JUDGMENT OF THE COURT

21 September 1999 *

In Case C-378/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Arrondissementsrechtbank te Rotterdam, Netherlands, for a preliminary ruling in the criminal proceedings before that court against

Florus Ariël Wijsenbeek

on the interpretation of Articles 7a and 8a of the EC Treaty (now, after amendment, Articles 14 EC and 18 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, J.-P. Puissochet and P. Jann (Presidents of Chambers), J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón (Rapporteur) and M. Wathelet, Judges,

Advocate General: G. Cosmas,

Registrar: D. Louterman-Hubeau, Principal Administrator,

* Language of the case: Dutch.

after considering the written observations submitted on behalf of:

— Florus Wijsenbeek, by J.L. Janssen van Raay, of the Rotterdam Bar,

— the Netherlands Government, by J.G. Lammers, Acting Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Spanish Government, by N. Díaz Abad, Abogado del Estado, acting as Agent,

— the Irish Government, by M.A. Buckley, Chief State Solicitor, acting as Agent,

— the Finnish Government, by H. Rotkirch, Ambassador, Head of Legal Affairs in the Ministry of Foreign Affairs, and T. Pynnä, Legal Adviser in the same Ministry, acting as Agents,

— the United Kingdom Government, by S. Ridley, of the Treasury Solicitor's Department, acting as Agent, and by P. Sales and M. Hoskins, Barristers,

— the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Wijsenbeek, represented by himself and by J.L. Janssen van Raay; of the Netherlands Government, represented by M.A. Fierstra, Head of the Department for European Law at the Ministry of Foreign Affairs, acting as Agent; of the Spanish Government, represented by S. Ortíz Vaamonde, Abogado del Estado, acting as Agent; of the Irish Government, represented by D. McGuinness, Barrister; of the United Kingdom Government, represented by P. Sales and M. Hoskins; and of the Commission, represented by P.J. Kuijper, at the hearing on 12 January 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 March 1999,

gives the following

Judgment

1 By judgment of 30 October 1997, received at the Court on 5 November 1997, the Arrondissementsrechtbank (District Court) Rotterdam referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 7a and 8a of the EC Treaty (now, after amendment, Articles 14 EC and 18 EC).

2 The two questions have been raised in criminal proceedings brought against Florus Ariël Wijsenbeek for refusing, in breach of the applicable Netherlands legislation, to present his passport and establish his Netherlands nationality when entering the Netherlands.

Law applicable

3 Article 23(1)(a) of the Vreemdelingenbesluit (Aliens Order of 19 September 1966, *Stb.* 1966, 387, hereinafter 'the Order') provides that foreigners entering the Netherlands must present and hand over the document in their possession for crossing the frontier if requested to do so by an official charged with border inspections.

4 Article 25 of the Order provides that Netherlands nationals who enter the Netherlands must, on request, present and hand over to an official charged with border inspections the travel and identity papers in their possession and establish if necessary by any other means their Netherlands nationality.

5 The Order was adopted on the basis of Article 3(1) of the Wet van 13 januari 1965, houdende nieuwe regelen betreffende: a. de toelating en uitzetting van vreemdelingen, b. het toezicht op vreemdelingen die in Nederland verblijf houden, c. de grensbewaking (Netherlands Law of 13 January 1965 containing new rules on (a) access and expulsion of foreigners, (b) monitoring of foreigners residing in the Netherlands, (c) border controls, *Stb.* 1965, 40). Under Article 44 of that Law, any infringement of the Order is liable to a criminal penalty.

6 Article 7a of the EC Treaty provides:

'The Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions of this Article and of Articles 7b, 7c, 28, 57(2), 59, 70(1), 84, 99, 100a and 100b and without prejudice to the other provisions of this Treaty.

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

7 Article 8a of the Treaty provides:

'1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act unanimously on a proposal from the Commission and after obtaining the assent of the European Parliament.'

8 When the Final Act to the Single European Act (hereinafter 'the Single Act') was signed on 17 and 28 February 1986, the Conference of Government Representatives adopted in particular a declaration on Article 8a of the EEC Treaty, which was introduced by Article 13 of the Single Act and which became Article 7a of the EC Treaty (hereinafter 'the Declaration on Article 8a of the EEC Treaty') and a general declaration on Articles 13 to 19 of the Single Act (hereinafter 'the Declaration on Articles 13 to 19 of the Single Act').

9 The first of those two declarations is worded as follows:

'The Conference wishes by means of the provisions in Article 8a to express its firm political will to take before the 1 January 1993 the decisions necessary to complete the internal market defined in those provisions, and more particularly

the decisions necessary to implement the Commission's programme described in the White Paper on the Internal Market.

