Directive 68/360 under which Member States are to grant the right of residence in their territory to workers from Member States and to their families moving within the Community.

REPORT FOR THE HEARING
delivered in Case 9/88 *

I — Facts and written procedure

1. The Act concerning the Conditions of Accession of the Kingdom of Spain and of the Portuguese Republic and the Adjustments to the Treaties, annexed to the Treaty between the 10 States which were already members of the European Communities and the Kingdom of Spain and the Portuguese Republic concerning the accession of the Kingdom of Spain and the Portuguese Republic to the European Economic Community and to the European Atomic Energy Community signed on 12 June 1985 (Official Journal 1985, L 302, p. 9) (hereinafter referred to as 'the Act of Accession'), provides in Article 215 that

'Article 48 of the EEC Treaty shall only apply, in relation to the freedom of movement of workers between Portugal and the other Member States, subject to the transitional provisions laid down in Articles 216 to 219 of this Act'.

Article 216(1) provides that:

'Articles 1 to 6 of Regulation (EEC) No 1612/68 on the freedom of movement of workers within the Community shall apply in Portugal with regard to nationals of the other Member States and in the other Member States with regard to Portuguese nationals only as from 1 January 1993'.

Article 218 provides that:

'In so far as certain provisions of Directive 68/360/EEC of the Council of 15 October 1968, on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, may not be dissociated from those of Regulation (EEC) No 1612/68 whose application is deferred pursuant to Article 216, the Portuguese Republic and the other Member States may derogate from those provisions, to the extent necessary for the application of the provisions for derogation which are laid down in Article 216 in connection with the said regulation'.

2. The Netherlands Vreemdelingenwet (Law on Aliens) (*Staatsblad* 1965, 40) draws a distinction, in respect of conditions governing entry into and residence in the

* Language of the case: Dutch.

Netherlands, between EEC nationals who enjoy preferential status and aliens who are subject to the general provisions.

Community nationals who enter the Netherlands for the purpose of employment receive a residence permit which is automatically renewable and normally valid for five years.

Aliens subject to the general provisions obtain a right of residence only after authorization which is made subject to specified conditions, some of which involve a wide discretion on the part of the authorities.

3. According to subparagraph (a) of the first paragraph of Article 91 of the Vreemdelingenbesluit (Aliens Order) (*Staatsblad* 1966, 387), every alien who is a national of a Member State of the EEC and who resides in or enters the Netherlands, either in order to pursue an activity as an employed or self-employed person or in order to receive services, is to be regarded as a favoured Community national.

The fifth paragraph of Article 91 provides that an alien who is a national of a State which has acceded to the EEC as a Member State in respect of which either the relevant Treaty of Accession or the provisions adopted pursuant to that Treaty provide for transitional arrangements, is to be treated as a favoured Community national only in so far as that status ensues from the provisions of the transitional arrangements which have been laid down.

4. Aliens employed on board vessels flying the Dutch flag are not required to hold a residence document, since residence on board a Dutch vessel is not considered to be residence in the Netherlands for the purposes of the Vreemdelingenwet. That category of alien is permitted, under Article 44 of the Vreemdelingenwet, to remain in the Netherlands during periods of leave.

The ordinary rules on the entry of aliens are applied to aliens who have been or who are employed as seamen on Dutch vessels and who wish to qualify for a residence permit.

According to the Vreemdelingencirculaire of 1982 (Circular on Aliens), aliens employed on sea-going vessels are to be granted permission to take up paid employment on shore if they have worked as seamen on board a Dutch vessel for seven consecutive years, provided that they satisfy a number of conditions relating to age and good behaviour.

A residence permit for the purpose of a family reunion may be granted to an alien member of crew who wishes to remain a seaman and who, in addition to the conditions already mentioned, satisfies the following requirements: the vessel on which he is registered must have its home port in the Netherlands; the person concerned must have suitable accommodation for his family; there must be good reason to believe that he will continue to be employed as a seaman on a Dutch vessel for at least one year.

5. Mário Lopes da Veiga, a Portuguese national from the Cape Verde Islands, has worked since 1974 as a seaman for a number of shipping companies based in the Netherlands on board vessels flying the Dutch flag. Income tax and social security

contributions deducted from his wages have been paid in the Netherlands. All vessels on which he was employed had their home port in the Netherlands, where, in addition, he spent all his periods of leave.

