JUDGMENT OF THE COURT

27 September 2001 *

In Case C-63/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for the Home Department,

ex parte:

Wiesław Gloszczuk et Elzbieta Gloszczuk,

on the interpretation of Articles 44 and 58 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, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, 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:

— Mr and Mrs Gloszczuk, by M. Muller, Barrister, instructed by J.G. Mayne, Solicitor,

— the United Kingdom Government, by J.E. Collins, acting as Agent, and by 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 N. Díaz Abad, acting as Agent,

— the French Government, by K. Rispal-Bellanger and C. Bergeot, acting as Agents,

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

— the Italian Government, by U. Leanza, acting as Agent, and F. Quadri, avvocato dello Stato,

— 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 Mr and Mrs Gloszczuk, represented by M. Muller, R.K. Rai and M. Connor, Barristers; 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 Spanish Government, represented by N. Díaz Abad; of the French Government, represented by A. Lercher, acting as Agent; of the Irish Government, represented by E. Barrington; of the Italian Government, represented by F. Quadri; 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 9 December 1998, received at the Court on 22 February 1999, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Articles 44 and 58 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, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and the Commission of 13 December 1993 (OJ 1993 L 348, p. 1) ('the Association Agreement').

2 Those questions have been raised in proceedings between Mr and Mrs Gloszczuk, who are Polish nationals, and the Secretary of State for the Home Department ('the Secretary of State') concerning a decision by which the latter refused Mr and Mrs Gloszczuk leave to remain in the United Kingdom.

The Association Agreement

3 The Association Agreement was signed in Brussels on 16 December 1991 and entered into force on 1 February 1994, pursuant to the second paragraph of Article 121 thereof.

4 According to Article 1(2), the aims of the Association Agreement are, *inter alia*, to provide an appropriate framework for political dialogue, allowing the development of close political relations between the Parties, to promote the expansion of trade and harmonious economic relations, in order to foster dynamic economic development and prosperity in the Republic of Poland, and to provide an appropriate framework for its gradual integration into the Community. According to the 15th recital in the preamble to the Association Agreement, the ultimate objective of the Republic of Poland is to accede to the Community.

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

6 Article 37(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 Polish 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 within the meaning of Article 41, 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 44(3) and (4) of the Association Agreement, which appears in Title IV, Chapter II, entitled 'Establishment', provides:

'3. Each Member State shall grant, from entry into force of this Agreement, a treatment no less favourable than that accorded to its own companies and nationals for the establishment of Polish companies and nationals as defined in Article 48 and shall grant in 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;

...

...

(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 58(1) of the Association Agreement, which appears in Title IV, Chapter IV, entitled 'General provisions', provides:

'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 as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of this 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 their 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 made 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... Poland; 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;

(3) failure to comply with any conditions attached to the grant of leave to enter or remain;

...'.

13 Persons who have obtained leave to remain for a limited period and who knowingly stay in the United Kingdom beyond the period authorised or who fail to comply with a condition of the authorisation obtained commit the offence referred to in section 24(1)(b) of the Immigration Act 1971 ('the Immigration Act') 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, by a fine or imprisonment for up to six months, or both.

The dispute in the main proceedings

15 According to the order for reference, Mr and Mrs Gloszczuk, both of whom are Polish nationals, were granted leave, on 15 October 1989 and 19 January 1991 respectively, to enter the United Kingdom as tourists for a period of six months.

16 Mr Gloszczuk told the immigration officer who questioned him that he was on a four-day organised visit to the United Kingdom. He presented a return ticket for 19 October 1989. He indicated that it was his intention, at the end of that short visit, to return to Poland, where his pregnant wife awaited him, and that he had no intention of staying or working in the United Kingdom.

17 When Mrs Gloszczuk arrived in the United Kingdom, she stated that she wished to spend seven days visiting the United Kingdom and that her husband was in Poland. She presented a return ticket for 17 February 1991.

18 The entry visas of Mr and Mrs Gloszczuk contained an express condition prohibiting them from entering employment or engaging in any business or profession in a self-employed capacity.

19 Notwithstanding the fact that their visas expired on 14 April 1990 and 18 July 1991 respectively, Mr and Mrs Gloszczuk did not leave the United Kingdom and so, as from those dates, were in breach of the immigration law of that Member State.

20 Mr Gloszczuk began working in the building industry in 1991. He claims to have become established as a self-employed building contractor on 27 March 1995.

