OPINION OF ADVOCATE GENERAL LÉGER
delivered on 21 October 2004 [1]

1. This case raises the problem of the connection between the right of a national of a Member State to reside in another Member State and the proof of his nationality that he must produce. Accordingly the Court is asked to determine whether such a person's right of residence may be subject to the production of a valid identity card or passport and whether, in the event of failure to fulfil that obligation, a Community national may be detained with a view to deportation.

I — Legal context

A — *Community law*

2. 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 [2] lays down the practical arrangements for implementing the articles of the Treaty relating to the freedom of establishment and the freedom to provide services. Adopted on the basis of Article 54(2) (later, after amendment, Article 54(2) of the EC Treaty and then, after amendment, Article 44(2) EC) and Article 63(2) (later Article 63 (2) of the EC Treaty and then, after amendment, Article 52(2) EC) of the EEC Treaty, one of its objectives is to give persons providing and receiving services a right of residence of the same duration as that of the services.

3. Consequently Article 4(2) of Directive 73/148 provides as follows:

'The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

1 — Original language: French.

2 — OJ 1973 L 172, p. 14. This directive was repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

Where such period exceeds three months, the Member State in the territory of which the services are performed shall issue a [residence certificate] as proof of the right of residence.

Where the period does not exceed three months, the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay. The Member State may, however, require the person concerned to report his presence in the territory.'

B — *National legislation*

4. Article 50 of the Vreemdelingenwet of 23 November 2000 ('Law on Aliens 2000') provides that persons suspected of illegal residence may be stopped for the purpose of establishing their identity, nationality and status with reference to the right of residence. If the identity of the person stopped cannot be established immediately, he may be taken to an appropriate place for questioning and kept there for not more than six hours, which may be extended to not more than 48 hours if it may still be presumed that the person stopped is not legally resident.

5. Article 59 of the Law provides that, if necessary by reason of public policy or national security, an alien not legally resident may be taken into detention with a view to deportation.

6. In addition, the Vreemdelingenbesluit of 23 November 2000 (Decree on Aliens, implementing the Law of the same date) contains provisions applying to nationals of Member States other than the Netherlands. Article 8:13, paragraph 1, of the Decree states that 'a Community national shall not be deported unless it appears that such person does not possess a right of residence or that his right of residence has expired'.

7. Finally, the Vreemdelingencirculaire 2000 (Circular on Aliens) provides that an alien residing in the Netherlands who pleads rights based on the EC Treaty, but who fails to produce a valid identity card or passport 'shall be given an opportunity to produce that document'. He is given two weeks in which to do so.

II — The facts and procedure of the main proceedings

8. On 2 December 2001 Mr Salah Oulane was arrested by the police for questioning on

suspicion of attempted theft and detained at a place provided for that purpose. As no criminal proceedings were brought against him, he was released on 3 December 2001.

9. Immediately afterwards, he was stopped pursuant to the Law on Aliens 2000 in the course of an internal check on aliens. As he was unable to prove his identity on the spot, he was held for questioning. He was then detained with a view to deportation under that Law.

10. During questioning, Mr Oulane gave his date of birth and stated that he had French nationality. He also said that he had resided in the Netherlands for approximately three months on holiday. He added that at that time he had no passport or other identity document and that he had no fixed abode in the Netherlands, that he had no money and that he had not registered with the office responsible for aliens.

11. By letter of 4 December 2001, he brought an action before the Rechtbank te 's-Gravenhage seeking the lifting of the detention order for the purpose of deportation, together with damages.

12. On 7 December 2001 he finally produced a French identity card to the Netherlands authorities.

13. On 10 December 2001, the eighth day of detention, the Netherlands authorities lifted the order detaining him for the purpose of deportation.

14. This first claim for damages before the national court is one of the two stages of the dispute that it must determine.

15. Other circumstances led Mr Oulane to commence a second action.

16. On 27 July 2002 he was arrested by the railway police in a goods tunnel of Rotterdam Central station for a breach of Article 7 of the Algemeen reglement vervoer (General Regulation relating to Transport) on the ground that he had no authorisation to be in a place prohibited to the public. As no criminal proceedings were brought against him, he was released two hours later.

17. After being stopped once again under the Law on Aliens 2000, he was again held for questioning. He was then placed under detention with a view to deportation under that law.

18. In the course of questioning, he stated that he was not in possession of identity documents and that his passport had been stolen. He added that he had been in the Netherlands for 18 days and that he had no fixed abode or residence there. He also gave his mother's address and telephone number in France.

19. It has been shown that the authorities had a copy of Mr Oulane's national identity card while he was in detention.

20. By letter of 29 July 2002 he instituted proceedings before the Rechtbank te 's-Gravenhage seeking the lifting of the detention order for the purpose of deportation and claiming damages.

21. The Netherlands authorities informed that court of the lifting of the detention order by letter received by the court registry on 29 July 2002.

22. Finally, Mr Oulane was deported to France on 2 August 2002.

III — The reference for a preliminary ruling

23. In its request for a preliminary ruling, the Rechtbank te 's-Gravenhage states that it regularly encounters the problem arising from the application of the Law on Aliens 2000 to persons who state that they have a right of residence under Community law but who cannot present immediately a valid identity card or passport.

24. In the two present sets of proceedings the national court must determine the question whether damages must be paid to the claimant in respect of the periods of detention for the purpose of deportation. Therefore the national court has to decide whether his detention during those periods was lawful or not.

