must not be disproportionate to the nature of the offence committed.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Touffait Bosco

Delivered in open court in Luxembourg on 14 July 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 14 JUNE 1977 [1]

Mr President,
Members of the Court,

I – The reference for a preliminary ruling with which my opinion today is concerned relates to three independent criminal proceedings pending before the Amtsgericht Reutlingen and concerned with the interpretation of the German Ausländergesetz (Aliens Law) of 28 April 1965 and in particular with the application of the penal provisions of Article 47 of that law to nationals of the Member States of the Community. The facts of the three cases are as follows:

1. On 21 November 1975 the Amtsgericht Reutlingen on the application of the Staatsanwaltschaft (Public Prosecutor's Office) of 12 November 1975 imposed a fine of DM 100 plus costs of the proceedings and execution on Concetta Sagulo, an Italian national employed as a bookbinder, for infringing the second subparagraph of Article 47 (1) of the Ausländergesetz in that from 24 February to 4 September 1975 she had resided in the Federal Republic of Germany without a passport and without a residence permit. On 28 November 1975 Mrs Sagulo appealed against this conviction.

2. On 25 November 1976 the Amtsgericht Reutlingen on application of the Staatsanwaltschaft of 22 November 1976 imposed a fine of DM 100 plus costs of the proceedings and execution on Gennaro Brenca, an Italian worker, for infringement of the second subparagraph of Article 47 (1) of the Ausländergesetz in that from '30 February' to 16 June 1976 he had resided in the Federal Republic of Germany without a passport

1 – Translated from the German.

and without a residence permit. Mr Brenca appealed against this conviction.

3. Addelmadjid Bakhouche, a French national of no occupation, after being stationed as a member of the French armed forces in the Federal Republic of Germany from 22 June 1962 to 14 November 1973, was issued on 12 December 1973 with a residence permit valid until 11 December 1974. For non-payment of fines imposed in 15 proceedings for traffic offences Mr Bakhouche was committed to prison where he remained from 27 January to 6 March 1976. Thereupon, because in spite of repeated requests by the competent authorities he neglected to have his residence permit extended he was remanded in custody until 12 March 1976 charged with an offence under the second subparagraph of Article 47 (1) of the Ausländergesetz and was sentenced on 12 March 1976 by the Amtsgericht Reutlingen for this offence to a fine of DM 1 200 plus costs and taking into account the time spent in prison on remand. By summons dated 24 September 1976 the Staatsanwaltschaft now accuses Mr Bakhouche of continuing to reside in the Federal Republic of Germany without a residence permit and of having, in spite of the imposition of a fine on 12 March 1976 and repeated requests by the competent authorities, neglected to apply for an extension of his residence permit which expired on 11 December 1974 and has applied for the main proceedings to be opened before the Amtsgericht Reutlingen for infringement of the second subparagraph of Article 47 (1) in conjunction with Articles 1 and 2 of the Ausländergesetz.

By order dated 13 January 1977 the Amtsgericht Reutlingen stayed the three criminal proceedings and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1. Can the special residence document which has declaratory effect and is referred to in Article 4 of Council Directive 68/360 issued as proof of a right of residence for aliens entitled thereto by virtue of Article 48 *et seq.* of the EEC Treaty be treated as being on all fours for the purposes of administrative and criminal law with the residence permit issued under the German Ausländergesetz (Aliens Law) with the result that such aliens who do not hold the document authorizing residence under the first or second subparagraph of Article 47 (1) of the Ausländergesetz or who hold such a document which has ceased to be valid can be sentenced under Article 5 of the Ausländergesetz for residence or entry without a valid residence permit, or does such a sentence contravene the EEC Treaty?
2. Is the EEC Treaty contravened if an alien directly entitled under Article 48 of the EEC Treaty and the abovementioned Council Directive is issued only with a residence permit under Article 5 of the Ausländergesetz with the possible adverse effects of Article 47 of that Law?
3. Is there an infringement of the prohibition on discrimination laid down in Article 7 of the EEC Treaty or the letter and spirit of the Treaty (Article 5) if an alien who under Article 48 of the EEC Treaty or under one of the provisions made in implementation thereof is or originally was entitled to reside in or to enter the Federal Republic of Germany for the purposes set out therein and whose national passport or document in lieu thereof required under Article 3 of the Ausländergesetz and Article 10 of the Aufenthaltgesetz/EWG (Law on Residence of Nationals of the Member States of the EEC) has ceased to be valid, can be sentenced within the ambit of the German Ausländergesetz under the first or second subparagraph of Article 47 (1) thereof to imprisonment for up to one year or fined up to 360 times his net daily income for an offence, whilst a German national whose

identity card required under the comparable Federal or Regional Laws governing identity cards has ceased to be valid can only be fined for a minor offence (Article 47 of the Gesetz über die Ordnungswidrigkeiten (Law on minor offences)) — although proceedings are not as a rule taken — up to DM 500 where the offence is committed negligently or up to DM 1 000 where it is committed intentionally?