On 31 March 1983, Mr Lopes da Veiga registered himself on the population register of the municipality of The Hague at the address of a Netherlands national with whom he claims to have had a permanent relationship since 1978.

On 12 April 1983 he applied to the head of police of the municipality of The Hague for a residence permit. By a decision of 28 August 1985 that application was turned down. The request for a review of that decision was made on 21 October 1985 and was rejected by a decision of the Staatssecretaris van Justitie (State Secretary for Justice) of 17 January 1986 on the ground that the Community provisions relating to freedom of movement for workers did not apply to Mr Lopes da Veiga, who, it was claimed, had never worked in the territory of the Netherlands; under the transitional arrangements introduced by the Act of Accession, freedom of movement for workers of Portuguese nationality would only exist as from 1993.

6. The applicant appealed against that decision to the Raad van State (State Council), which, by a decision of 22 December 1987, stayed the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'(1) Must Article 216(1) of the Act of Accession be interpreted as meaning that Article 7 *et seq.* of Regulation (EEC) No 1612/68 of 15 October 1968 apply to a Portuguese national who works on board a Dutch vessel as the employee of an employer established in the Netherlands and who has not been granted possession of a residence document for carrying on an activity as an employed person in the territory of the Netherlands pursuant to the policy on entry generally applied to aliens or on any other basis?

(2) In the event that Question 1 is answered in the affirmative: must Article 218 of the Act of Accession be interpreted as meaning that Article 4 of Directive 68/360/EEC of 15 October 1968 is also applicable to the Portuguese national referred to in Question 1?'

7. In its decision, the Raad van State explains that in its view the person concerned, having been employed on board a Dutch vessel by a Netherlands shipping company at the time of Portugal's accession, already had, at that time, the status of a migrant worker within the meaning of Community law and that the transitional arrangements laid down in Articles 216 to 218 of the Act of Accession may not be invoked against him.

8. The decision of the Raad van State was lodged at the Court Registry on 13 January 1988.

9. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 14 April 1988 by the Commission of the European Communities, represented by A. Caeiro and B. J. Drijber, members of its Legal Department, acting as Agents; on 19 April 1988 by the Government of the Kingdom of the Netherlands, represented by E. F. Jacobs, Secretary-General to the Ministry of Foreign Affairs; on 21 April 1988 by Mário Lopes da Veiga, applicant in the main proceedings, represented by R. J. Wybenga, of the Rotterdam Bar; and on 28 April 1988 by the Government of the Portuguese

Republic, represented by Luís Fernandes, Director of the Legal Department in the General Directorate for European Affairs, and by Maria Luísa Duarte, Legal Adviser in the General Directorate for European Affairs.

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. The Government of the Kingdom of the Netherlands was requested to answer a question and did so within the stipulated period.

11. In accordance with Article 95(1) and (2) of the Rules of Procedure, the Court, by decision of 26 April 1989, assigned the case to the Sixth Chamber.

II — Written observations submitted to the Court

1. Mário Lopes da Veiga, the applicant in the main proceedings, points out that he has already been authorized to reside in the Netherlands in connection with his employment. The fact that he has not formally been granted a residence or a work permit cannot be relied on against him because as a favoured Community national, he may exercise his right irrespective of whether or not he has been issued with such a residence document. His employment relationship with his employer constitutes a connection with Netherlands territory and should be treated as equivalent to employment in the territory of the Netherlands. The purpose behind the transitional arrangements in the Act of Accession is to prevent a sudden increase in the number of aliens in any Member State resulting from an unexpected influx of workers. However, he had already secured his position on the Netherlands labour market and for that reason ought to be entitled to equal treatment.

The first question must therefore be answered in the affirmative.

Since Article 7 *et seq.* of Regulation (EEC) No 1612/68 (Official Journal, English Special Edition 1968 (II), p. 475) apply to him, he should be treated as a national within the meaning of Article 1 of Directive 68/360 (Official Journal, English Special Edition 1968 (II), p. 485). Article 4 of that directive provides that Member States are to grant the right of residence to the national in question who is able to produce a travel document and a declaration from his employer.

For those reasons, the applicant argues, the answer to the second question should also be in the affirmative.

