OPINION OF ADVOCATE GENERAL ALBER

delivered on 14 September 2000 [1]

I — Introduction

1. The present reference for a preliminary ruling has its origin in a dispute concerning the entry to and residence in the United Kingdom of a Bulgarian national who had first entered Great Britain on a holiday-work visa (which has since expired) and subsequently applied for asylum. Following rejection of her asylum application, she sought leave to remain on the basis of her marriage to a Mauritian national, who had indefinite leave to remain in the United Kingdom on the basis of an earlier marriage. That application for leave to remain was also turned down. The Bulgarian applicant in the main proceedings finally invoked Article 45 of the Europe Agreement with Bulgaria [2] and seeks to derive from this a right of residence and establishment in the United Kingdom as a self-employed cleaner.

II — Facts

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

The applicant, who was at the time 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. She had indicated in her visa application that she intended to stay in the United Kingdom for two to three months, and had produced evidence of funds to support herself during that period. On the basis of the information supplied, she was given leave to enter the United Kingdom as a short-term agricultural worker for three months.

3. The applicant submitted a claim for political asylum on 23 July 1993. In her asylum interview on 4 March 1994, she

1 — Original language: German.

2 — Decision 94/908/ECSC, EC, Euratom of the Council and the Commission of 19 December 1994 on the conclusion of the Europe Agreement between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part (OJ 1994 L 358, p. 1).

admitted that, notwithstanding the statements which she had made in order to obtain entry clearance and on entry to the United Kingdom, she had, in fact, always intended to seek asylum in the United Kingdom. Her claim was refused on 19 April 1994 by the Immigration and Nationality Directorate (IND). The applicant appealed against that refusal to the Special Adjudicator on 27 April 1994. 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 that appeal.

4. The Special Adjudicator dismissed the applicant's appeal on 24 February 1995. The Immigration Appeal Tribunal refused her leave to appeal against that decision on 14 March 1995. On 25 April 1995, the IND wrote to the applicant's solicitors, indicating that, since her appeal had been dismissed, she had no further basis for staying in the United Kingdom and would have to leave immediately. She did not, however, do so. On 25 July 1995 she married Mr Armen 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). The applicant applied to the Secretary of State for the Home Department ('the respondent') on 2 August 1995 for leave to remain in the United Kingdom on the basis of that marriage.

5. Immigration officers visited the matrimonial home on 28 October 1995 and 9 November 1995. At an interview on 9 November 1995, the applicant further informed the IND that she was not in receipt of benefit but was working as a cleaner for 18 hours a week, for which she received GBP 50 weekly.

6. On the basis of those visits and in light of the applicant's written explanations and replies during the interview, the respondent was not satisfied that the applicant's marriage was genuine and subsisting.

7. Since the applicant had again acknowledged during that interview that her true intention on arrival had been to seek asylum, the respondent also concluded that she had illegally entered the United Kingdom.

8. The applicant was for that reason served on 9 November 1995 with Notice to an Illegal Entrant, informing her that she had entered illegally. She was granted 'temporary admission', subject to a reporting requirement, pending her removal from the United Kingdom.

9. On 2 January 1996, the applicant commenced her activities as a self-employed cleaner.

10. By letter of 4 July 1996, the AIRE Centre, acting on the applicant's behalf, applied for leave for her to remain in the United Kingdom on the basis of the Europe Agreement with Bulgaria. It explained that the applicant wished to establish herself in business as a self-employed person offering general household care services. Her husband, it stated, was in employment and had undertaken to support his wife as much as possible until her business began to generate sufficient profit. The AIRE Centre enclosed with that letter copies of leaflets advertising the applicant's business, an estimate of anticipated monthly income and expenditure, references from customers, confirmation of her financial resources and a letter confirming that the applicant would be working exclusively in a self-employed capacity.