4. Is the EEC Treaty contravened if an alien to whom Article 48 of the EEC Treaty applies who in the previous year had been fined for an offence against the Ausländergesetz committed intentionally because he had resided in the territory of the Federal Republic without a residence permit is sentenced to imprisonment for a similar offence after the judgment for the previous offence has become absolute?

II — There are already decisions of the Court on a number of the problems raised in these questions. Accordingly it appears to me useful to draw together the basic points of this case-law before I give my opinion on the questions referred to the Court for a preliminary ruling.

In its judgment of 8 April 1976 in Case 48/75, *Royer* [1976] ECR 497 with regard to the right of residence of nationals of a Member State in the territory of another Member State the Court held:

The right of nationals of a Member State to enter the territory of another Member State and reside there is a right conferred directly, on any person falling within the scope of Community law, by the Treaty — especially Articles 48, 52 and 59 — or, as the case may be, by the provisions adopted for its implementation, independently of any residence permit issued by the host State.

With regard to the legal nature of the residence permit under Article 4 (2) of Council Directive No 68/360 of 15 October 1968 (OJ, English Special Edition 1968 (II), p. 485) the Court has decided that this does not give rise to rights but is a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of Community law (Cf. judgment in Case 48/75, *Royer* [1976] ECR at pp. 512 and 513, paragraphs 31 to 33). The residence permit simply provides proof of the right of residence and must be issued to everyone who provides proof that he belongs to the category of those entitled (Cf. judgment in Case 48/75, *Royer* [1976] ECR at p. 513, paragraphs 34 to 37, and p. 520, paragraph 2 of the operative part of the judgment).

On the question how far measures for the control of aliens are permissible against the nationals of another Member State the Court has stated in the said judgment *(ibid.* at p. 514, paragraph 42):

On the other hand Community law does not prevent the Member States from providing, for breaches of national provisions concerning the control of aliens, any appropriate sanctions — other than measures of expulsion from the territory — necessary in order to ensure the efficacy of those provisions.

The Court in its judgment of 7 July 1976 in Case 118/75, *Watson and Belmann* [1976] ECR at p. 1198, paragraphs 17 and 18, has expressly confirmed this right of the Member States to apply measures for the control of aliens to the nationals of other Member States as well. In the same judgment *(ibid.* at p. 1199, paragraph 21) the Court has said with regard to penalties:

As regards other penalties, such as fines and detention, whilst the national authorities are entitled to impose penalties in respect of a failure to comply with the terms of provisions requiring foreign nationals to notify their presence, which are comparable to those attaching to infringements of provisions of equal

importance by nationals, they are not justified in imposing a penalty so disproportionate to the gravity of the infringement that it becomes an obstacle to the free movement of persons.

If we now consider the questions in the present case referred for a preliminary ruling in the light of this case-law the following position appears:

1. *Question 1* agrees with the case-law of the Court in assuming the purely declaratory nature of the residence permit under Article 4 of Council Directive No 68/360, which is described in the question as 'residence document' (Aufenthaltsbescheinigung). This expressly stresses the special legal nature of this document, distinguishing it from the residence permit (Aufenthaltserlaubnis) under the German Ausländergesetz, which creates rights. If a residence permit under Article 2 (1) of the Ausländergesetz expires the right of residence of the alien concerned in the Federal Republic of Germany also expires. If on the other hand the residence permit under Article 4 of Council Directive No 68/360 expires, the holder simply no longer has written proof of his right of residence which continues to exist unchanged, although he does have a right to have this proof extended or newly made out. The residence permit for nationals of a Member State of the EEC is therefore much closer from the point of view of its legal nature to the identity card of a national than is the general residence permit under the German Ausländergesetz. For these general considerations it appears to me impossible to equate the two residence permits in administrative and criminal law.