21 Neither he nor his wife at that time applied for permission to work in either an employed or a self-employed capacity.

22 On 1 October 1993, Mrs Gloszczuk gave birth to a child, Kevin. It is common ground that if Mrs Gloszczuk and her son have any rights to enter and remain in the United Kingdom, they enjoy them as dependants of Mr Gloszczuk.

23 By letter of 31 January 1996, Mr and Mrs Gloszczuk sought for the first time to regularise their stay by applying to the Secretary of State for 'recognition' of their right to establish themselves in the United Kingdom under Article 44 of the Association Agreement and consequently for leave to remain in that Member State.

24 The Secretary of State treated the applications submitted by Mr and Mrs Gloszczuk under the Association Agreement as if they were applications for leave to remain. On 25 April 1996, he decided to reject them on the basis of paragraph 322(2) and (3) of the Immigration Rules.

25 Mr and Mrs Gloszczuk thereupon applied to the referring court for leave to seek judicial review of that decision, and leave to do so was granted them on 28 October 1997. They submitted before the referring court that they did not require 'leave' to enter or remain in the United Kingdom on the ground that they could invoke directly applicable rights under the Association Agreement.

26 The Secretary of State, on the other hand, took the view that the Association Agreement conferred rights only on persons lawfully present in a Member State. For a Polish national to be recognised as having the right to become established in

self-employment in the United Kingdom, he or she should first of all have been granted leave to remain. Mr Gloszczuk had also violated the express condition attached to his leave to enter the United Kingdom by working before applying for recognition of a right to become established under the Association Agreement. The Secretary of State concluded that the applicants were not entitled to be in the United Kingdom.

27 It appears from the order for reference that Mr and Mrs Gloszczuk have not been subject to any criminal proceedings under section 24(1)(b) or section 26(1)(c) of the Immigration Act. Even though the Secretary of State's decision rejecting their applications expressly threatened deportation if they refused immediately to leave the United Kingdom, no deportation proceedings have been brought against Mr and Mrs Gloszczuk.

The questions submitted for preliminary ruling

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

'(1) Does Article 44 of the Association Agreement between the EEC and the Republic of Poland... 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?'

The second question

29 By its second question, which it is appropriate to consider first, the referring court is asking essentially whether Article 44(3) 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 the Polish national invoking that provision the national laws and regulations regarding entry, stay and establishment, in accordance with Article 58(1) of that Agreement.

30 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).

31 In order to ascertain whether Article 44(3) of the Association Agreement meets those criteria, it is first necessary to consider the wording of that provision.

32 In this regard, Article 44(3) lays down, in clear, precise and unconditional terms, a prohibition preventing Member States from discriminating, on grounds of their nationality, against, *inter alios*, Polish 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 would effectively control.

33 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 Polish 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).

34 Examination of the purpose and nature of the Agreement of which Article 44(3) 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.

35 According to the 15th recital in its preamble and Article 1(2), the purpose of the Association Agreement is to establish an association designed to promote the expansion of trade and harmonious economic relations between the Parties, in order to foster dynamic economic development and prosperity in the Republic of Poland, with a view to facilitating its accession to the Community.

36 Moreover, the fact that the Association Agreement is intended essentially to promote the economic development of Poland 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, along these lines, *Sürül*, paragraph 72).

37 Nor is the finding that Article 44(3) of the Association Agreement is directly applicable invalidated by an examination of Article 58(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 own national laws and regulations regarding entry, stay and establishment. Consequently, Article 58(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 44(3) subject to the adoption of further national measures.

38 It follows that the answer to the second question must be that Article 44(3) 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 Polish 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 58(1) of that Agreement.

The first and third questions

39 By its first and third questions, which can be examined together, the referring court is asking essentially whether, having regard to Article 58(1) of the Association Agreement, Article 44(3) of that Agreement is capable of conferring on a Polish 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 44(3) of the Agreement.

40 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 58(1) of the Association Agreement, apply its laws and regulations regarding entry, stay and establishment to Polish nationals invoking Article 44(3) of that Agreement.

41 It should be noted in this regard that, according to Article 44(4)(a) and (c) of the Association Agreement, the principle of non-discrimination set out in Article 44(3) 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.

42 The right of a Polish 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 44(3) of the Association Agreement falls to be determined.

The scope of Article 44(3) 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)

43 Mr and Mrs Gloszczuk contend that the right which they invoke under Article 44(3) of the Association Agreement is equivalent to the right of establishment governed by Article 52 of the Treaty. They argue 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).