25. In order to do so, the national court wishes to know whether Community law prevents the authorities of a Member State from making a detention order for the purpose of deportation against a person

staying in that State when he has the status of a national of another Member State but cannot immediately prove it by the production of a valid identity card or passport.

26. That is why the national court has referred the following questions to the Court:

'As regards the first proceedings:

(1) As a consequence of the abolition of entry controls at internal borders, must the third paragraph of Article 4(2) of Directive 73/148/EEC ... be interpreted as meaning that the right of residence granted therein of a person who claims to be a national of another Member State and a tourist has to be recognised by the authorities of the Member State in which that person invokes his right of residence only from such time as he has presented his valid identity card or passport?

(2a) If the answer to Question 1 is in the affirmative, does Community law as it stands at present, in particular in regard to the principle of non-discrimination and the freedom to provide services, provide grounds for making an exception thereto with the result that the authorities of a Member State must still afford to that person the opportunity to present his valid identity card or passport?

(2b) Is it material to the answer to Question 2a that the national law of the Member State in which that person invokes his right of residence imposes on its own nationals no general duty to provide evidence of identity?

(2c) If the answer to Question 2a is in the affirmative, does Community law as it stands at present lay down any requirements in regard to the period within which that Member State must afford the opportunity for the person concerned to present a valid identity card or passport before it imposes an administrative penalty in the form of an order in respect of the presumed unlawful residence?

(2d) Does an administrative penalty in the form of an order, as referred to in Question 2c, namely the imposition of a detention order with a view to deportation pursuant to Article 59 of the Law on Aliens 2000 before the period referred to in Question 2c has elapsed constitute a penalty which impinges disproportionately on freedom to provide services?

(3a) If the answer to Question 1 is in the negative, as Community law stands at present, is freedom to provide services impeded where a detention order with a view to deportation under Article 59 of the Law on Aliens 2000 is, in the interest of public policy, imposed on a

person claiming to be a national of another Member State and a tourist for as long as he does not demonstrate his right of residence by presenting a valid identity card or passport, even where there is no obvious present and serious danger to public policy?

(3b) If that freedom is impeded in the manner described in Question 3a, is the period within which that Member State afforded an opportunity to present a valid identity card or passport material for the purposes of establishing whether or not the impediment is justified?

(3c) If that freedom is impeded in the manner described in Question 3a, is it relevant, for the purposes of establishing whether that impediment is justified, whether or not the Member State subsequently pays compensation in respect of the period during which the person was detained pending production of proof of nationality by means of a valid passport or identity card, as is customary in that Member State in the case of unlawful detention as an illegal alien?

(4) Where a Member State itself lays down no general duty to provide evidence of identity, does Community law as it stands at present preclude, in particular in light of the prohibition on discrimination, a Member State from imposing, in connection with the internal control of aliens, a measure such as detention as an illegal alien with a view to deportation under Article 59 of the Law on Aliens 2000 in respect of a person who claims to be a tourist for as long as that person does not demonstrate his alleged right of residence by presenting a valid identity card or passport?

As regards the second proceedings:

(5) So long as a national of a Member State does not himself invoke the right of residence as the recipient of services vis-à-vis the Member State in whose territory he is residing, does Community law as it stands at present preclude that Member State from not regarding that person as a national protected by a right of residence under Community law?

(6) Is the term "recipient of services" in the context of freedom to provide services to be construed as meaning that, even where a person stays in another Member State for a long period, possibly longer than six months, is arrested there for an offence, is unable to give a fixed abode or residence and, furthermore,

has no money or luggage, residence in another Member State itself provides sufficient grounds for having to assume that tourist and other services associated with short-term residence are received such as, for example, accommodation and the consumption of meals?'

IV — Analysis

27. I think that the questions referred by the national court must be divided into four groups.

28. The national court asks the Court of Justice, first, to define the term 'recipient of services' in order to determine whether a national of a Member State who stays in another Member State for a long period, possibly longer than six months, is arrested there for an offence, is unable to give a fixed abode or residence and has no money or luggage may fall within the scope *ratione personae* of the Community rules concerning the freedom to provide services. Accordingly questions 5 and 6 ask whether it may be presumed that a national of a Member State, such as Mr Oulane, who resides in another Member State, is a recipient of tourist services. If that is the case, he will qualify for the protection provided by the Community rules on the freedom to provide services.

29. Second, the national court asks, in essence, whether the third paragraph of Article 4(2) of Directive 73/148 must be construed as meaning that the recognition by a Member State of a right of residence in favour of a national of another Member State with the status of a recipient of services may be conditional on the production by him of a valid identity card or passport and, if so, whether Community law requires the Member State in question to give the person concerned an opportunity to produce it within a certain period (questions 1, 2a and 2c).

30. Third, the national court asks, in substance, whether the principle of non-discrimination on grounds of nationality precludes the host Member State from imposing, pursuant to its legislation on aliens, on nationals of other Member States an obligation to produce a valid identity card or passport to prove their nationality, with a detention order for the purpose of deportation being made if they are unable to produce one of those documents, whereas Netherlands law imposes no such obligation on its own nationals (questions 2b and 4).

31. Fourth, and finally, the national court asks, in substance, whether the detention for deportation of nationals of other Member States if they fail in their obligation to carry a valid identity card or passport constitutes an obstacle to the freedom to provide services and, if so, whether that obstacle may be justified (questions 2d, 3a, 3b and 3c).

A — *'Recipient of services'*

32. With questions 5 and 6, the national court asks the Court of Justice to define 'recipient of services' in order to determine whether a national of a Member State who stays in another Member State for a long period, possibly longer than six months, is arrested there for an offence, is unable to give a fixed abode or residence and has no money or luggage may fall within the scope *ratione personae* of the Community rules concerning the freedom to provide services.