11. The respondent turned down this application on 24 July 1996 on the ground that he was not satisfied that the profits which the applicant would receive from her proposed business would be sufficient to maintain and accommodate her without recourse to employment or to public funds.

12. Subsequent to that decision, instructions were issued on 26 July 1996 to proceed with the applicant's removal as an illegal entrant. The applicant was arrested on 10 September 1996 and detained with a view to effecting her removal from the United Kingdom on 11 September 1996.

13. On 17 September 1996 the applicant's legal representatives informed the respondent that they were bringing proceedings, and requested that the applicant's detention be reviewed and that she be released.

14. On 24 September 1996 the applicant issued an application for leave to apply for judicial review.

15. The applicant was released on 10 October 1996, exactly one month after her original detention.

16. By letter of 23 October 1996, the respondent again set out the calculations of profitability on which the refusal of the applicant's application had been based; these, he claimed, showed that she would not receive sufficient funds from her business to meet her future outgoings. He noted that the applicant's representatives had not yet addressed that specific point and invited them to provide realistic projections to show that the business would indeed gen-

erate sufficient profits within the first six to twelve months to meet her outgoings. He accepted that it need not generate such profits from the outset and that, *in the short term*, her income could be supplemented by funds provided by Mr Moothien. The point at issue, he stated, was that the applicant's business should provide her with an income sufficient to meet her outgoings in the long term.

17. The applicant's representatives replied by letter of 4 November 1996. In their calculation of the long-term profitability of the applicant's business, they used the same hourly rates and outgoings data as had already been supplied to the respondent on 4 July 1996.

18. By letter of 3 December 1996, the respondent informed the applicant that he was prepared to grant her leave to remain in the United Kingdom under the provisions of the Europe Agreement with Bulgaria.

19. The respondent invited the applicant to withdraw her application for judicial review. In a letter of 15 January 1997, her representatives set out a list of terms on the basis of which the applicant would withdraw her application.

20. By letter of 21 January 1997, the respondent stated that he was not prepared to consent to the terms set out in the letter of 15 January 1997. He did not accept that the applicant would be successful on a substantive application for judicial review. The fact that he had, in his letter of 3 December 1996, granted her leave to remain had been a discretionary decision and did not amount to an admission as to the unlawfulness of earlier refusals.

21. The application for leave to move for judicial review made by the applicant was granted by the referring court on 22 January 1997.

III — The questions submitted for preliminary ruling

22. Since the applicant in this case has invoked a right of residence and establishment derived from the Europe Agreement with Bulgaria — the wording of the articles cited in the questions submitted is set out in points 26 and 27 below — the High Court of Justice of England and Wales has submitted to the Court the following questions on the interpretation of that Agreement:

'1. Does Article 45 of the Association Agreement between the EEC and the Republic of Bulgaria ("the Agreement": OJ 1994 L 358, p. 1) 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?

(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?

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?

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 —

3. If the answer to the second question is "yes",

(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

(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?

(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?'

IV — Relevant provisions of the Europe Agreement with Bulgaria

23. The Europe Agreement with Bulgaria [3] (hereafter also referred to as 'the Bulgaria Agreement') was concluded having regard to 'the commitment of the Community and its Member States and of Bulgaria to strengthening the political and economic freedoms which constitute the very basis of the association'. [4] The 17th recital in the preamble to the Agreement recognises further the fact that 'Bulgaria's ultimate objective is to become a member of the Community, and that this association, in the view of the Parties, will help Bulgaria to achieve this objective'.

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

25. The objectives of this association are set out in Article 1(2). They concern the provision of an appropriate framework for political dialogue between the Parties, the gradual establishment of a free trade area covering substantially all trade between them, promotion of the expansion of trade and harmonious economic relations

3 — Reference cited in footnote 2.

4 — Fourth recital in the preamble.

between the Parties, provision of a basis for economic, financial, cultural and social cooperation, support for Bulgaria's efforts to develop its economy and to complete the transition into a market economy, and provision of an appropriate framework for the gradual integration of Bulgaria into the Community.