2. The Netherlands Government first outlines the provisions applicable to seamen and former seamen. There is complete freedom of access in relation to work and residence on board sea-going vessels flying the Dutch flag. With regard to residence on shore, disembarkation between voyages does not entitle an individual to a residence permit. With regard to active employment on shore or problems connected with family reunions, the general rules relating to aliens apply. The Netherlands Government draws attention to the conditions under which alien seamen may be granted permission to hold paid employment on shore or to stay for the purpose of a family reunion.

Vessels flying the Dutch flag are not an integral part of Netherlands territory and

the exercise of employment on board such a vessel does not come within the ambit of the Netherlands labour market. Article 216 of the Act of Accession allows a distinction to be drawn between the pursuit of an activity on board a vessel flying the Dutch flag and the pursuit of an activity in the territory of the Netherlands.

The Netherlands Government therefore suggests that the first question should be answered in the negative.

The Netherlands Government adds, superfluously, that the second question must also be answered in the negative. The scope of Regulation No 1612/68 is limited to Community nationals pursuing an activity within a Member State. The provisions concerning employment on board vessels flying the Dutch flag, which, in one respect, are broader than the normal rules, inasmuch as there is no restriction on the admission of aliens, and which, in another respect, are more restrictive, in so far as no residence permit will be granted for the purpose of residence in Netherlands territory, comply with the EEC Treaty. Moreover, those conditions are not discriminatory and are not at variance with the interpretation of Community law given by the Court in its judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359. Since the territorial scope of Regulation No 1612/68 is limited to the territory of the Member States, the Commission submitted to the Consultative Committee on Freedom of Movement for Workers a preliminary draft for an amendment to that regulation extending its scope beyond the territory of the Member States.

3. The Government of the Portuguese Republic states that the general principle of freedom of movement for workers enshrined in Article 48 *et seq.* of the EEC Treaty and implemented by Regulation No 1612/68 and Directive 68/360 has been made subject to a number of derogations by the Act of Accession. Article 216 of the Act of Accession suspends the application of Articles 1 to 6 of Regulation No 1612/68 until 1 January 1993, thereby removing the opportunity for Portuguese workers to move within the Community for the purposes of seeking and pursuing paid employment there. The principle of equality of treatment set out in Article 7 *et seq.* of Regulation No 1612/68 cannot, however, be denied to those Portuguese workers who were already working or who had acquired lawful employment in the Community on 1 January 1986.

The right of residence is an essential element of the principle of freedom of movement for persons and has its legal basis in Article 48(3)(c) of the EEC Treaty and Article 4 of Directive 68/360. The Court has confirmed the purely declaratory nature of the residence permit granted by national authorities to nationals of other Member States and has ruled that those authorities do not have the discretionary power of assessment which has been traditionally applicable to all aliens. As in the case of the principle of equal treatment, Member States cannot, by relying on the restrictions laid down in Article 218 of the Act of Accession, prohibit the exercise of the right of residence established by Directive 68/360, and in particular by Article 4 thereof, by Portuguese nationals who were already working or who had acquired lawful employment in the Community in 1986.

Employment on board a vessel must be governed in law within the territory of the State in which the vessel is registered. In its judgment of 4 April 1974 (already cited),

the Court accepted that Community law applied to seamen who were nationals of a Member State of the Community and who were employed on board a vessel flying the flag of another Member State. The provisions of Community law relating to freedom of movement for workers are applicable to maritime employment, except in the case of an express derogation. The derogation provided for in Article 61(1) of the Treaty is confined to the provision of services and the Council has never used the powers conferred on it by Article 84(2) to lay down specific provisions for sea transport.

In those circumstances, the Portuguese Republic proposes that the Court should reply as follows to the questions submitted by the Raad van State:

'(1) Article 216(1) of the Act of Accession should be interpreted as meaning that Article 7 *et seq.* of Regulation No 1612/68 are applicable to a Portuguese national who is working legally, as an employed person, in the territory of a Member State, irrespective of the nature of the activity being exercised, including that of seaman.

(2) Article 218 of the said Act of Accession must therefore be understood as meaning that Article 4 of Directive 68/360 also applies to the Portuguese national referred to above'.