33. I should make it clear that the reply I shall give to this question relates to a national of a Member State who stays in another Member State for a period not exceeding three months, in accordance with the account of the facts in the order for reference. It appears from this that Mr Oulane stated that he had been in the Netherlands for approximately three months at the time of his first arrest. Then, when he was arrested a second time seven months later, he said that he had been there for 18 days.

34. Therefore I shall not consider the situation of a national of a Member State who stays in another Member State 'for a long period, possibly longer than six months'. [3]

35. The questions referred by the national court clearly indicate that it does not cast doubt on Mr Oulane's statements, in that the questions relate only to the documents that have to be produced in the case of residence for less than three months, namely a valid identity card or passport.

36. With regard to the scope *ratione personae* of the Community rules on the freedom to provide services, the Court has consistently held that 'the principle of freedom to provide services established in Article 59 of the Treaty, which is one of its fundamental principles, includes the freedom for the

3 — Contrary to the original wording of question 6 from the national court.

recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions, and that tourists must be regarded as recipients of services'. [4]

37. I shall not attempt here to define 'tourist' according to Community law, taking the same approach as Advocate General Lenz in his Opinion in the *Cowan* case. I share his doubts as to the utility of defining what is a tourist in Community law: 'it is not important from a legal point of view to lay down strict definitions of the individual possible groups of potential recipients of services and distinguish them one from another. What is important is to give some substance to the notion of a recipient of services'. [5]

38. The Advocate General supported this approach, from the viewpoint of the different Community measures relating to the entry and residence of Community nationals, by observing that a person 'can rely on his status as a recipient of services at the border, before he has entered the territory of another Member State and even before he has actually received a service'. Status as a recipient of services is therefore established in principle globally right at the beginning of the journey, in consideration of the 'services to be received in the course of a journey'. [6] Consequently it is not a matter of establishing status as a recipient of services after the event, by referring to the services actually used during the journey.

39. This reasoning leads me accordingly to observe that the fact that a person from a Member State is present at a given moment in another Member State gives rise to a presumption that he is or will be a recipient of services in that State. That person's presence in a Member State predisposes him to receive a whole range of services, whether one-off or continuous.

40. In this connection the circumstances described in detail by the national court are not such as to deny a national of a Member State, such as Mr Oulane, the status of a recipient of services. Being arrested for an

4 — See, in particular, Case C-348/96 *Calfa* [1999] ECR I-11, paragraph 16. The freedom of movement of recipients of services, which was not expressly provided for by the Treaty, was first recognised by Directive 73/148, before the Court observed that such freedom is 'the necessary corollary' of the Treaty provisions concerning the freedom to provide services and 'fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital': see Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraph 10. For recipients of tourist services, see also Case 186/87 *Cowan* [1989] ECR 195.

5 — See the Opinion of Mr Lenz in *Cowan*, paragraph 22.

6 — *Ibid.*, paragraph 28.

offence or even being convicted of certain offences is not incompatible with such status, as shown by the *Calfa* judgment.[7] The same applies where a person has no fixed abode or residence in the host Member State, which, on the contrary, suggests that he is staying precisely as a tourist.

41. Furthermore, the fact that a person has no money or luggage at the time of arrest does not justify the assumption that he has none.[8] However, I think I must point out that proof of a complete lack of means of subsistence of such a person in a host Member State would be incompatible with the Community definition of services, which are 'normally provided for remuneration'.[9] On this point, a person who, for example, receives financial assistance from a national of the host Member State or who is in a position to obtain money from his State of origin may be considered to be not entirely without such means of subsistence.

42. Consequently I propose that the reply to be given to the national court should be that the fact that a national of a Member State is present at a given moment on the territory of another Member State is sufficient for a presumption that he is or will be a recipient of services in that Member State and that, with that status, he falls within the personal scope of the Community rules on the freedom to provide services.

43. Before examining the other questions from the national court, let me show why it is important, in my view, to determine in the present case whether the person concerned falls within the category of recipients of services.

44. It might be observed that the status of national of a Member State has in itself been sufficient, since the Treaty of Maastricht and the introduction of the concept of European citizenship into primary Community law, to confer a right of residence in another Member State, without the need for the person concerned to pursue or participate in an economic activity, whether as an employee or self-employed person.

45. As the right to reside in the territory of the Member States is therefore 'conferred directly on every citizen of the Union by a

7 — *Calfa* judgment, cited above: in that case, Ms Calfa was considered to be a recipient of services although she had been convicted of an offence under the drugs legislation and sentenced to three months' imprisonment and to deportation for life from Greece as an additional penalty.

8 — In the main proceedings, it appears from the file that a Postbank receipt was found in Mr Oulane's possession.

9 — Article 50, first paragraph, EC.

clear and precise provision of the EC Treaty,'[10] the mere status of national of a Member State, and therefore of a citizen of the Union, is in itself sufficient for a person to exercise that right.

46. However — and this is where it is desirable to specify and categorise carefully the persons with freedom of movement — Article 18(1) EC states that the right to move and reside freely within the territory of the Member States which every citizen of the Union has is 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.[11]

47. To ascertain those limitations and conditions and all their implications, it is also necessary to consider the provisions of primary and secondary law substantively applicable to a given legal situation.

48. Regarding specifically the dispute before the national court, the limitations and conditions relating to the right of residence at the material time are set out in the Community measures governing the freedom to provide services.