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

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

Article 45 in particular provides as follows in this regard:

'1. Each Member State shall grant, from entry into force of the Agreement, [5] 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. [6]

...

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;

5 — Pursuant to its Article 124, the Bulgaria Agreement, which was signed on 8 March 1993, entered into force on 1 February 1995, and thus only at a date by which the applicant had already been residing in the United Kingdom for one and a half years.

6 — Annex XVa is entitled: 'Legal acts relating to real-estate property in frontier regions in accordance with legislation in force in certain Member States of the Community'. Since the derogating provision in the final part of Article 45(1) has no bearing on the decision in this case, it need not be addressed in what follows.

(ii) ...

...

6. ...'

28. Chapter IV of Title IV of the Agreement sets out general provisions. Article 59(1) provides as follows:

'1. 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....'

V — Submissions of the parties

29. The applicant submits that Article 45 of the Bulgaria Agreement confers a right of establishment on Bulgarian nationals seeking to take up and pursue economic activities as self-employed persons in a Member State. This right exists independently of the applicant's entry status. It cannot in any event be made dependent on the grant of leave to remain or any other form of permission within the discretion of the Member State.

30. Article 45 of the Bulgaria Agreement, she argues, contains a sufficiently clear and precise obligation not conditional on the adoption of implementing measures to be of direct effect. This is in no way affected by the rule in Article 59.

31. Member States are free to apply their own laws and regulations regarding entry, stay and establishment of natural persons to persons seeking to invoke their right of establishment and residence under Article 45 of the Agreement only to the extent to which such application does not discriminate on grounds of nationality and does not in any way infringe the right in question. Article 59 of the Agreement consequently does not provide any additional legal basis for refusal of an application under Article 45. Should such a refusal none the less be possible under Article 59 of the Agreement, account must be taken of the principle of proportionality.

32. The applicant submits further that Article 45 and/or Article 59 of the Bulgaria Agreement do not permit a Member State to require Bulgarian nationals to provide evidence of sufficient resources to maintain themselves without recourse to public funds where no such requirement is imposed on its own nationals.

33. Finally, the infringement of Articles 45 and 59 of the Agreement by the competent authorities of the United Kingdom is, she argues, sufficiently serious to entitle her to an award of reparation for the damage to her business and that otherwise suffered by reason of her detention for one month.

34. The United Kingdom Government takes the view that Article 45 of the Bulgaria Agreement does not confer rights of establishment on a Bulgarian national whose continued presence within the territory of a Member State is unlawful under national immigration law. In the alternative, it submits that Article 45 does not have direct effect, as evidenced by the fact that there is a special Article 59. A Bulgarian national may invoke a right to equal treatment in matters of establishment only if he or she has complied with national laws and regulations regarding entry and stay within the meaning of Article 59 of the Agreement.

35. A Member State is thus entitled to continue to apply its rules regulating entry, stay and establishment to Bulgarian nationals, on condition that it does not do so in a manner which makes the exercise of the right of free establishment impossible or very difficult. This is tantamount to complying with the principles of non-discrimination and proportionality. Under Article 59 of the Agreement, a Member State can thus demand proof from a Bulgarian national, who, following his entry, is unlawfully present within the territory of that Member State for reasons other than those of establishment, that his intention is in fact to take up and pursue an economic activity as a self-employed person and that this activity will be financially successful. In the event of unlawful residence, refusal of an application based on Article 45 of the Agreement will therefore be correct in law.

36. Articles 45 and 59 of the Agreement do not therefore preclude national rules which allow the competent authorities to require Bulgarian nationals wishing to establish themselves within the territory of a Member State under Article 45 of the Agreement to provide evidence of sufficient income from the activity or other own resources.

37. With regard to the claim for damages, the United Kingdom Government submits that, in the light of the state of development of Community law at the relevant time, no

sufficiently serious breach of those provisions has occurred.