4. The Commission points out that Netherlands law contains no general rules defining the territory of the Kingdom in the geographical sense. The State of the Netherlands does not regard vessels flying the Dutch flag as forming part of the territory of the Netherlands and no right of residence in the territory of the Netherlands may be derived from employment on board a vessel flying the Dutch flag. With regard to the system of unemployment insurance in the Netherlands, the law stipulates, for the purpose of determining the domicile of the crew of vessels, that those vessels which have their home port in the Netherlands are deemed to form part of the national territory. The same legislation, however, denies the status of worker to any alien who is a member of the crew of a vessel which has its home port in the Netherlands, when such person resides on board that vessel. In view of Article 13(2)(c) of Regulation No 1408/71 (see Council Regulation (EEC) No 2083/83 of 2 June 1983 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 — Official Journal 1983, L 230, p. 1), that provision must remain inapplicable to aliens who are nationals of a Member State of the Communities. For those reasons, the applicant in the main proceedings has been able since 1 January 1986, to claim unemployment benefit paid in the Netherlands if he were to become unemployed.

Turning to the problems of the right of residence, the Commission observes that the Court has already had occasion to rule on the interpretation of the transitional measures relating to freedom of movement for workers contained in the Act of Accession in its judgment of 23 March 1983 in Case 77/82 *Peskeloglou* v *Bundesanstalt für Arbeit* [1983] ECR 1085 and in Case C-3/87 *Agegate* [1989] ECR 4459. Those cases, unlike the present one, concerned situations where States already members of the Community had enacted, subsequent to the accession of Greece and Spain, new restrictive measures governing the carrying on of paid employment by Greek nationals on German territory (judgment of 23 March

1983, already cited) and by Spanish nationals on board fishing vessels flying the British flag (*Agegate* case, already cited).

In order to answer the questions referred by the Raad van State, the Commission believes that it is necessary to settle two preliminary questions, the first relating to the applicability of Article 48 of the EEC Treaty to seamen, the second to the legal nexus existing between the employment of the person concerned and the territory of the Community.

It regards the applicability to seamen of Article 48 of the EEC Treaty, the Commission points to the extensive case-law of the Court according to which the concept of worker has a Community meaning and must not be given a restrictive interpretation. The work of a seaman on board a vessel constitutes an employment relationship, defined in the judgment of 3 July 1986 in Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2139, as being a relationship in which a person performs services, for a certain period of time, for and under the direction of another person in return for which he receives remuneration. The Court, in its judgment of 4 April 1974 (*Commission* v *French Republic*, already cited), has also held that Article 48 of the Treaty and Regulation No 1612/68 apply to employment in the merchant navy. If a sailor is able to invoke the prohibition of discrimination laid down in Article 48, he is equally able to assert the rights conferred by secondary Community law based on Article 49 of the Treaty, including, in particular, Directive 68/360.

As regards the connection between the territory of the Community and the activity exercised by the person concerned, the Commission believes that the legal effects of the labour relationship may be localized in the territory of the Netherlands. The person in question is working on board a vessel flying the Dutch flag and is employed by a shipping company incorporated under the law of the Netherlands and established in that State; Netherlands tax and Netherlands social security contributions are deducted from his wages.

As regards the first question referred by the national court, the Commission observes that any derogation from the principle of freedom of movement must be strictly interpreted. Article 216(1) of the Act of Accession suspends the application only of Articles 1 to 6 of Regulation No 1612/68, which relate to the seeking and acceptance of paid employment by a national of one Member State in the territory of another Member State.

Thus, according to the wording of Article 216(1) of the Act of Accession, Article 7 *et seq.* of Regulation No 1612/68 are indeed applicable to a Portuguese national, just as, according to Article 56(1) of the Act of Accession, they apply to a Spanish national.

The *ratio legis* of the transitional measures is the desire to restrict access for Portuguese nationals during a certain period to the labour market of the other Member States; however, there is no reason to deny to Portuguese nationals who were already working in another Member State at the date of accession the rights and advantages conferred by Title II of Regulation No 1612/68.

Article 217(1) of the Act of Accession lays down special conditions for the application of Article 11 of Regulation No 1612/68 contained in Title III relating to the rights of members of the family, which proves that those provisions do, in principle, apply to migrants. The same must be true *a fortiori*

of the rights provided for in Title II for the benefit of the migrant worker himself.

The Commission believes that it can derive a further argument from Article 379(4) of the Act of Accession, which reads as follows:

'If difficulties arise which are serious and liable to persist in the employment market of the Grand Duchy of Luxembourg, that State may apply for authorization, in accordance with the procedure set out in the first and second subparagraphs of paragraph 2 and under the conditions defined in paragraph 3, to apply provisionally until 31 December 1995 protective measures within the framework of national provisions governing change in employment, with regard to workers who are nationals of a new Member State allowed to immigrate to the Grand Duchy after the date of that authorization with a view to taking up employment there'.