49. The development of Community law is undoubtedly towards the standardisation, or even the unity, of the rules on the freedom of movement of nationals of the Member States.[12] In the meantime, so far as cases which still fall within a specific sector of Community law are concerned,[13] I think it is still useful for legal purposes to categorise those who enjoy the freedom of movement.

50. Finally, the provisions of primary and secondary law on the freedom to provide services seem to me sufficient to give a helpful reply to the questions from the national court, which will then make it 'superfluous to have recourse to this further protection offered by Community citizenship'.[14] However, let me add that, although the protection given by the status of citizen of the Union does not have to be system-

10 — Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 84.

11 — Article 18(1) EC. For a case concerning the limitations and conditions arising from Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26), see the *Baumbast and R* judgment, paragraph 85 et seq. According to the Court, those limitations and conditions do not prevent Article 18(1) EC from having direct effect: 'the application of the limitations and conditions acknowledged in Article 18(1) EC in respect of the exercise of that right of residence is subject to judicial review. Consequently, any limitations and conditions imposed on that right do not prevent the provisions of Article 18(1) EC from conferring on individuals rights which are enforceable by them and which the national courts must protect' (same judgment, paragraph 86).

12 — See Directive 2004/38, with which the Member States must comply by 30 April 2006.

13 — Directive 2004/38 is based in particular on the intention of 'remedying this sector-by-sector, piecemeal approach to the right of free movement and residence and facilitating the exercise of this right ... [in] a single legislative act ...' (fourth recital of preamble).

14 — To adopt the phrasing of Advocate General La Pergola in a comparable situation, in his opinion in the *Calfa* case, paragraph 10.

atically called on as such, the development of Community law on the freedom of movement of persons, in the broad sense, which that entails cannot be disregarded. That is why Union citizenship, which 'is destined to be the fundamental status of nationals of the Member States,'[15] is a factor which must be actively taken into account for interpreting all the Community rules on the freedom of movement of persons, in particular those relating to the freedom to provide services.

B — *Production by a recipient of services of a valid identity card or passport as a condition of the recognition of his right of residence by the host Member State*

51. With questions 1, 2a and 2c, the national court asks, in essence, whether the third paragraph of Article 4(2) of Directive 73/148 must be construed as meaning that the recognition by a Member State of a right of residence in favour of a national of another Member State with the status of a recipient of services may be conditional on the production by him of a valid identity card or passport and, if the reply is in the affirmative, whether Community law requires that Member State to give the person concerned an opportunity to produce the valid identity card or passport within a certain period.

52. Article 4(2) of that directive provides, first, that 'the right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided'. Second, it makes a distinction according to whether that period exceeds three months or not:

53. Where the period during which services are provided, and hence the period of residence, exceeds three months, 'the Member State in the territory of which the services are performed shall issue a [residence certificate] as proof of the right of residence' (second subparagraph).

54. *Where the period does not exceed three months, 'the identity card or passport with which the person concerned entered the territory shall be sufficient to cover his stay'* (third subparagraph).[16]

55. From the wording of this last provision concerning a period of residence not exceeding three months, which the Court is asked to interpret, it is not clear whether the

15 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31.

16 — Emphasis added.

production of a valid identity card or passport by a recipient of services is a necessary condition for the recognition of a right of residence by the host Member State in his favour.

56. This is why I consider that the third subparagraph of Article 4(2) of Directive 73/148 must be given a teleological interpretation. This method of interpretation seems to be justified in so far as the reply to be given to the national court does not appear clearly from the wording of the Community law provision in question. [17]

57. Consequently I think that the third subparagraph of Article 4(2) must be understood as meaning that, although the production of a valid identity card or passport by a recipient of services to the competent authorities of the host Member State obliges it to recognise a right of residence for him not exceeding three months, the inability to produce such a document immediately cannot in itself destroy that right of residence.

58. In this connection it must be observed that, as early as the *Royer* judgment of 1976, the Court held that 'the right of nationals of a Member State to enter the territory of another Member State and reside there for the purposes intended by the Treaty ... is *a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation*'. [18] The Court concluded that 'this right is acquired independently of the issue of a residence permit by the competent authority of a Member State', and that such a permit was 'therefore to be regarded not as a measure giving rise to rights but as 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.' [19]

59. It may be concluded from this case-law that Community law leaves no scope for the host Member State to grant a right of entry and residence to nationals of other Member States and that it has power only to control the way in which that right is exercised and to penalize, if necessary and within certain limits, any failure to comply.

60. Regarding specifically the conditions laid down for exercising the right to move and reside in the Member States, and the right of control of the Member States, the Court

17 — For the use of textual and teleological methods of interpretation, see the observations in my Opinion in Case C-63/00 *Schilling and Nehring* [2001] ECR I-4483, paragraph 17 et seq.

18 — Case 48/75 *Royer* [1976] ECR 497, paragraph 31, emphasis added.

19 — *Ibid.*, paragraphs 32 and 33 respectively.

observed, in the *Wijsenbeek* judgment of 1999, that 'as long as Community provisions on controls at the external borders of the Community ... 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*'. [20] Proof of the status of a national of a Member State is still clearly part of 'the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect' [21] in relation to the exercise of the right which the nationals of the Member States have to move and to reside freely in other Member States.

61. Starting from this assumption, the Court went on to observe that, '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'. [22] This means, first, that identity checks at the internal frontiers of the Community may lawfully be carried out by the Member States and, secondly, that the obligation of those concerned to produce a valid identity card or passport flows directly from Community law. The purpose of that obligation is to determine whether those concerned have the right, as nationals of a Member State, to move freely within the territory of the Member States.