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

VI — Analysis

39. All of the questions submitted in this reference for a preliminary ruling seek clarification as to whether a person may invoke a direct right of establishment under Article 45 of the Bulgaria Agreement, and a separate right of residence derived therefrom, as against the Member State in question, in particular where the person concerned had already been unlawfully residing in the Member State for three years when he or she made the application and had even been doing so before the Bulgaria Agreement came into force.

(1) Questions 1 and 2

40. It should first be noted — as the Commission and the Irish Government have also proposed — that the order of the questions submitted should be changed and that it is first necessary to examine whether the applicant can at all rely before a national court directly on Article 45 of the Agreement and whether she can derive from that article the right of residence which she seeks to acquire. Should that not be the case from the outset, all of the remaining questions submitted in this reference for a preliminary ruling would necessarily be merely hypothetical in nature.

(a) The jurisdiction of the Court of Justice

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

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

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

43. That case-law also holds good for Europe Agreements. The designation of the agreement with Bulgaria as a Europe Agreement cannot to that extent have any other significance in law. While the first agreements concluded with non-member countries were described as association agreements, they were later designated as cooperation agreements. The agreements concluded with the States of central and eastern Europe, in contrast, were designated as Europe Agreements. The notion of a Europe Agreement takes account of the fact that the States of central and eastern Europe are also politically part of Europe and seek at some future time to join the European Union.

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

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

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

47. The Court's case-law on the Agreement with Turkey can thus be applied, at least with regard to jurisdiction, for the purpose of interpreting and construing provisions of

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

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

the Europe Agreements, with the result that the Court does have jurisdiction to reply to the questions submitted to it in this case.

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

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

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

50. Since the rights which the applicant invokes can be derived, if at all, only from Article 45(1) of the Bulgaria Agreement, Article 45(1) alone will, in what follows, be examined in regard to direct effect, but with account being taken of the effect of other provisions of the Agreement.

51. Article 45(1) of the Bulgaria Agreement falls to be examined in the light of the principles laid down by the Court:

As the Governments of Belgium, Italy, Spain and France in particular also submit, the right of establishment as described in Article 45(1) of the Agreement, but also only the right of establishment as such, is a clear and unambiguous equal-treatment clause which is unconditional and directly applicable. It prohibits Member States, once the Bulgaria Agreement has come into force, from applying to Bulgarian nationals wishing to establish themselves under the terms of the Agreement less favourable treatment than that accorded to their own nationals.

52. In comparison with other provisions of this Agreement, Article 45(1) does not constitute a rule which is purely programmatic in character and the direct applicability of which depends on decisions still to be taken by the Association Council. [12] That, for instance, is the case with regard to

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

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

12 — Article 3(2) of the Bulgaria Agreement provides as follows with regard to the Association Council: 'At ministerial level, political dialogue shall take place within the Association Council. This shall have general responsibility for all matters which the Parties might wish to put to it.' Further provisions on the Association Council are to be found in Articles 105 to 110 of the Bulgaria Agreement.

the areas of free movement of workers under Article 40(1) and the supply of services under Article 56(3) of the Agreement, since these refer expressly to measures still to be taken.

53. No indications can be gleaned from the wording of Article 45(1) of the Bulgaria Agreement or from articles applicable to Article 45(1) as to Association Council decisions still to be taken in this area. In contrast, the provisions of the Agreement with Turkey indicated, in regard to the free movement of Turkish workers, that the exact timetable and the order for implementation of those provisions would have to be laid down in future Association Council decisions. [13] Many of the provisions in the Association Agreement with Turkey acquired direct effect only after they had been formulated in secondary legislation by the Association Council. [14]

54. The purpose and object of the Europe Agreement with Bulgaria are also not at variance with the direct applicability of Article 45(1) of the Bulgaria Agreement. The immediate aims of the Agreement, which are also listed in Article 1(2) — see point 25 above — can be inferred from the recitals in the preamble.