44 Mr and Mrs Gloszczuk acknowledge that the rights of establishment and residence, conferred directly by Article 44(3) of the Association Agreement, are subject to the limitation laid down in Article 58(1) of that Agreement. However, provisions concerning entry, residence 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.

45 Consequently, according to Mr and Mrs Gloszczuk, the application by the competent authorities of the host Member State of national immigration rules under which Polish nationals are required to obtain leave to enter and remain is in

itself such as to render ineffective the rights recognised by Article 44(3) of the Association Agreement.

46 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 44(3) and 58(1) thereof be construed together. They argue in particular that, since Article 37 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 Polish nationals who actually intend to gain access to the labour market by that route, as employed workers.

47 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 1964, 217, p. 3687), the right to the same treatment as nationals in regard to establishment, as defined by Article 44(3) 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 are conferred, as corollaries of the right of establishment, on Polish 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).

48 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).

49 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 on, *inter alia*, 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).

50 The Association Agreement is designed simply to create an appropriate framework for the Republic of Poland'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)).

51 It also follows from the wording of Article 58(1) of the Association Agreement that the rights of entry and residence conferred on Polish 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 Polish nationals.

52 It follows that the interpretation of Article 52 of the Treaty, as reflected in the Court's case-law, cannot be extended to Article 44(3) of the Association Agreement.

53 The argument put forward by Mr and Mrs Gloszczuk, to the effect that application by the competent authorities of a Member State of the national immigration rules requiring Polish nationals to obtain leave to enter is in itself liable to render ineffective the rights granted to such persons by Article 44(3) of the Association Agreement, cannot therefore be accepted.

54 That said, it is none the less the case that, as follows from Article 58(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 Polish nationals is expressly subject to the condition of not nullifying or impairing the benefits accruing to the Republic of Poland under that Agreement.

55 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 Polish nationals by Article 44(3) 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 58(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 58(1) of the Association Agreement

56 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 44(3) of the

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

57 It should first be noted that, since Article 44(3) of the Association Agreement is applicable only to those persons who are exclusively self-employed, in accordance with the final sentence of Article 44(4)(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.

58 Application of a national system of prior control to check the exact nature of the activity contemplated by the applicant has a legitimate objective in so far as it makes it possible to restrict the exercise of rights of entry and residence by Polish nationals invoking Article 44(3) of the Association Agreement to persons to whom that provision applies.

59 However, as follows from Articles 44(3) and 58(1) of the Association Agreement, the host Member State cannot refuse to a Polish national admission and residence for the purpose of that person's establishment in the territory of that 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.

60 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 Polish 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.

61 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 Polish nationals.

62 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 Polish nationals in the host Member State and must be regarded as being compatible with the Association Agreement.

63 It ought, however, to be borne in mind that, as indicated in paragraph 24 above, the applications for leave to remain submitted by Mr and Mrs Gloszczuk pursuant to the Association Agreement were 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 Polish nationals. That decision of

refusal by the Secretary of State was based on paragraph 322(2)and (3) of the Immigration Rules, in so far as Mr and Mrs Gloszczuk had made false representations in order to be admitted to the United Kingdom and had failed to comply with the expiry dates and conditions attached to their initial leave to enter.

64 It is therefore necessary to examine whether Article 58(1) of the Association Agreement allows the competent authorities of the host Member State to refuse leave to remain, applied for by a Polish national invoking Article 44(3) 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 or by reason of the breach of an express condition attached to that entry and relating to the authorised duration of that person's stay in that Member State, where that irregularity occurred before that person became self-employed and claimed the right of establishment under the Association Agreement.

65 That was indeed the situation of Mr and Mrs Gloszczuk, who had remained unlawfully in the United Kingdom since 1989 and 1991 respectively and claimed a right of establishment under the Association Agreement only in January 1996.

The power of the competent authorities of the host Member State to refuse leave to remain, applied for by a Polish national invoking Article 44(3) of the Association Agreement, on the sole ground that his presence within the territory of that State was unlawful

66 Mr and Mrs Gloszczuk argue that, unlike Article 37(1) of the Association Agreement, which concerns the movement of workers, Article 44(3) of the

Agreement does not make lawful residence a precondition. There is, therefore, nothing in Article 44 to suggest that a right of establishment cannot be conferred on Polish nationals because of an infringement of the immigration legislation of the Member State concerned.