As far as the Grand Duchy of Luxembourg is concerned, the special transitional arrangement introduced by the third subparagraph of Article 216(1), which provides for the maintenance in force, until 31 December 1995, of national provisions dealing with the movement of Portuguese workers, is supplemented by Article 379(4). That provision allows the Grand Duchy of Luxembourg to apply provisionally until 31 December 1995 protective measures within the framework of national provisions governing change in employment, in the event that difficulties should arise which are serious and liable to persist in the employment market. That provision thus allows Portuguese nationals to be denied certain rights other than those relating to access to paid employment. It is a measure which derogates from the general rule under which Portuguese nationals who have lawful paid employment in other Member States have the right to change jobs.

The non-possession of a residence permit for pursuing paid employment in the Netherlands in no way affects the right conferred on the applicant in the main proceedings by Regulation No 1612/68 (judgment of 8 April 1976 in Case 48/75 *Royer* [1976] ECR 497).

In those circumstances, the Commission proposes that the Court should give the following reply to the first question:

'Article 216(1) of the Act concerning the Conditions of Accession of the Kingdom of Spain and the Portuguese Republic of 1985 must be understood as meaning that Article 7 *et seq.* of Regulation (EEC) No 1612/68 apply to a Portuguese national who, since a date prior to the accession of Portugal, has been employed on board a vessel flying the flag of another Member State by an employer established in that Member State and who has not been granted possession of a residence permit for carrying on an activity as an employed person within the territory of that Member State'.

As regards the second question referred by the national court, which concerns the interpretation of Article 218 of the Act of Accession, the Commission believes that the right of a migrant worker to a residence permit is not inseparably linked to the provisions of Title I of Regulation No 1612/68 but is related to Title II dealing with employment and equality of treatment. The issue of a residence permit is a condition for the application of the principle of equal treatment. Article 218 of the Act of Accession does not therefore prevent Article 45 of Directive 68/360 from applying in the case of Portuguese nationals who were already gainfully employed in another Member State at the date of Portugal's accession.

The answer to the second question should therefore be that:

'Article 218 of the Act of Accession must be understood as meaning that Article 4 of

Directive 68/360 is also applicable to the Portuguese national referred to in the first question'.

III — Answer to the question put by the Court

The Netherlands Government was asked to explain why Netherlands legislation makes a distinction between the exercise of an activity on board a vessel flying the Dutch flag and the exercise of an activity in the territory of the Netherlands.

In reply, it explained that vessels flying the Dutch flag often have only a formal connection with the Netherlands. Such vessels rarely, sometimes never, call at Dutch ports and the centre of their activities is situated in another part of the world where the seamen are also recruited. Work carried out on board those vessels has no effect on the Netherlands labour market. Other Member States also have legislation under which vessels flying their flag are not required to apply national laws in full. The distinction made by Netherlands legislation is also designed to maintain in existence a Dutch merchant fleet; it is necessary to prevent ships from taking the flag of States which impose less stringent conditions; one factor is that shipowners wish to avoid excessive labour costs.

Asked to explain the rules of Netherlands public law, labour law and social security legislation which apply to alien seamen working on board Dutch vessels and the conditions under which those rules apply, the Netherlands Government replied that Netherlands law does not apply, in the majority of cases, to alien seamen working on board Dutch vessels. As the position varies depending on the matter under consideration, the Netherlands Government reviews in turn different branches of the law.

Criminal law is fully applicable to acts committed on board a vessel flying the Dutch flag.

The law relating to the employment of aliens does not apply to seamen.

The Commercial Code contains specific rules relating to contracts of employment in sea transport; pursuant to those rules, the provisions of the Civil Code are generally applicable.

With regard to social security and tax legislation, the test is that the person concerned must have a connection with the Netherlands. Thus, public insurance schemes and insurance schemes for employed persons only cover seamen who are domiciled in the European territory of the Netherlands.

The Law on Minimum Wages and Minimum Holiday Pay applies only to members of the crew on board vessels whose home port is situated in the Netherlands if they live either in the territory of the Netherlands or on board the vessel, and they have no permanent address on shore.

The Law on Working Hours and Periods of Rest in Maritime Transport applies only to persons working on board vessels.

F. A. Schockweiler
Judge-Rapporteur