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

56. However, a further indication as to the direct applicability of Article 45(1) of the Bulgaria Agreement arises from the fact that Article 45(1) does not give the host Member State any discretion in taking a decision on the right of establishment for a Bulgarian national.

57. Contrary to the applicant's submissions, however, the rights derived from Article 45(1) of the Bulgaria Agreement do not correspond to the right of establishment under Article 52 of the EC Treaty (now Article 43 EC), which the settled case-law of the Court has confirmed to be directly applicable. [16] That, however, is no longer the issue in the present case. First,

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

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

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

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

the wording of the two provisions is not the same,[17] and, second, the difference in treatment can be explained by the discrete objectives pursued by those respective instruments.

58. Whereas the Bulgaria Agreement concerns the gradual integration of Bulgaria and its accession to the European Union is not at all something which will come about automatically, the objectives of the EC Treaty are much wider and more far-reaching in their scope. Those objectives involve the creation of an internal market, the establishment of which necessarily implies the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital (see Article 3(c) of the EC Treaty — now, following amendment, Article 3(1)(c) EC).

59. It thus follows from the foregoing that, regard being had to its wording as well as to its meaning and purpose, Article 45(1) of the Bulgaria Agreement is directly effective in regard to the right of Bulgarian nationals to establish themselves for the purpose of taking up self-employed activities. There is, however, still no reference in this to a right of residence. In order to be able to determine to what extent Article 45(1) confers a separate right of residence which is independent of national law, it is necessary to clarify the scope of that provision.

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

(c) The scope of Article 45(1) of the Bulgaria Agreement

60. The applicant argues essentially in both her written observations to the Court and in the oral procedure that the right of establishment laid down in Article 45(1) of the Bulgaria Agreement confers on her at the same time an implied right of residence in the Member State in question, irrespective of the fact that, at the time of her application under Article 45(1) of the Bulgaria Agreement, she had already been residing in the host Member State for three years contrary to national immigration law.

61. The applicant's arguments that the unlawful nature of her residence in the Member State is immaterial in the context of an application relating to Article 45(1) of the Bulgaria Agreement are unconvincing. They fail to take account of the fact that, within the context of that provision, a clear distinction needs to be drawn between the right of residence and the right of establishment.

62. According to the unambiguous wording of Article 45(1) of the Bulgaria Agreement, that provision relates solely to the right of establishment of Bulgarian nationals in a Member State. At no point does the Agreement mention an implied right of residence which may be derived from that right of establishment.

63. Since the Court, in deriving freedom-conferring rights from rights of residence, has consistently chosen the objectives of the relevant instrument as the criterion for its examination, [18] that criterion must also be applied in deriving rights of residence from the right of establishment set out in Article 45(1) of the Bulgaria Agreement. It follows from the deliberate restriction of the area regulated by the Agreement that Article 45(1) establishes merely a prohibition of discrimination and a requirement of treatment equivalent to that accorded to nationals, but does not establish a right of residence going beyond that.

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

65. The same must hold good for the interpretation of Article 45(1) of the Bulgaria Agreement. Contrary to the opinion expressed by the applicant, this case-law can be applied to the Bulgaria Agreement. The contention that the Bulgaria Agreement goes further on this point than the Association Agreement with Turkey is untenable, as demonstrated by the following comparison of the two Agreements in respect of the right of establishment:

— The Association Agreement with Turkey

66. Under Article 2(1) and the second recital in the preamble, the aim of the Agreement is to promote the continuous and balanced strengthening of trade and economic relations between the Parties. As soon as the operation of the Agreement allows Turkey fully to accept obligations under the Treaty establishing the Community, the Contracting Parties are to examine the possibility of Turkey acceding to the Community (Article 28 of the Agreement).