Setting the date of 31 December 1992 does not create an automatic legal effect.'

10 In its declaration on Articles 13 to 19 of the Single Act, the Conference declared:

'Nothing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries, and to combat terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.'

11 The Conference also took note in particular of a political declaration by the Governments of the Member States on the free movement of persons, which stated:

'In order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of nationals of third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.'

12 Article 3(1) of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485) and of Council Directive 73/148/EEC of 21 May 1973 on the

abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14) provides:

'Member States shall allow the persons referred to in Article 1 to enter their territory simply on production of a valid identity card or passport.'

13 Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28) and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59) refer, in the first subparagraph of Article 2(2), in particular to Article 3 of Directive 68/360.

Procedure in the main proceedings

14 Mr Wijsenbeek, a Dutch national, is accused of having refused, when entering the Netherlands through Rotterdam airport on 17 December 1993, to present and hand over his passport to the national police officer responsible for border controls and to establish his nationality by other means, in breach of Article 25 of the Order.

15 Mr Wijsenbeek accepts the facts on which the prosecution is based. However, he denies that he has committed an offence. He maintains that at Rotterdam airport where he disembarked from a scheduled flight from Strasbourg there are only scheduled flights from and to other Member States and that Article 25 of the Order is contrary to Articles 7a and 8a of the Treaty.

16 By judgment of 8 May 1995 the Kantonrechter (Magistrate) ordered Mr Wijsenbeek to pay a fine of NLG 65 or to serve one day's imprisonment, for infringement of Article 25 of the Order.

17 Mr Wijsenbeek appealed against that decision to the Arrondissementsrechtbank te Rotterdam, which decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Are the second paragraph of Article 7a of the EC Treaty, which provides that the internal market is to comprise an area without internal frontiers in which the free movement of persons is ensured, and Article 8a of the EC Treaty, which confers on all citizens of the Union the right to move and reside freely within the territory of the Member States, to be interpreted as precluding national legislation of a Member State imposing an obligation, accompanied by criminal penalties for failure to comply, on persons (whether or not citizens of the European Union) to present a passport on entry into a Member State whenever that person enters the Member State through the national airport coming from another Member State?

2. Does any other provision of Community law preclude such an obligation?'

Admissibility

18 The Irish Government considers that the questions are inadmissible on the ground that, since the case concerns the application in the Netherlands of a Netherlands provision to a Netherlands national, the case is purely internal (see Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 37) and that the judgment by which the reference was made does not contain the explanations of fact necessary

to enable the Court to answer the questions submitted, in particular the question whether Mr Wijsenbeek started his journey in a Member State or in a non-member country.

19 On this point, the Commission points out that, on his return to the Netherlands, Mr Wijsenbeek exercised his right to free movement within the Community, so that he can receive the protection resulting from Community law (see Case C-370/90 *Singh* [1992] ECR I-4265).

20 First of all, the Court finds that Mr Wijsenbeek's statement that his flight came from Strasbourg is not contested.

21 Consequently, the judgment making the reference and the written and oral observations give the Court sufficient information to enable it to interpret the rules of Community law in relation to the situation which is the subject of the main proceedings (see, in particular, Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 14).

22 Secondly, in arriving at an airport of the Member State of which he is a national on a flight from another Member State, Mr Wijsenbeek was using his right to move freely, which is a right conferred by the Treaty on nationals of the Member States. If those nationals, who have a right to move freely within the other Member States (Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 15) were not able to avail themselves of this right in their State of origin, the right could not be fully effective (see, to this effect, *Singh*, cited above, paragraphs 21 and 23).

23 The questions submitted therefore concern the interpretation of Community law so that the Court of Justice is bound in principle to give a ruling (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

The questions submitted for a preliminary ruling

24 By its questions, which can be examined together, the national court asks essentially whether Article 7a or Article 8a of the Treaty prohibits a Member State from requiring a person, whether or not a citizen of the European Union, under threat of criminal penalties, to establish his nationality when entering the territory of that Member State by an internal Community frontier.

25 Mr Wijsenbeek argues that, since 1 January 1993, the end of the period expiring on 31 December 1992, Article 7a of the Treaty has direct effect and that the Member States no longer have competence in this field, since Article 3(c) of the EC Treaty [now, after amendment, Article 3(1)(c) EC] and Article 7a of the Treaty entail a complete transfer of competences to the Community.

26 He claims that those provisions, as well as Directives 68/360 and 73/148, directly prohibit internal border controls. Since the Court considers that any tourist is a recipient of services, it must also hold that, after 1 January 1993, any person who crosses a border is a consumer. If Article 7a of the Treaty is to be interpreted reasonably, as is done in the case of the free movement of goods, freedom of movement for persons implies at least that the internal frontiers may be crossed without the slightest control and that the control of persons should take place at the external borders.

