and the requirement that he submit, in due and proper form, a new application for establishment on the basis of that Agreement, by applying for an entry visa to the competent authorities in his State of origin or, as the case may be, in another country, can never have the effect of preventing that national from having his situation reviewed at a later time when he submits that new application. Moreover, such measures must be adopted without prejudice to the obligation to respect that national's fundamental rights, such as the right to respect for his family life and the right to respect for his property, which follow, for the Member State concerned, from the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 or from other international instruments to which that State may have acceded.

91 It follows from all of the foregoing that the answer to the first, third and fourth questions should be as follows:

— The right of establishment, as defined by Article 45(1) of the Association Agreement, means that rights of entry and residence, as corollaries of the right of establishment, are conferred on Bulgarian nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen, or activities of the professions in a Member State. However, it follows from Article 59(1) of that Agreement that those rights of entry and residence are not absolute privileges, inasmuch as their exercise may, in some circumstances, be limited by the rules of the host Member State governing the entry, stay and establishment of Bulgarian nationals.

— Articles 45(1) and 59(1) of the Association Agreement, read together, do not in principle preclude a system of prior control which makes the issue by the competent immigration authorities of leave to enter and remain subject to the condition that the applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. Substantive requirements such as those set out in paragraphs 217 and 219 of the Immigration Rules have as their very purpose to enable the competent authorities to carry out such checks and are appropriate for achieving such a purpose.

— Article 59(1) of the Association Agreement must be construed as meaning that the competent authorities of the host Member State may reject an application made pursuant to Article 45(1) of that Agreement on the sole ground that, when that application was submitted, the Bulgarian national was residing illegally within the territory of that State because of false representations made to those authorities or non-disclosure of material facts for the purpose of obtaining initial leave to enter that Member State on a different basis. Consequently, those authorities may require that national to submit, in due and proper form, a new application for establishment on the basis of that Agreement by applying for an entry visa to the competent authorities in his State of origin or, as the case may be, in another country, provided that such measures do not have the effect of preventing such a national from having his situation reviewed at a later date when he submits that new application.

The fifth question

92 In view of the answer to the first, third and fourth questions, it is unnecessary to reply to the fifth question.

Costs

93 The costs incurred by the United Kingdom, Belgian, German, Greek, Spanish, French, Irish, Italian, Netherlands and Austrian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Divisional Court), by order of 18 December 1998, hereby rules:

1. **Article 45(1) of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part, concluded and approved on behalf of the Community by Decision 94/908/ECSC, EC, Euratom of the Council and**

the Commission of 19 December 1994, is to be construed as establishing, within the scope of application of that Agreement, a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals. The direct effect which that provision must therefore be recognised as having means that Bulgarian nationals relying on it have the right to invoke it before the courts of the host Member State, notwithstanding the fact that the authorities of that State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment, in accordance with Article 59(1) of that Agreement.

2. The right of establishment, as defined by Article 45(1) of the above Association Agreement, means that rights of entry and residence, as corollaries of the right of establishment, are conferred on Bulgarian nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen, or activities of the professions in a Member State. However, it follows from Article 59(1) of that Agreement that those rights of entry and residence are not absolute privileges, inasmuch as their exercise may, in some circumstances, be limited by the rules of the host Member State governing the entry, stay and establishment of Bulgarian nationals.

3. Articles 45(1) and 59(1) of the above Association Agreement, read together, do not in principle preclude a system of prior control which makes the issue by the competent immigration authorities of leave to enter and remain subject to the condition that the applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success. Substantive requirements such as those set out in paragraphs 217 and 219 of the United Kingdom Immigration Rules (House of Commons Paper 395) have as their very purpose to enable the competent authorities to carry out such checks and are appropriate for achieving such a purpose.

4. Article 59(1) of the above Association Agreement must be construed as meaning that the competent authorities of the host Member State may reject an application made pursuant to Article 45(1) of that Agreement on the sole ground that, when that application was submitted, the Bulgarian national was residing illegally within the territory of that State because of false representations made to those authorities or non-disclosure of material facts for the purpose of obtaining initial leave to enter that Member State on a different basis. Consequently, those authorities may require that national to submit, in due and proper form, a new application for establishment on the basis of that Agreement by applying for an entry visa to the competent authorities in his State of origin or, as the case may be, in another country, provided that such measures do not have the effect of preventing such a national from having his situation reviewed at a later date when he submits that new application.

Rodríguez Iglesias Gulmann La Pergola

Wathelet Skouris Edward

Puissochet Jann Sevón

Schintgen Macken

Delivered in open court in Luxembourg on 27 September 2001.

R. Grass G.C. Rodríguez Iglesias

Registrar President