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

68. However, most of the rights thus far derived from the Association Agreement with Turkey are based on the very specific

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

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

decisions of the Association Council adopted to date.

— The Europe Agreement with Bulgaria

69. Article 1(2) of the Bulgaria Agreement provides that its objectives include the provision of an appropriate framework for political dialogue and the gradual integration of Bulgaria into the Community, the expansion of trade and the promotion of harmonious economic relations. The 17th recital in the preamble also stresses that the Europe Agreement serves Bulgaria's ultimate objective of becoming a member of the Community.

70. Under Article 45(1) of the Bulgaria Agreement, Member States must, with regard to establishment, grant Bulgarian nationals treatment which is no less favourable than that accorded to their own nationals.

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

72. Article 59 of the Bulgaria Agreement, for which there is no comparable provision in the Association Agreement with Turkey, makes it in this connection all the more evident, through its express mention of the terms 'entry' and 'stay', that these areas of regulation are to remain within the competence of the Member States, and thus makes clear what is already obvious from the case-law on the Association Agreement with Turkey.

73. In particular, however, it is the Association Council decisions adopted to date under the Association Agreement with Turkey which make clear that, in the areas of free movement and the right of establishment, the Association Agreement with Turkey is considerably more advanced than the Bulgaria Agreement. It is also obvious from this fact that no more rights can be conferred on Bulgarian nationals to enable them to work in a self-employed capacity than those which may be conferred on Turkish nationals under the Association Agreement with Turkey.

74. In view of the comparative speed with which Bulgaria is endeavouring to secure entry to the Community, the applicant seeks to attribute to the Bulgaria Agreement a broader scope than that of the Association Agreement with Turkey. This

line of argument, however, fails to take account of the fact that a vital distinction must be drawn between the political and the juridical significance of an agreement.

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

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

77. The definition of the term 'establishment' in Article 45(5) of the Bulgaria Agreement [23] also makes it clear that a strict distinction has to be drawn under that Agreement between Bulgarian employed workers and Bulgarian self-employed workers, with the result that rights which may apply to employed persons are in no way also unconditionally applicable to self-employed persons.

78. The following consideration also demonstrates that the right of establishment which Bulgarian nationals are recognised as having under Article 45(1) of the

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

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

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

23 — Article 45(5) of the Bulgaria Agreement states: '... Self-employment and business undertakings by nationals shall not extend to seeking or taking employment in the labour market or confer a right of access to the labour market of the other Party. The provisions of this chapter do not apply to those who are not exclusively self-employed;...'.

Bulgaria Agreement cannot form the basis for any implied right of residence. Even in cases where self-employed Turkish nationals have been recognised as having a right of residence pursuant to Decision No 1/80 of the Association Council, the Court has none the less derogated from that principle in those cases where, at the time of their application, applicants were residing in the Member State in question contrary to national immigration law. [24] In the cases in point, the Turkish nationals concerned had obtained their original authorisation to reside in a Member State only by providing false information.

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

80. It can thus be held that the right of establishment granted by Article 45(1) of the Bulgaria Agreement and a potential right of residence must, at the present stage of implementation of the Europe Agreement with Bulgaria, be strictly distinguished one from the other.

24 — *Savas*, cited above in footnote 14, paragraph 60, and Case C-285/95 *Kol* v *Land Berlin* [1997] ECR I-3069, paragraph 29.

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

81. The applicant deceived the national authorities by providing false information on her entry. Account must be taken in this regard of the fact that her residence was unlawful even before the Europe Agreement entered into force. [25] In that regard, any rights to which the applicant would have been entitled by virtue of the leave to remain and work permit initially obtained are also irrelevant. Article 45(1) of the Bulgaria Agreement provides no support for the argument that earlier infringements of national law may be remedied by that provision.

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

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

25 — See footnote 4 above.