27 The Spanish, Irish and United Kingdom Governments consider that neither Article 7a nor Article 8a of the Treaty have direct effect, so that Mr Wijsenbeek cannot rely on those provisions before the national court. The Netherlands Government and the Commission, for their part, maintain that Article 7a of the Treaty has no direct effect. All these parties consider that the abolition of controls at the Community's internal frontiers requires accompanying measures.

28 According to the Commission, abolition of those controls concerns all persons, since the maintenance of controls for nationals of non-member countries at internal frontiers would mean that they would have to be distinguished from nationals of the Member States and that the latter would therefore also have to undergo controls. Consequently, special Community measures at the external borders would be necessary in order that no Member State has to deal with undesirable foreigners from non-member countries entering via another Member State.

29 In this regard, the Netherlands Government points out that those Community measures concerning the external borders entail, in particular, an equivalent level of surveillance of borders, harmonisation of conditions of access, a common visa policy, rules for applicants for asylum making their application in more than one Member State, intensification of cooperation between police forces and the judiciary and the creation of a common computerised information exchange system.

30 According to the United Kingdom Government, since, as Community law stands at present and contrary to the situation concerning the free movement of goods, no common Community policy governs, in particular, the entry of nationals of non-member countries into the Member States, each Member State retains the right to adopt its own immigration policy (see also the Declaration on Articles 13 to 19 of the Single Act) and to require each person who tries to enter its territory to present a valid identity card or passport, this being the only means of distinguishing nationals of non-member countries from nationals of Member States of the Community.

31 To the Irish Government and the Commission it is clear from the declarations annexed to the Single Act, in particular the Declaration on Article 8a of the EEC Treaty, adopted by the Conference of Government Representatives in order to prevent that article from having direct effect from 1 January 1993, that Article 7a of the Treaty is not unconditional and that it leaves some latitude in its implementation.

32 The Netherlands and Irish Governments and the Commission also consider that it is clear from the judgment in Case C-297/92 *Baglieri* [1993] ECR I-5211, paragraph 16, that, in the absence of any measure adopted by the Council in the matter, the Member States are not automatically subject to the obligation to abolish border controls the day after 31 December 1992.

33 The Netherlands and United Kingdom Governments submit that, even if Article 7a of the Treaty could have direct effect, it does not prohibit internal border controls. That article does not go further than the other provisions of the Treaty. According to these two governments, the provisions of the Treaty on freedom of movement for persons, namely Articles 48, 52 and 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC), and the legislation adopted in accordance with those provisions, namely Directives 90/364, 90/365 and 93/96, confer direct rights exclusively on nationals of the Member States of the Community whereas nationals of non-member countries are given no independent right to freedom of movement (see *Singh*, cited above). Since it is impossible to carry out border controls on a single category of persons, the right of the Member States to require any person to present a valid identity card or passport is expressly recognised by Article 3(1) of Directives 68/360 and 73/148.

34 As regards Article 8a of the Treaty, the Irish and United Kingdom Governments consider that, like Article 7a of the Treaty, it requires supplementary measures, such measures not yet having been adopted.

35 The Commission, on the other hand, considers that the direct effect of Article 8a(1) of the Treaty is incontestable. The right to move and reside freely within the territory of the Member States is recognised directly in that provision, without any reservation and without the slightest scope for the exercise of discretion, to every citizen of the Union. The fact that this right is subject to the 'limitations and conditions laid down in this Treaty and by the measures adopted to give it effect' does not affect this conclusion in any way (see Case 2/74 *Reyners* [1974] ECR 631; Case 33/74 *Van Binsbergen* [1974] ECR 1299; and Case 41/74 *Van Duyn* [1974] ECR 1337). The implementing measures which the Council

may take under Article 8a(2) of the Treaty are to facilitate the exercise of the rights referred to in paragraph (1) and they confirm the direct effect of that latter provision.

36 As regards the scope of Article 8a of the Treaty, the Commission states that the right to move and reside freely constitutes an autonomous substantive right subject to the specific limitations and conditions laid down in the Treaty and its implementing provisions. This new right conferred on citizens of the Union should be interpreted broadly and its exceptions and limitations should be interpreted strictly. However, as long as specific Community rules concerning controls at the Community's external borders have not been adopted and put into effect, the requirement to produce a valid passport or identity card at internal frontiers, provided for in Article 3(1) of Directive 68/360, does not constitute an abusive obstacle to the right to move freely within the Community and is not disproportionate.

