REPORT FOR THE HEARING
in Case C-363/89 *

I — Facts and procedure

1. *The dispute in the main proceedings*

1. Mrs Danielle Roux, a French national, arrived in Belgium at the end of January 1988 and on 10 January 1989 lodged a request with the municipal authorities in Liège for an establishment permit as a self-employed person, declaring that she was working as a self-employed waitress.

2. On 24 February 1989, the Office des étrangers (Aliens Office) informed the municipal authorities that in its view Mrs Roux was in an employment relationship as regards her principal, and that consequently she was required to produce an employer's certificate with a number issued by the Office national de sécurité sociale (National Social Security Office (ONSS)).

3. By an administrative decision notified to Mrs Roux on 12 April 1989, the Office des étrangers turned down her application for an establishment permit on the ground that she could not be regarded as a self-employed waitress since she was working in an employed capacity for an employer and was not working in compliance with the social legislation relating to salaried employees. In those circumstances she could not claim a right of residence in Belgium. Consequently, the Belgian authorities ordered Mrs Roux to leave the country.

4. Mrs Roux made an interlocutory application to the Tribunal de première instance (Court of First Instance), Liège, for an order that the Belgian authorities issue her with a provisional residence permit, and for a prohibition on the enforcement of the expulsion order.

5. The court hearing interlocutory matters found that the Belgian authorities were not disputing that Mrs Roux was carrying on an economic activity in Belgium. However, it noted that in Belgium there were two different residence permits, according to whether that activity is carried on as an employee or as a self-employed person.

6. Mrs Roux argued that the right of residence could not be frustrated by a distinction as to the description of the type of residence permit. For its part, the Belgian State considered that an activity could be authorized only where it was carried on in accordance with the laws, regulations and administrative provisions governing the employment of Belgian workers; that is not the case when a foreigner is employed without being registered with the ONSS.

7. By an order of 29 November 1989, the President of the Tribunal de première instance, Liège, by an interlocutory decision, ordered the Belgian State to issue Mrs Roux with a permit for provisional residence and establishment in Belgium

* Language of the case: French

pending the outcome of the interlocutory proceedings, and requested the Court of Justice to give a preliminary ruling on the four following questions:

'(1) Under Articles 3(c), 7, 48 et seq. and 52 et seq. of the EEC Treaty and Council Directives 68/360, 73/148 and 64/221, must prior registration of a worker who is a national of a Member State of the Community in a social security scheme set up by the legislation of the host State be regarded as constituting a condition of his right of residence in that State and of his right to obtain a residence or establishment permit in that State?

In particular, if there is a dispute as to the classification of the economic activity carried on by the person concerned, though not as to the actual pursuit thereof, may his registration with the social security scheme for self-employed persons rather than that for employed persons or vice versa afford justification for a measure requiring him to leave the territory, or for refusing to issue him with a residence or establishment permit?

(2) Do Article 4 of Directive 68/360 and Article 6 of Directive 73/148 (or any other provision of Community law) preclude a Member State from requiring as a condition for the issue of a residence or establishment permit either a certificate from an employer or a certificate of employment showing that the employer is registered with the national body responsible for managing the social security scheme for employed persons or evidence of registration with a social insurance scheme for self-employed persons, depending on whether the person concerned is regarded as an employed person or a self-employed person, to the exclusion of any other evidence of the economic activity carried on?

(3) Do Articles 3(c), 48 et seq. and 52 et seq. of the EEC Treaty, Regulation No 1612/68 and Directives 68/360, 73/148 and 64/221 require Member States to issue a worker who is a national of another Member State of the EEC a residence or establishment permit valid for five years, or at the very least for a period sufficient not to constitute an obstacle to the pursuit of his occupation, where there is no dispute as to the actual pursuit thereof, and/or where it has been found to fall under either Article 48 or Article 52, but there is a dispute as to its classification under those two categories?

(4) Do Articles 48(3), 56 and 66 of the EEC Treaty, Council Directive 64/221, Article 10 of Council Directive 68/360 and Article 8 of Directive 73/148 permit Member States to refuse a Community national claiming the right to freedom of movement a residence or establishment permit on the ground that he is not pursuing his economic activity in accordance with the social legislation in force, although the social legislation applicable to employed persons in the host Member State imposes an obligation to register and a corresponding penalty only on the employer of the person concerned?'

2. *Procedure before the Court*

8. The order for reference was registered at the Court Registry on 30 November 1989.

9. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities written observations were submitted:

on 16 February 1990 by Mrs Danielle Roux, represented by Luc Misson, Avocat;

on 27 February 1990 by the Commission of the European Communities, represented by its Legal Adviser, Étienne Lasnet, acting as Agent.

10. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and assigned the case to the Third Chamber in pursuance of Article 95(1) of the Rules of Procedure.

II — Written observations submitted to the Court

11. *1. Mrs Roux*, the plaintiff in the main proceedings, considers that, with regard to the first question, the observance of national social security rules is not a condition either of the right of residence or of the issue of a residence permit.