84. Were this not so, Article 45(1) might even encourage Bulgarian nationals initially to enter a Member State under false pretences and then, in contravention of national provisions, to apply for authorisation to reside, over the granting of which the Member State in question would — given the right to such authorisation under an Association Agreement — no longer have any influence.

85. The scope of Article 45(1) of the Bulgaria Agreement therefore goes only so far as to grant a right to equal treatment, with reference solely to establishment, to a Bulgarian national who is already lawfully resident in the host State, that is to say, whose presence is in accordance with the national rules governing entry and residence.

86. Since it is thus established that Article 45(1) of the Bulgaria Agreement confers only a right of establishment, but no right of residence, it follows that the effect of Article 59 of the Bulgaria Agreement can relate, if at all, only to the right of establishment. The question, however, is to what extent Article 59 of the Bulgaria Agreement can restrict Member States in defining the right of establishment.

87. Article 59 of the Bulgaria Agreement states that nothing in the Agreement is to prevent a Member State from applying its laws and regulations regarding entry and stay, work, labour conditions and establishment of natural persons and supply of services, provided that, in so doing, it does not apply them in such a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement.

88. A comparison with the wording of Article 45(1) of the Agreement demonstrates that Article 59 is addressed only to the Community, the Member States and Bulgaria; individual Bulgarian nationals cannot derive any direct rights from that provision. This also explains why Article 59 of the Bulgaria Agreement can have no bearing on the essentially direct applicability of Article 45(1) of the Agreement, as explained above.

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

90. The fact that Articles 59 and 45(1) are both to be found in Title IV of the Bulgaria Agreement does not, contrary to the argument put forward by the applicant, provide any support whatever for the contention that Article 45(1) has the effect of conferring a right of residence or that it may not be restricted in this regard by measures taken by Member States. On the contrary,

this systematic position of Article 59 demonstrates *a fortiori* that Member States continue to be entitled to regulate the entry and residence of Bulgarian nationals also in regard to the right of establishment.

91. Further, the Contracting Parties agreed, when signing the 'Joint Declaration on Article 59 of the Agreement' annexed to the Final Act of the Agreement, that the sole fact of requiring a visa for natural persons of certain Parties and not for those of others is not to be regarded as nullifying or impairing benefits under a specific commitment.

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

93. Article 46(1) of the Bulgaria Agreement, furthermore, makes it clear that, subject to Article 45(1), each Contracting State may regulate the establishment and operation of companies and nationals on its territory, in so far as those regulations apply in a non-discriminatory manner. In this way, not only Article 59 but also Article 46(1) of the Bulgaria Agreement show that the Member States continue to retain a not inconsiderable regulatory power in regard to the right of establishment.

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

Article 45 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, has direct effect for the establishment of Bulgarian nationals in regard to guaranteeing equal treatment with nationals of the Member States of the European Communities, but does not confer any legal entitlement to entry or residence.

(2) Question 3

95. Even if it is unnecessary to reply to Question 3 on the ground that Question 1 has been answered in the negative, the question ought none the less to be addressed by way of alternative submission. Question 3 essentially involves the issue of whether the provisions of the Bulgaria Agreement on entry and residence constitute an obstacle to the United Kingdom's own provisions and concerns the degree to which the entry and residence

provisions are applicable within the context of granting a right of establishment.

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

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

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

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

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

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

26 — See point 42 above.

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

102. The Bulgaria Agreement thus does not stand in the way of application of a Member State's legislative and administrative provisions — in particular those governing entry and residence — to Bulgarian nationals.

(3) Question 4

103. Question 4 will also be answered only by way of alternative submission, but also in order to clarify the view being expressed here.

104. The United Kingdom provisions on the furnishing of proof of guaranteed income are also in accordance with what is laid down in the Europe Agreement. Such proof is appropriate for establishing that the applicant is serious in his or her intention.