37 To the Netherlands, Finnish and United Kingdom Governments it is clear from the wording of Article 8a of the Treaty that this provision, too, also does not create a right to move and reside freely which goes beyond the existing provisions of the Treaty and the measures adopted to give it effect. Article 8a of the Treaty does not therefore add any additional element in relation to Article 7a of the Treaty. In any event, according to the United Kingdom Government, since the rights conferred by Article 8a apply only to persons having the nationality of a Member State, identity checks at borders must be allowed.

38 The Finnish Government adds that a Member State is entitled to apply criminal penalties for failure to present the travel documents required, provided that the penalties applicable are not, in view of the type of offence committed, so severe that they actually constitute an obstacle to the free movement of persons (Case 8/77 *Sagulo and Others* [1977] ECR 1495, paragraph 12).

39 The Court observes that the first paragraph of Article 7a of the Treaty provides that the Community is to adopt measures with the aim of progressively establishing the internal market before 31 December 1992, in accordance with the provisions of the Treaty cited in that provision. Under the second paragraph of Article 7a, the internal market is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.

40 That article cannot be interpreted as meaning that, in the absence of measures adopted by the Council before 31 December 1992 requiring the Member States to abolish controls of persons at the internal frontiers of the Community, that obligation automatically arises from expiry of that period. As the Advocate General points out in point 77 of his Opinion, such an obligation presupposes harmonisation of the laws of the Member States governing the crossing of the external borders of the Community, immigration, the grant of visas, asylum and the exchange of information on those questions (see, to this effect, as regards social security, *Baglieri*, cited above, paragraphs 16 and 17).

41 Moreover, Article 8a(1) of the Treaty confers the right to move and reside freely in the territory of the Member States on citizens of the Union, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect. According to Article 8a(2) of the Treaty, the Council may adopt provisions with a view to facilitating the exercise of those rights.

42 However, as the Commission has rightly pointed out, as long as Community provisions on controls at the external borders of the Community, which also imply common or harmonised rules on, in particular, conditions of access, visas and asylum, have not been adopted, the exercise of those rights presupposes that the person concerned is able to establish that he or she has the nationality of a Member State.

43 At the time of the events in question in the main proceedings, there were no common rules or harmonised laws of the Member States on, in particular, controls at external frontiers and immigration, visa and asylum policy. Consequently, even if, under Article 7a or Article 8a of the Treaty, nationals of the Member States did have an unconditional right to move freely within the territory of the Member States, the Member States retained the right to carry out identity checks at the internal frontiers of the Community, requiring persons to present a valid identity card or passport, as provided for by Directives 68/360, 73/148, 90/364, 90/365 and 93/96, in order to be able to establish whether the person concerned is a national of a Member State, thus having the right to move freely within the territory of the Member States, or a national of a non-member country, not having that right.

44 In the absence of Community rules governing the matter, the Member States remain competent to impose penalties for breach of such an obligation, provided that the penalties applicable are comparable to those which apply to similar national infringements. However, Member States may not lay down a penalty so disproportionate as to create an obstacle to the free movement of persons, such as a term of imprisonment (see, in particular, Case C-265/88 *Messner* [1989] ECR 4209, paragraph 14, and Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 36). The same considerations apply as regards breach of the obligation to present an identity card or a passport upon entry into the territory of a Member State.

45 The answer to be given to the questions submitted must therefore be that, as Community law stood at the time of the events in question, neither Article 7a nor Article 8a of the Treaty precluded a Member State from requiring a person, whether or not a citizen of the European Union, under threat of criminal penalties, to establish his nationality upon his entry into the territory of that Member State by an internal frontier of the Community, provided that the

penalties applicable are comparable to those which apply to similar national infringements and are not disproportionate, thus creating an obstacle to the free movement of persons.

Costs

46 The costs incurred by the Netherlands, Spanish, Irish, Finnish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Arrondissementsrechtbank te Rotterdam by judgment of 30 October 1997, hereby rules:

As Community law stood at the time of the events in question in the main proceedings, neither Article 7a nor Article 8a of the EC Treaty (now, after amendment, Articles 14 EC and 18 EC) precluded a Member State from requiring a person, whether or not a citizen of the European Union, under threat of criminal penalties, to establish his nationality upon his entry into the territory

of that Member State by an internal frontier of the Community, provided that the penalties applicable are comparable to those which apply to similar national infringements and are not disproportionate, thus creating an obstacle to the free movement of persons.

Rodríguez Iglesias Kapteyn Puissochet

Jann Moitinho de Almeida Gulmann

Murray Edward Ragnemalm

Sevón Wathelet

Delivered in open court in Luxembourg on 21 September 1999.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President