62. The Court added that the Member States may validly impose penalties for breach of such an obligation when entering the territory of a Member State, provided that the penalties are comparable to those which apply to similar national infringements and that they are not so disproportionate as to create an obstacle to the free movement of persons. [23]

63. I think the following conclusions may be drawn from the Court's reasoning. First, identity checks at the internal frontiers of the Community and the corresponding

20 — Case C-378/97 *Wijsenbeek* [1999] ECR I-6207, paragraph 42, emphasis added. The facts of this case may be summarised as follows: criminal proceedings were brought against Mr Wijsenbeek, a Dutch national, in his own country for refusing, when entering the Netherlands at Rotterdam Airport on 17 December 1993, to present and hand over his passport to the national police officer responsible for border controls and to prove his nationality by any other means, contrary to Article 25 of the national Decree on Aliens.

21 — Article 18(1) EC.

22 — *Wijsenbeek*, paragraph 43.

23 — *Ibid.*, paragraph 44.

obligation on the part of a person arriving to submit to them by presenting a valid identity card or passport have a *single purpose*: to ensure that the person concerned does have the right to move freely as a national of a Member State. That is why the position taken by the Court must, in my opinion, be read in a purposive, rather than a formalistic, light, as the obligation to present a valid identity card or passport at an internal frontier is not an aim in itself: what is important in the end is proof of the nationality of the person concerned.

64. Second, it seems to me that this legitimate inquiry as to status as a national of a Member State of the person being checked on entering the territory of another Member State may also be made when verifying the right of residence alone, in isolation, after that territory has been entered, the Court's reasoning with regard to checks at internal frontiers then being, to that extent, applicable to that aspect of the right to move freely. Furthermore, the Court was referring to the rights of movement and residence when it observed that their exercise 'presupposes that the person concerned is able to establish that he or she has the nationality of a Member State'. [24]

65. Third, it is necessary to distinguish that which is a condition for exercising the right of residence, namely proof of nationality, from the obligation to present a valid identity card or passport, which is only one of the 'legal formalities concerning access, movement and residence of aliens'. [25] Therefore, as we have seen, failure to fulfil this obligation may be penalized by the host Member State, but under no circumstances can it entail denial of the right of residence.

66. All of these considerations support my view, which is shared by the Commission, that the administrative requirements in Article 4(2) of Directive 73/148, such as the provision that an identity card or passport covers a stay by a recipient of services not exceeding three months, must be considered in the light of the purpose of the directive, namely the removal of restrictions on the movement and residence of nationals of the Member States within the Community in the matter of establishment and the provision of services. [26]

67. From this viewpoint, and taking a pragmatic approach, the Commission stresses a decisive factor, namely that the requirement laid down in the third subpar-

24 — *Ibid.*, paragraph 42.

25 — *Royer*, paragraph 38.

26 — Paragraph 34 of the Commission's observations.

agraph of Article 4(2) of Directive 73/148 has a dual function because it aims, first, to simplify the burden of proof of the right of residence not only for nationals of other Member States, but also for the Member States themselves [27] and, second, to lay down a maximum standard in relation to the formal requirements which a Member State may impose concerning the burden of proof of the right of residence, thus excluding more stringent requirements. [28]

68. Accordingly the Commission takes the view that it cannot be concluded *a contrario* from the third subparagraph of Article 4(2) of Directive 73/148 that failure to fulfil that requirement means that nationality and hence, in the present case, the right of residence will not be recognised. According to the Commission, such formalism could have absurd consequences inconsistent with the philosophy of Community measures, which aim at a broad (but not of course unlimited) interpretation of the right of residence.

69. Following directly from this reasoning, and in the light of the purpose of the directive in question, I consider that although, in accordance with the third subparagraph of Article 4(2), the possession of a valid identity card or passport is the rule, because that is the simplest and most obvious means of establishing a person's nationality, that provision cannot be construed as meaning that nationality cannot be established by any other means. [29]

70. In my opinion, this interpretation is not inconsistent with the actual wording of the third subparagraph of Article 4(2) of Directive 73/148. Although, in principle, the identity card and passport are official documents which cover a stay not exceeding three months by the recipient of services, and failure to present one of them may entail the imposition of a penalty by the host Member State, the latter cannot for that reason prevent the person concerned from exercis-

27 — The Commission observes that, in principle, the presentation of a valid identity card or passport is the simplest means of proving nationality and that the Member States have power to impose that requirement.

28 — I think this approach is maintained in Article 6 of Directive 2004/38, paragraph 1 of which provides that 'Union citizens shall have the right of residence on the territory of another Member State for a period of up to three months *without any conditions or any formalities* other than the requirement to hold a valid identity card or passport' (emphasis added). It will be noted that the dispute to which the national court's question may give rise is perfectly reflected in the wording chosen by the Community legislature, which moreover is really a 'non-choice' which remains ambiguous: is the possession of a valid identity card or passport a *condition* of the right of residence or a *formality* relating to it? I think it is merely a formality to be observed when exercising the right of residence.

29 — Think of the effect that the contrary reasoning would have on the situation of a tourist whose passport or identity card has been lost or stolen (not an unusual situation). Is it then reasonable to put an end to that person's stay?

ing his right of residence, which would amount in fact to denying its existence.