12. As the Court has consistently held, the right of residence is subject only to the condition that the person concerned is carrying on an economic activity falling within the scope of the EEC Treaty, whether it be under Article 48 or Article 52 thereof (see the judgments in Case 36/74 *Walrave* [1974] ECR 1405 and in Case 53/81 *Levin* [1982] ECR 1035).

13. Moreover, Mrs Roux considers that it is also well-established in the Court's case-law that rights conferred on individuals by the EEC Treaty or by any other provision of Community law are acquired as soon as the substantive and objective conditions giving rise thereto are met. Therefore, fundamental freedoms may not be affected by national administrative formalities which have the effect of curtailing the substance or enjoyment thereof.

14. Mrs Roux emphasizes that, in an area as fundamental to the Community legal order as the right of residence, there is a fortiori a pressing need to avoid making that right dependent on the proper accomplishment of national administrative formalities relating to questions of affiliation to one social security scheme or another.

15. The need to observe national social security rules cannot, in Mrs Roux's view, be relied on in the context of the issue of the residence permit. The Court has held that a residence permit is merely declaratory (see judgment of 8 April 1976 in Case 48/75 *Royer* [1976] ECR 497), and Member States are thus precluded from attaching to the issue of the residence permit conditions which for the purpose of the acquisition of the right of residence are prohibited.

16. Mrs Roux concludes that in her case it is manifestly unlawful to order her to leave the country for failure to produce an employer's certificate for an indefinite period bearing the employer's ONSS number, since the order to leave the country constitutes the absolute negation of the right of residence, the conditions for which she satisfies.

17. As far as evidence of belonging to the category of persons enjoying the right to freedom of movement (second question) is concerned, Mrs Roux refers to Article 4(3) of Council Directive 68/360, and to Article 6(b) of Council Directive 73/148.

18. In accordance with Article 4(3) of Directive 68/360, Member States may require, for the issue of a residence permit, only the production of a confirmation of engagement from the employer or a certificate of employment.

19. In that connection Mrs Roux argues that the Court made clear in its *Royer* judgment that Article 4 of Directive 68/360 entailed the obligation on Member States to issue a residence permit to any person presenting by way of evidence the documents exhaustively enumerated in that article, namely a confirmation of engagement from the employer or a certificate of employment.

20. Noting that no mention is made in that article of any document confirming compliance with social security rules, Mrs Roux considers that the Office des étrangers was not entitled to require an employer's certificate bearing the employer's ONSS number, or to penalize non-compliance with that requirement by refusing to issue the residence permit.

21. In Mrs Roux's opinion the same applies as regards the evidence provided for in Directive 73/148.

22. That directive uses the same restrictive and non-formalist wording as regards establishment and the provision of services as Directive 68/360 concerning the residence of employed persons. It must be inferred from the fact that Article 6(b) of Directive 73/148 does not specify the nature of the evidence to be adduced that evidence of activity in a self-employed capacity may be adduced by any means, and that the Member States are not entitled to require as evidence affiliation to a social insurance scheme for self-employed persons.

23. With regard to the question whether the classification of economic activity according to categories of persons entitled under Articles 48, 52 and 59 of the EEC Treaty affects the right of residence or the issue of a permit (third question), Mrs Roux considers that such classification is secondary in relation to the question whether an economic activity is involved.

24. The acquisition of the right of residence and the issue of a permit are conditional only on the exercise by the person concerned of an economic activity falling within the scope of the EEC Treaty, whether under Article 48 or under Articles 52 and 59 of the EEC Treaty. In Mrs Roux's view, it would be contradictory to

confer on such Community nationals carrying on an economic activity a right of residence, only to take that right away from them on the ground that there is a dispute as to whether the economic activity is being carried on as an employed person or as a self-employed person within the meaning of Community law.

25. Consequently, Mrs Roux considers that there is no overriding reason for suspending the right of residence pending determination of the question whether an economic activity is to be classified as activity carried on by an employee or by a self-employed person.

26. Mrs Roux adds that it is the Member States which are obliged to classify an economic activity as falling under either Article 48 or Article 52 of the EEC Treaty. Thus, after it has issued the residence permit the Office des étrangers may, if it considers that the person concerned is not working in conformity with Belgian social legislation, apprise the ONSS of all the relevant facts in order to enable that body to take a decision on that point in accordance with its statutory powers.

27. As regards the fourth question, Mrs Roux considers that the principle of national treatment specifically laid down in Article 7 and Article 48(3)(c) of the EEC Treaty prohibits a Member State from imposing on a Community citizen claiming the right to freedom of movement for persons and not carrying on his economic activity in conformity with the social legislation in force penalties which differ from those applicable to one of its nationals in the same situation.

28. Mrs Roux argues that under the principle of national treatment, whenever the obligation in question is a general one, that is, applying to both nationals of the host Member State and other Community citizens, the penalty for any non-compliance must be general, that is, applicable without distinction to all Community citizens including the nationals of the host Member State.

