OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 23 September 1997 *

I — The questions referred and their legislative background

1. The Royal Court of Jersey (the 'Royal Court') has referred to the Court of Justice in these proceedings — which are the first in which a court of that island has used the cooperation mechanism established by Article 177 of the Treaty — the following questions for a preliminary ruling:

'(1) On the premiss that British citizens are not liable to immigration control in, or to be deported from, Jersey, does Article 4 of Protocol No 3 to the Act of Accession of the United Kingdom to the European Communities have the effect that nationals of another Member State are equally not liable to be deported from Jersey?

(2) If the answer to the first question is "No", does the said Article 4 prohibit the competent authorities in Jersey from deporting a national of another Member State save where such deportation is justified on grounds of public policy, public security or public health?

(3) If the answer to the second question is "Yes", does the said Article 4 prohibit the competent authorities of Jersey from deporting a national of another Member State from Jersey where the considerations of public policy applied by those authorities would not in practice lead to the deportation of that person from the United Kingdom?'

2. In order to gain a proper understanding of those questions, let alone answer them, it is necessary first to consider both the constitutional law links which the Bailiwick of Jersey has with the United Kingdom of Great Britain and Northern Ireland and also the status of Jersey in international law, both before and after the accession of the United Kingdom to the European Communities in 1973. [1]

3. The Bailiwick of Jersey comprises, in addition to the island of the same name, the islets of Les Minquiers and Les Ecréhos.

* Original language: Italian.

1 — In preparing the brief summary which follows in the text, I have referred to the following legal writings: R. O. Plender, *The Protocol, the Bailiwicks and the Jersey Cow*, in R. O. Plender-A. K. R. Kiralfy, *Legal History and Comparative Law: Essays in Honour of Albert Kiralfy*, London, 1990, pp. 143-163; L. Fransman, *British Nationality Law*, London, 1989, esp. pp. 71, 132-136 and 809-810; S. A. Horner, *The Isle of Man and the Channel Islands. A Study of Their Status Under Constitutional, International and European Law*, European University Institute Working Paper No 98, San Domenico, 1984; K. R. Simmonds, *United Kingdom — Appendix: British Islands*, in V. Knapp (ed.), *International Encyclopedia of Comparative Law*, The Hague-Tübingen, 1976, pp. 103-106; ibid., *The British Islands and the Community: I — Jersey*, C. M. L. Rev., 1969, pp. 156-169.

Like the other British islands, [2] it is neither a part nor a colony of the United Kingdom. [3]

Instead it is a dependency of the British Crown, [4] whose constitutional relationship (or *modus vivendi*) with the United Kingdom has developed in a form which cannot be fitted into a rigid framework, [5] based as it is on an unusual and delicate balance between monarchical rights and the responsibilities of the island authorities for self-government. [6] Jersey enjoys a large measure of legislative, administrative and judicial autonomy in relation to the United Kingdom. [7]

2 — That is to say, the other Channel Islands (the Bailiwick of Guernsey, the islands of Alderney, Brechou, Sark, Herm, Jethou, Lihou and other islets, mostly uninhabited) and the Isle of Man.

3 — See *Royal Commission on the Constitution 1969-1973*, Vol. I (Report), paragraph 1347. For the purposes of nationality, however, the British Nationality Act 1948 provided that references in that statute to *colonies* were to be construed as including references to the Channel Islands and the Isle of Man (Section 33(1)). As a result, citizens of the Channel Islands were declared citizens *of the United Kingdom and colonies* (although having the right to be referred to as citizens of the United Kingdom, *islands* and colonies).
With effect from the entry into force of the British Nationality Act 1981 on 1 January 1983, while the remaining colonies of the United Kingdom were classified as *British Dependent Territories* — and persons having a sufficient link with any one of those territories became *British Dependent Territories citizens* —, the British islands became, *for the limited purposes of nationality*, part of the United Kingdom, and their citizens were reclassified as British citizens (see point 14 below).

4 — As their French name (les îles Anglo-Normandes) would imply, the Channel Islands belonged for a time (from 933, to be precise) to the Duchy of Normandy. After the Norman conquest of England in 1066, although England and the Duchy of Normandy were united under a single Crown, the Channel Islands became unassimilated possessions of the King of England.
When, in 1204, the English Crown lost continental Normandy to the French Crown, it was agreed that the English Crown would retain its sovereignty over the Channel Islands, thus remaining responsible for their external relations. English sovereigns continued, in effect, to govern them in their capacity as Dukes of Normandy until that title was abandoned in 1259; and even afterwards they maintained their claim to the inseparability of the Channel Islands from the Crown, which was finally recognised by French sovereigns in the late Middle Ages. The Channel Islands thus represent the only part of the former Duchy of Normandy still attached to the British Crown.

5 — Although attempts have been made in legal writings to arrive at a precise definition of the constitutional status of the British islands. According to Horner (op. cit. in footnote 1 above, pp. 40-50), since the islands (i) are not treated as part of the metropolitan territory under the British constitution, (ii) do not enjoy democratic representation at central level, and (iii) show a number of analogies with the position of possessions generally acknowledged as 'colonial', the relationship between the British islands and the United Kingdom should be classified at the constitutional level as 'quasi-colonial'.