71. I must add that what I have said does not mean that it is sufficient for a Community national to invoke his right of free movement to be able to reside legally in the host Member State. On the contrary, the purposive basis of my reasoning requires a Community national to prove his nationality at the request of the competent authorities of the host Member State and, I must make it clear, to do so in a convincing manner, namely by reference to any official document or contact which affords cogent evidence of possession of the nationality of a Member State.

C — *Different treatment of Community nationals and home nationals with regard to the obligation to prove nationality*

72. Moreover, a national of a different Member State must always be given an opportunity to produce a valid identity card or passport within a reasonable period, that is to say, allowing for the normal time required to obtain and dispatch such documents.

73. Therefore I propose that the reply to be given by the Court of Justice to the national court should be that the third subparagraph of Article 4(2) of Directive 73/148 must be construed as meaning that the recognition by a Member State of a right of residence in favour of a national of another Member State with the status of a recipient of services may not be conditional on the production by him of a valid identity card or passport. However, a recipient of services who exercises his right of residence in this way for a stay not exceeding three months in the host Member State must, at the request of the competent authorities of that State, prove his status as a national of a Member State by any means. Finally, he must be given an opportunity to produce a valid identity card or passport within a reasonable period.

74. With questions 2b and 4, the national court asks, in substance, whether the principle of non-discrimination on grounds of nationality precludes the host Member State from requiring, pursuant to its legislation on aliens, nationals of other Member States to produce a valid identity card or passport to prove their nationality, with a detention order for the purpose of deportation being made if they are unable to produce one of those documents, whereas Netherlands law

imposes no such obligation on its own nationals.

75. In accordance with the consistent case-law of the Court in the field of freedom to provide services, I must point out that this question must be examined in the light of Article 49 EC. Although Article 12 EC enshrines the general principle of the prohibition of discrimination on grounds of nationality, it 'applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific rule against discrimination.' However, with regard to the freedom to provide services, 'this principle is given specific expression and effect' by Article 49 of the Treaty. [30]

76. The question from the national court must therefore be understood as seeking to ascertain whether the general principle of non-discrimination on grounds of nationality in Article 49 EC precludes nationals of other Member States from being subject, under the law of the host Member State relating to aliens, to an obligation to present a valid identity card or passport to prove their nationality when Netherlands law imposes no such obligation on Dutch nationals. [31]

77. The national court describes as follows what could, in its view, constitute discrimination on grounds of nationality contrary to Community law: there is no wholesale and general identification requirement under Netherlands law, but there are limited identification requirements in special laws confined to particular situations. [32] The national court states that the Law on Aliens 2000 is regarded by the Netherlands authorities as falling within the category of limited identification requirements.

78. Consequently, the national court considers it useful, with regard to the requirement to produce a valid identity card or passport, to compare the situation of a person who, when a check is carried out, claims to be a Netherlands national with that of a person who claims to be a national of another Member State.

30 — See Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraphs 16 and 17; also Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 18.

31 — I consider that the problem of the means of constraint in the form of a detention order for deportation, which is applicable where a person fails to comply with the requirement to be able to produce a valid identity card or passport at all times, must be examined by reference to the justification for obstacles to freedom of movement and not, in isolation, in the light of the principle of non-discrimination alone. It is clear from the actual words of the Law on Aliens 2000 that these measures can, by definition, relate only to foreign nationals in so far as the purpose of the measures is the deportation of aliens. Therefore I shall discuss this part of the problem when considering the last group of questions from the national court.

32 — The national court points out that the aim of most of these limited identification requirements is to counteract abuses concerning benefits and allowances granted by certain social and tax laws.

79. In this connection, the national court adds that, according to national administrative case-law, a person claiming to be a Netherlands national must prove his identity by producing objective details relating directly to his physical person. Besides producing a Netherlands identity card or passport, he could also prove his identity by presenting, for example, a driving licence issued in the Netherlands. Where necessary, any doubts as to identity could be dispelled by examining local administrative records.

80. On the other hand, in the case of a person who, when subjected to an internal check of aliens, claims to be a national of another Member State and invokes freedom of movement for persons and services, the national court observes that such a person is normally detained under the Law on Aliens 2000 on grounds relating to the requirements of public policy unless and until he produces a valid identity card or passport.

81. Consequently the national court is uncertain whether this constitutes discrimination against a Community national contrary to Community law, compared to a Netherlands national who, under national law, is not required to produce a valid identity card or passport, excluding other documents, to prove his nationality.

82. On this problem, the Commission considers that, with regard to the right of residence, the situation of home nationals and nationals of other Member States is fundamentally different by virtue of the Treaty itself in so far as the right of residence of the former is, by definition, permanent and absolute, particularly in the light of the prohibition on the deportation of nationals. The difference in treatment regarding the requirement to produce a valid identity card or passport is not connected with nationality proper, but with the legal situation which differs objectively in relation to the right of residence.

83. In my view, it must above all be borne in mind that, although the requirement for a national of another Member State to carry a valid identity card or passport does not in itself constitute his right of residence, as we have seen, it is nevertheless a formality laid down by Community law, in particular Directive 73/148. Therefore it can be said that the Member States find in Community law a firm foundation for requiring nationals of other Member States residing on their territory to carry a valid identity document.

That is why the Court has held that 'the power of Member States to punish infringements of this duty cannot in principle be contested'. [33]

84. I would also add that the Court has often accepted situations where the mere fact of not being a national of the Member State in question may justify a condition which is not imposed on nationals, such as a requirement to report to the competent authorities. [34] The Court has also held that 'in so far as [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] imposes special obligations (such as the possession of a passport or an identity card) on the nationals of a Member State who enter the territory of another Member State or reside there, the persons affected thereby cannot be simply put on the same footing as nationals of the country of residence'. [35]

85. These factors support the view that there are specific constraints, existing by virtue of Community law, which affect nationals of Member States who wish to reside in a different Member State and this explains why their situation is not comparable with that of home nationals with regard to the administrative requirements relating to the exercise of the right of residence.