105. Article 45(5)(a) of the Bulgaria Agreement confers on Bulgarian nationals only the right to establish themselves as self-employed persons in a Member State. The requirement that proof be produced of sufficient income serves in particular to monitor this criterion in an objective manner, without rights of Bulgarian nationals being infringed thereby. This rule makes it possible to exclude, in a meaningful way, the chances of Bulgarian applicants seeking access to the (United Kingdom) labour market and thereby to employment.

106. Nor does the national rule infringe the principle of equal treatment with the Member State's own nationals, as set out in Article 45(1) of the Bulgaria Agreement. Separate social systems apply to United Kingdom nationals, on the one hand, and Bulgarian nationals, on the other, and account must be taken of these in the present context. To date, there have, within the framework of the Europe Agreement with Bulgaria, been no rules in the area of the right of establishment requiring the Member State to provide financial support for self-employed persons in a position of financial dependency. The host Member State must accordingly be allowed to check whether applicants are or are not likely to be independent of State benefits.

107. Particular reference in this regard must also be made to the Council Resolution of 30 November 1994 relating to the limitations on the admission of third-country nationals to the territory of the Member States for the purpose of pursuing activities as self-employed persons,[28] under which Member States may demand evidence of income such as that here under discussion. Paragraph 7 in Part A expressly states that appropriate measures are required to prevent persons establishing themselves in a Member State without having the necessary financial means.

28 — OJ 1996 C 274, p. 7.

108. Nor is the Court's judgment in *Levin*,[29] which the applicant cites in her argument that the requirement of proof of subsistence is inadmissible, applicable to the present case. The Court ruled in *Levin* that the Community-law concept of an employed person, within the meaning of the Treaty, is not dependent on the earning of a minimum income. That decision served to define the term 'worker' for purposes of Community law in the light of the tasks and objectives of the Communities and to clarify elementary questions of the internal market with regard to the free movement of workers in the context of Article 48 of the EC Treaty (now Article 39 EC). For that reason alone it is clear that *Levin* is not applicable.

109. In the first place, the present case concerns provisions relating to self-employed workers, and, second, those provisions are to be found in a Europe Agreement, which, as has already been established above, cannot, within this area, be in any way compared to the rules in the Treaty. Once again, reference must here be made to the Court's case-law, according to which similar or identical provisions in different treaties or agreements must be interpreted in the light of their differing objectives and contextual conditions.[30] Further, Article 59 of the Bulgaria Agreement allows precisely the application of national provisions in regard to entry and residence.

110. The purpose and objective of the Europe Agreement with Bulgaria thus permit the requirement that evidence be provided of subsistence funds, as is also required in the United Kingdom.

(4) Question 5

111. Whereas Questions 3 and 4 bore a direct relationship to Questions 1 and 2 and were for that reason answered by way of alternative submission, that is not the case with regard to the final question, Question 5.

112. The question of the conditions under which a claim for damages may arise from an infringement of the Bulgaria Agreement has no direct connection to the first four questions and is, in view of the answer to Question 1, now no more than hypothetical in nature.

113. It is for that reason unnecessary to answer Question 5.

29 — Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035.

30 — Case 270/80 *Polydor* v *Harlequin Record Shops* [1982] ECR 329.

VII — Conclusion

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

(1) Article 45 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, has direct effect for the establishment of Bulgarian nationals in regard to guaranteeing equal treatment with nationals of the Member States of the European Communities, but does not confer any legal entitlement to entry or residence.

(2) A Member State can also apply its legal and administrative rules on entry and residence to persons who, within the context of establishment, can or could invoke equal treatment under Article 45 of the Bulgaria Agreement, on condition that it does not do so in such a manner as to nullify or impair the benefits accruing to any Party under the terms of a specific provision of the Agreement.

(3) Articles 45 and 59 of the Bulgaria Agreement are to be construed as not precluding application of a national provision authorising the competent national authorities to require a Bulgarian national wishing to work in a self-employed capacity to provide evidence of adequate funds.