The question is directed to ascertaining, as a matter of fact, whether the criminal provisions of the first and second subparagraphs of Article 47 (1) of the German Ausländergesetz are applicable to the residence permit under Article 4 of Council Directive No 68/360. On this the Commission has rightly pointed out that the extension of the question to the first subparagraph of Article 47 (1) (entry without a residence permit) must be due to an error. Article 2 (1) of the German Gesetz über Einreise und Aufenthalt von Staatsangehörigen der Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft (Law on entry and residence of nationals of Member States of the European Economic Community) of 22 July 1969 permits those persons entitled to freedom of movement to enter without a residence permit. According to Article 15 of this law its provisions have precedence over the Ausländergesetz. Thus even under the national law of the Federal Republic of Germany entry without a residence permit by those entitled under Article 48 of the EEC Treaty is not punishable.

With regard to the second subparagraph of Article 47 (1) of the Ausländergesetz it is not for the Court to interpret the provision of the German law as to whether by 'residence permit' the law is referring to a substantive right to residence or refers to a document containing only evidence of an existing right of residence. It appears however from considerations of Community law that the residence permit under Article 4 of Council Directive No 68/360 cannot come under the penal provision of the general Ausländergesetz. Under the general rule of the first paragraph of Article 7 of the EEC Treaty which as regards workers is particularly reflected in Article 48 (2) of the Treaty any discrimination and differentiation of treatment based on nationality between nationals of the Member States is prohibited. Nationals of the Member States must therefore basically be put on an equal footing with nationals of the country concerned. As I have already stated, the special residence permit for nationals of a Member State of the EEC is from the legal point of view much closer to the identity papers of a national than to the general residence permit under the German Ausländergesetz. If a

national does not comply with his obligations in respect of identity cards then under German law he is liable to a fine only for a minor offence. From the point of view of its criminality the disregard of the obligation in respect of evidence of a substantively existing right of residence by a national of another Member State of the EEC cannot be treated differently. This is in line with the previous case-law of the Court. It is true, as I stated earlier, that the Court has declared the adoption and execution of provisions for the control of aliens to be permissible as regards nationals of the Member States of the EEC, but with regard to penalties it has expressly stated that they must accord with the principles of national treatment and of proportionality as regards the means employed (Cf. judgment in Case 118/75, *Watson and Belmann* [1976] ECR at p. 1199, paragraph 21). An interpretation of the second subparagraph of Article 47 (1) of the German Ausländergesetz to the effect that this provision is applicable also to the residence permit under Article 4 of Council Directive No 68/360 would therefore infringe the prohibition on discrimination in the first paragraph of Article 7 of the EEC Treaty. Further such an interpretation would lead to the application of penalties quite disproportionate to the criminality of disregard of the formalities with regard to control of aliens and would thus represent a direct obstacle to freedom of movement guaranteed by Community law and to that extent be contrary to the EEC Treaty.

2. With regard to *Question 2* it must be observed that this proceeds from the false premise that the application of the penal provision of the second subparagraph of Article 47 (1) of the German Ausländergesetz might depend on which form of residence permit the issuing authority chose to adopt. Since the right of residence of nationals of the Member States arises directly from the Treaty or from the provisions of Community law adopted thereunder, its legal nature cannot be altered by the fact that the competent authority in error issues a general residence permit under the Ausländergesetz. Since moreover, as already recognized by the case-law, a national of a Member State entitled to a right of residence under Article 48 of the EEC Treaty has a right to the issue of the special residence permit under Article 4 (2) of Council Directive No 68/360, the issue of a general residence permit under Article 2 (1) of the German Ausländergesetz would also be contrary to Community law.

3. With regard to *Question 3* I can be very brief. As I have already stated with regard to Question 1, the different treatment referred to in Question 3 clearly infringes the prohibition on discrimination set out in the first paragraph of Article 7 of the EEC Treaty.

4. The answer to *Question 4* follows likewise from what I have stated in respect of the first question. As moreover the Commission has rightly observed, a prior conviction contrary to Community law can have no influence on the assessment of the same act in fresh proceedings.

III – I therefore propose that the questions referred to the Court for a preliminary ruling should be answered as follows:

1. The right of residence arising from Article 48 of the EEC Treaty and the provisions for its implementation exists independently of the issue of a residence permit. Penalties under laws of the Member States for the control of aliens relating to the absence or loss of the substantive right of

residence are therefore not applicable where a national of a Member State entitled under Article 48 of the EEC Treaty has no residence permit or it has expired.

2. Member States have a duty to issue nationals of other Member States entitled under Article 48 of the EEC Treaty with a document regarding their right of residence and complying with the provisions of Council Directive No 68/360.

3. It follows from Article 7 of the EEC, Treaty that Member States may not make the penalties on nationals of other Member States entitled under Article 48 of the EEC Treaty for not possessing a valid residence permit more severe than the penalties applied to their own nationals under national law for disregard of their obligations with regard to identity cards.