86. However, I am not persuaded by this view. It seems to me to have a substantive limit, in relation precisely and only to the requirement for nationals of other Member States to carry at all times of a valid identity card or passport, in the approach taken by the Court in the 1989 judgment in the case of *Commission* v *Belgium*. Although the case only involved the right of entry onto the territory of a Member State, the Court found, in terms which go beyond that particular case, that 'Community law does not prevent Belgium from checking, within its territory, compliance with the obligation imposed on persons enjoying a right of residence under Community law to carry their residence or establishment permit at all times, where an identical obligation is imposed upon Belgian nationals as regards their identity card'. [36] The same position is expressed in the 1998 judgment in the case of *Commission* v *Germany* by an even clearer statement that

33 — Case 8/77 *Sagulo and Others* [1977] ECR 1495, paragraph 10.

34 — Case 118/75 *Watson and Belmann* [1976] ECR 1185.

35 — *Sagulo and Others*, paragraph 11.

36 — Case 321/87 *Commission* v *Belgium* [1989] ECR 997, paragraph 12.

State checks on compliance by nationals of other Member States with the obligation to be able to produce a residence permit at all times are authorised by Community law only on condition that the host Member State imposes the same obligation on its own nationals as regards their identity card. [37] In addition, this parallel between the situation of nationals of other Member States and that of home nationals implies that the penalties for failure to fulfil this obligation must be comparable in both cases. [38]

87. As we have seen, the Court has accepted, on the basis of this case-law, that the situation of nationals of other Member States and the situation of home nationals in relation to their obligation to carry a valid residence permit or valid identity card respectively are comparable and, consequently, that they should receive similar treatment in connection with checking compliance with that requirement. This means accepting that the two categories of persons are in a comparable situation regarding the need to prove their nationality and that they should be treated in the same way for that reason and in that connection.

88. Consequently, it seems to me to be inconsistent with the principle of the prohibition of discrimination on grounds of nationality for national case-law and administrative practice to require a national of another Member State exercising his right of residence to prove his status solely by presenting a valid identity card or passport, whereas a Netherlands national who also undergoes an internal check has the option of proving his identity by any other means.

89. In that situation, the view may be taken that the case-law of the Court cited above applies since the nationals of other Member States residing as recipients of services for a period not exceeding three months in a host Member State are required at all times to carry a valid identity card or passport, whereas the same obligation is not imposed on Netherlands nationals in relation to their identity documents. [39]

90. I therefore propose that the Court reply to the national court that the general

37 — Case C-24/97 *Commission* v *Germany* [1998] ECR I-2133, paragraph 13.

38 — *Commission* v *Germany*, paragraph 14. The Court found that the Federal Republic of Germany had failed in its Community obligations by treating nationals of other Member States residing in Germany 'disproportionately differently', as regards the degree of fault and scale of fines, from German nationals 'when they commit a comparable infringement of the obligation to hold a valid identity document'.

39 — The national court mentions 'a valid identity card showing his Netherlands identity or a valid Netherlands passport' (order for reference, p. 16) as examples of such documents.

principle of non-discrimination on grounds of nationality, laid down in Article 49 EC, prevents nationals of other Member States from being required, by the law on aliens of the host Member State, to present a valid identity card or passport in order to prove their nationality, when Netherlands law does not impose that obligation on Netherlands nationals.

D — *Detention for deportation of a national of a Member State, who is a recipient of services, in the event of failure to fulfil the obligation to present a valid identity card or passport*

91. In this last group of questions (questions 2d, 3a, 3b and 3c) the national court asks, in essence, whether the detention for deportation of nationals of other Member States if they fail in their obligation to carry a valid identity card or passport constitutes an obstacle to the freedom to provide services and, if so, whether that obstacle may be justified.

92. To reply to this question, it must be observed that, in the *Sagulo* judgment, the Court held that 'although Member States are entitled to impose reasonable penalties for infringement by persons subject to Community law of the obligation to obtain a valid identity card or passport, such penalties should by no means be so severe as to cause an obstacle to the freedom of entry and residence provided for in the Treaty'. Starting from this premiss, the Court addressed the national court as follows: 'it is the task for the national court to use its judicial discretion to impose a punishment appropriate to the character and objective of the provisions of Community law the observance of which the penalty is intended to safeguard'. [40]

93. This settled case-law rules out the possibility that failure to comply with formalities such as carrying a valid identity card or passport may be punished by deportation as 'such a measure negates the very right conferred and guaranteed by the Treaty'. [41] The Court has also observed, in relation to the temporary deprivation of liberty of an alien covered by the Treaty with a view to his expulsion, that 'no measure of this nature is permissible if a decision ordering expulsion from the territory would be contrary to the Treaty'. [42]

40 — *Sagulo and Others*, paragraph 12.
41 — *Watson and Belmann*, paragraph 20.
42 — *Royer*, paragraph 43.

94. However, it is important to add that this last statement must not be understood as excluding the power of the host Member State to detain temporarily, in a suitable place, a national of another Member State in order to carry out the necessary checks concerning his nationality. In such a case, the administrative measure in question has no bearing on a deportation order, if any, and is not a measure taken with a view to expulsion. Its purpose is to enable the national of another Member State to prove his nationality by any means.