29. In order to illustrate the discriminatory situation to which any other conclusion would lead, Mrs Roux refers to the Belgian legislation on employed persons. Under Article 35 et seq. of the Law of 27 June 1969 on social security for employed persons, it is the employer alone who is subject to obligations with regard to affiliation and payment of contributions and it is the employer alone who is subject to the corresponding penalties. If the principle of dual penalties were to be accepted, the Belgian authorities would be entitled to penalize non-compliance with social legislation by employees who are nationals of other EEC Member States, whereas national workers would be immune from prosecution.

30. Mrs Roux stresses that that in no way means that deportation is not a possible sanction in the case of a worker from another Member State who failed to comply with national legislation. If such a person, after having been subject to the various penalties provided for, persisted in unlawfully carrying on his activity, it would then be possible to consider his deportation on the basis of the reservation in respect of public policy if the particular conditions for the exercise of such measures, as defined in

Directive 64/221 and as strictly interpreted by the Court, were met.

31. 2. *The Commission* points out at the outset that the questions raised are closely linked and that the reply must be focused on the specific nature of the right of residence enjoyed by Community nationals carrying on an economic activity in a Member State other than the one whose nationality they hold.

32. In that respect the Commission recalls that the Court has already exhaustively determined the scope of the right of residence. According to the Court's case-law, the right of residence is conferred directly by the EEC Treaty, where a Community national carries on an economic activity in another Member State, whether under Article 48, Article 52 or Article 59 of the EEC Treaty. Consequently, the issue by the competent authority of a Member State of a residence permit is not an act conferring rights and is merely declaratory on the part of a Member State of the individual situation of a national of a Member State in the light of provisions of Community law (see the *Royer* judgment, cited above).

33. The detailed rules governing the exercise of the right of residence are laid down in the Council directives cited by the national court. On that basis the authorities of the Member States are not entitled to place restrictions on or obstacles to the entry or residence within their territory of nationals of other Member States who fall within the personal scope of Articles 48, 52 and 59 of the EEC Treaty and are able to prove that they belong to one of those categories of persons.

34. Also referring to the Court's case-law, the Commission observes that non-compliance with the requisite formalities for a declaration that a worker protected by Community law enjoys the right of residence may be made subject by the national authorities only to penalties comparable to those applicable to national infringements. There can be no justification whatsoever for imposing a disproportionate penalty which would impede freedom of movement for workers (see the judgments in Case 157/79 *R.* v *Pieck* [1980] ECR 2171 and in Case 265/88 *Criminal proceedings against Lothar Messner* [1989] ECR 4209).

35. The Commission argues that those principles from the Court's case-law may be transposed to cases such as the one underlying this reference for a preliminary ruling.

36. In view of the fact that the Belgian authorities do not dispute that Mrs Roux does carry on an economic activity in Belgium, the Commission notes that she is entitled to claim a right of residence in Belgium, either as an employed person or as a self-employed person. The appraisal of that right under Community law may not, in the Commission's view, vary substantially according to the host State's assessment of the legal classification of that activity.

37. If Mrs Roux, as the Belgian State maintains, is carrying on an activity as an employed person, that State may, under Article 4(3) of Directive 68/360, require for the issue of a residence permit, in addition to the 'document with which [s]he entered the territory', namely the passport or identity card, only 'a confirmation of engagement from the employer or a

certificate of employment'. In no event may the registration of an employee in the social security scheme be demanded as a prerequisite for the acquisition of the right of residence, particularly since, the Commission notes, under Belgian legislation that obligation is in any event imposed on the employer. If that obligation is not observed, the penalties provided for by Belgian law should be imposed on the employer.

38. If Mrs Roux, as she maintains, is working as a self-employed person, Article 6 of Directive 73/148 provides that for the issue of the residence permit or right of abode, a Member State may require the person concerned to produce, in addition to the document with which he or she entered its territory, namely a passport or identity card, only 'proof that he or she comes within one of the classes of person referred to in Articles 1 and 4' of Directive 73/148. Accordingly, the Commission says, for a self-employed person no one form of evidence is exclusive. Thus the State cannot require a single means of proof such as a record of contributions to the social security scheme for self-employed persons. On the contrary, the details may vary according to each individual case. For example, it may involve registration in the commercial register or payment of various taxes, registration with a professional body, etc.

39. As regards the Belgian authorities' decision to expel Mrs Roux, the Commission refers to the Court's case-law according to which such a decision runs counter to the provisions of the EEC Treaty if it was based exclusively on a failure by the person concerned to comply with the legal formalities relating to the control of aliens, or to the failure to hold a residence permit (see the *Royer* judgment, cited above).

40. In conclusion, the Commission suggests that the reply to the questions should be as follows:

(a) the reply to the first question should be in the negative;

(b) the reply to the second question should be in the affirmative;

(c) the reply to the third question should be in the affirmative;

(d) the reply to the fourth question should be in the negative.

M. Zuleeg
Judge-Rapporteur