67 Consequently, a Member State may reject an application submitted under Article 44(3) of the Association Agreement by a person whose presence within its territory is otherwise unlawful only after it has taken into account the substantive requirements established by that Agreement.

68 In order to rule on whether this argument is well founded, it is necessary to bear in mind that, as pointed out in paragraphs 57 to 62 above, a system of prior control, such as that established by the Immigration Rules, under which the host Member State makes the granting of entry clearance and leave to 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 44(3) of the Association Agreement, read in conjunction with Article 58(1) thereof.

69 Under such a system of prior control, if it turns out that a Polish 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 58(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.

70 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 Polish national invoking Article 44(3) of the Association Agreement, irrespective of whether the other substantive conditions laid down by the national legislation have been satisfied.

71 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 declarations 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.

72 In those circumstances, as the Advocate General indicates in point 75 of his Opinion, if Polish nationals were allowed at any time to apply for establishment in the host Member State, notwithstanding a previous breach of the condition relating to the authorised duration of their initial stay as tourists in that State, 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 immigration legislation had been satisfied.

73 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.

74 Such an interpretation would risk depriving Article 58(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.

75 Consequently, a Polish 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 tourism 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 therein).

76 The fact that the infringement of the host Member State's immigration legislation was committed by the Polish 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 paragraph 24 above, the Secretary of State treated the applications made by Mr and Mrs Gloszczuk under the Association Agreement as if they were applications for leave to remain and rejected them on the ground that Mr and Mrs Gloszczuk were in an irregular situation when he took his decision.

77 Consequently, it is compatible with Article 58(1) of the Association Agreement for the competent authorities of the host Member State to reject an application made under Article 44(3) 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 for the purpose of obtaining initial leave to enter that Member State on a separate basis or of the

failure to comply with an express condition attached to that entry and relating to the authorised duration of his stay in that Member State.

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 44(3) of the Association Agreement and with the condition mentioned in Article 58(1) thereof

78 In considering the question whether the requirement that a Polish 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 44(3) 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).

79 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).

80 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 44(3) of the Association Agreement.

81 There is also the question whether, in a situation such as that of Mr and Mrs Gloszczuk, the requirement to submit a new establishment application in due and proper form in the Polish national's State of origin or, as the case may be, in another country is compatible with Article 44(3) of the Association Agreement and with the condition set out at the end of the first sentence of Article 58(1), read together.

82 The making of false representations breaches the obligation to declare one's intentions honestly. As indicated in paragraph 71 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 Polish 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.

83 On the same grounds as those indicated in paragraphs 68 to 77 above, the interpretation of the Association Agreement advocated by Mr and Mrs Gloszczuk, 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.

84 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 58(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 Polish nationals.

85 It follows that the decision by the competent authorities of the host Member State to reject an application for establishment submitted by a Polish national on the basis of Article 44(3) of the Association Agreement, because of false representations made to them for the purpose of obtaining initial leave to enter or the failure to comply with a condition attaching to the granting of that leave to enter or leave to stay, 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.

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

— The right of establishment, as defined by Article 44(3) of the Association Agreement, means that rights of entry and residence, as corollaries of the right of establishment, are conferred on Polish 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 58(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 Polish nationals.

— Articles 44(3) and 58(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 58(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 44(3) of that Agreement on the sole ground that, when that application was submitted, the Polish national was residing illegally within the territory of that State because of false representations made to those authorities for the purpose of obtaining initial leave to enter that Member State on a different basis or of non-compliance with an express condition attached to that entry and relating to the authorised duration of his stay in that Member State. 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.

Costs

87 The costs incurred by the United Kingdom, Belgian, German, 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 (Crown Office), by order of 9 December 1998, hereby rules:

1. Article 44(3) 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, concluded and approved on behalf of the Community by Decision 93/743/Euratom, ECSC, EC of the Council and

the Commission of 13 December 1993 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 Polish 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 58(1) of that Agreement.

2. The right of establishment, as defined by Article 44(3) of the above Association Agreement, means that rights of entry and residence, as corollaries of the right of establishment, are conferred on Polish 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 58(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 Polish nationals.

3. Articles 44(3) and 58(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 58(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 44(3) of that Agreement on the sole ground that, when that application was submitted, the Polish national was residing illegally within the territory of that State because of false representations made to those authorities for the purpose of obtaining initial leave to enter that Member State on a different basis or of non-compliance with an express condition attached to that entry and relating to the authorised duration of his stay in that Member State. 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