95. Furthermore, the Court has likewise consistently held that, where a national of another Member State fails in his obligation to present a valid identity card or passport on entering the host Member State, the latter cannot 'lay down a penalty so disproportionate as to create an obstacle to the free movement of persons, such as a term of imprisonment'. [43]

96. In addition, it must be borne in mind that the principle of freedom to provide services established in Article 49 EC, 'which is one of its fundamental principles, includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions ...'. [44]

97. Taking these considerations into account, I think a detention order for the purpose of deportation if they are unable to prove their status as a national of a Member State by means of a valid identity card or passport is a manifest obstacle to the free movement of recipients of services. Such a measure, which deprives them of their right of residence, is the negation of a right directly conferred on recipients of services by Article 49 EC and the directives implementing it.

98. However, it is necessary to consider whether such a measure may be justified on the ground of public policy laid down in Article 46 EC. [45] According to the Court, this article permits 'Member States to adopt, with respect to nationals of other Member States, and in particular on the grounds of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the territory or to deny them access thereto'. [46]

43 — *Wijsenbeek*, paragraph 44.

44 — *Calfa*, paragraph 16.

45 — According to the national court, the two detention orders are 'in the interest of public policy on account of presumed evasion of deportation because the person concerned had no identity document within the meaning of Article 4.21 of the Vreemdelingenbesluit (Decree on Aliens), had not registered with the commissioner of police, had no fixed abode/residence and was suspected of having committed a criminal offence' (order for reference, p. 5).

46 — *Calfa*, paragraph 20.

99. It seems to me that the reply to be given to the national court on this point must be found in the Court's judgment in the *Royer* case, where it stated that failure by a national of a Member State to complete the legal formalities concerning access, movement and residence of aliens, 'since it is a question of the exercise of a right acquired under the Treaty itself, ... cannot be regarded as constituting in itself a breach of public policy or public security'. [47]

100. Accordingly, it is sufficient to find that the public policy exception in Article 46 EC cannot be applied to justify an obstacle to the freedom to provide services, where that obstacle takes the form of a detention order for the purpose of the deportation of nationals of other Member States who fail to fulfil their obligation to carry at all times a valid identity card or passport, and it is unnecessary to determine whether the national measure in question observes the principle of proportionality.

101. Moreover, it must be pointed out to the national court that, in any case, the public policy exception justifying certain restrictions on the freedom of movement of persons can only be validly used by a Member State where there is a 'genuine and sufficiently serious threat ... affecting one of the fundamental interests of society'. [48] The 'perturbation of the social order which any infringement of the law involves' [49] is not therefore sufficient. It must also be observed that the public policy exception, like all exceptions to a fundamental principle of the Treaty, must be interpreted restrictively.

102. Furthermore, Article 3 of Council Directive 64/221/EEC [50] states that public policy measures must be 'based exclusively on the personal conduct of the individual concerned' and that 'previous criminal convictions shall not in themselves constitute grounds for the taking of such measures'. [51] It must also be pointed out to the national court that the public policy exception, as formulated by the Court, can arise only where there is shown to be 'personal conduct constituting a present threat to the requirements of public policy'. [52]

47 — *Royer*, paragraph 39.

48 — See Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35.

49 — Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 66.

50 — Council Directive of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security and public health (OJ English Special Edition 1963-1964, p. 117). It should be noted that, pursuant to Article 1, this directive applies to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person or *as a recipient of services.*

51 — Article 3(1) and (2) respectively.

52 — *Bouchereau*, paragraph 28.

103. Finally, I consider that a possible subsequent award of damages by a national court to a recipient of services for illegal detention is irrelevant with regard to justifying an obstacle to the freedom to provide services.

104. I therefore propose that the Court's reply to the question referred by the national court should be that detention for the purpose of deportation of a recipient of services for failing to fulfil the obligation to carry at all times a valid identity card or passport is an unjustified obstacle to the freedom to provide services and is, as such, contrary to Article 49 EC. However, the competent authorities of the host Member State may decide to detain temporarily a national of another Member State to give him an opportunity to prove his nationality by any means.

V — Conclusion

105. In the light of the foregoing considerations, I propose that the Court should answer the questions referred by the Rechtbank te 's-Gravenhage as follows:

(1) The fact that a national of a Member State is present at a given moment on the territory of another Member State is sufficient for a presumption that he is or will be a recipient of services in that Member State and that, with that status, he falls within the personal scope of the Community rules on the freedom to provide services.

(2) The third subparagraph of Article 4(2) 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 must be construed as meaning that the recognition by a Member State of a right of residence in favour of a national of another Member State with the status of a recipient of services may not be conditional on the production by him of a valid identity card or passport. However, a recipient of services who exercises his right of residence in this way for a stay not exceeding three months in the host Member State must, at the request of the competent authorities of that State, prove his status as a national of a Member State by any means. Finally, he must be given an opportunity to produce a valid identity card or passport within a reasonable period.

(3) The general principle of non-discrimination on grounds of nationality, laid down in Article 49 EC, prevents nationals of other Member States from being required, by the law on aliens of the host Member State, to present a valid identity card or passport in order to prove their nationality, when Netherlands law does not impose that obligation on Netherlands nationals.

(4) Detention for the purpose of deportation of a recipient of services for failing to fulfil the obligation to carry at all times a valid identity card or passport is an unjustified obstacle to the freedom to provide services and is, as such, contrary to Article 49 EC. However, the competent authorities of the host Member State may decide to detain temporarily a national of another Member State to give him an opportunity to prove his nationality by any means.