6 — See Simmonds, *The British Islands and the Community*, cited in footnote 1 above, p. 160. Horner states that 'the present relationship between Westminster and the islands is characterised by a dichotomy between the legal norms and the situation in reality. The central doctrine of the supremacy of the [British] Parliament extends to the islands by virtue of the Crown's responsibility for their good government. The main facets of the relationship, however, are based on extra-legal factors: long-standing traditions, historical autonomy, and a form of political equilibrium which has been arrived at without recourse to legal devices.' See op. cit., footnote 1 above, p. 39.

7 — The island's judicial system comprises the Lower Court and the Royal Court (which is the referring court in this case); at second instance, a single Channel Islands Court of Appeal, with jurisdiction in civil and criminal matters, functions for the whole of the Channel Islands. Final jurisdiction is exercised by a British body, namely the Judicial Committee of the Privy Council, which is traditionally the court of final instance for cases brought in the British colonies (and in ex-colonies which have not abolished the procedure), but has no jurisdiction over the United Kingdom; see Horner, op. cit. footnote 1, p. 50. The authority of the Judicial Committee to resolve such disputes with reference to the island of Jersey derives from the prerogatives of the sovereign, as the source of all justice, to rule on appeals from the judges in her realm.
The single legislative body of the island, recognised as such by the British Government since 1771, is the States of Jersey. The members of the States, which constitutes an emanation of the Royal Court, are partly designated by the Crown but in the great majority of cases elected. The competence of the States is limited to those matters — such as taxation, finance, agriculture and fisheries, criminal law, mining rights, police, social services, trade and professions — that do not transcend the boundaries of the island. Even today, the sources of Jersey legislation comprise: (i) the ancient customary law of the Duchy of Normandy (as deducible from the *Grand Coutumier du Pays et Duché de Normandie* of the 13th century, sporadic compilations of statutes and published decisions of the Privy Council and the Royal Court); (ii) Royal Charters, by means of which (from the Royal Charter of Edward III in 1241 to that of Charles II in 1662) English sovereigns emphatically reiterated the privilege of the British islands to be governed in accordance with their ancient customs, clearly with the purpose of ensuring the loyalty of the islanders, who occupied a forward position strategically located at the threshold of the territory of the traditional enemy, France. In particular, the Royal Charter of Elizabeth I of 1559 confirmed the exclusive jurisdiction of the Royal Court of Jersey (save in cases of *habeas corpus* and treason) and the exemption (subsequently confirmed by statutes of 1952 and 1979) of island products from customs duties on importation into the United Kingdom, their main market); (iii) Orders in Council of the British sovereign (see below); (iv) Acts of the British Parliament specifically declared applicable to the Channel Islands (see below); (v) statute law, as codified in the Jersey Code in 1771; (vi) Acts of the States of Jersey and related regulations and implementing orders (which the States typically adopts in the form of bills (*projets de loi*) subject to the approval of the Crown (Her Majesty in Council), expressed through the assent of the Privy Council); and (vii) triennial regulations (*règlements*) adopted by the States in purely local or administrative matters. Such measures do not require confirmation by an Order in Council.

4. Furthermore, Jersey and the other British islands do not have international personality (understood as the power to act independently) and thus constitute, for international law purposes, mere territorial subdivisions of the United Kingdom. [8] Whilst that conclusion appears at first sight to be incompatible with the above observations on the relations between Jersey and the United Kingdom in terms of internal constitutional law, the contradiction is merely apparent. The unusual constitutional position reserved for the British islands may be regarded merely as a form of self-government laid down by the domestic constitution of the United Kingdom in relation to a part of its own national territory. [9]

As stated earlier, [10] the conduct of and responsibility for the international relations of the British islands belong to the Crown, which acts through the Government of the United Kingdom.

Under public international law, treaties — together with all the acts whereby each State expresses its intention to become party to them: signature, ratification, accession — are presumed to apply not only to national territory, but to all territories for whose international relations each contracting State is responsible, save where that presumption is superseded by an express or implied limitation in the territorial scope of the agreement (such as could result, for example, from a

As for the underlying power of the British Parliament (in which the British islands are not represented) to legislate for the islands, it is in practice exercised subject to a number of important customary limitations (which, according to at least one school of thought, subscribed to by Plender among others (op. cit. p. 145), go so far as to constitute binding constitutional conventions). On the one hand, the Channel Islands enjoy the fundamental right and privilege of exemption from United Kingdom taxation, and generally — save for rare exceptions — from British legislation on matters of purely local interest, in respect of which the metropolitan Parliament may legislate only with the consent and participation of the island bodies. In all other matters, British legislation applies to the territory of the Channel Islands not automatically but by express provision or implied extension. In the absence of express provision, Acts of the British Parliament may authorise the Queen to extend the effect of newly adopted laws, with such modifications as may be necessary, to the Channel Islands by means of an Order in Council. Acts of the British Parliament intended to be applied in the Channel Islands must be sent to the Royal Courts of Jersey and Guernsey for registration. Whilst such registration may not be unreasonably withheld, transmission to the Royal Courts gives the competent island authorities the opportunity to consider whether the legislation which it is proposed to extend to the islands conflicts in any way with their acknowledged rights and privileges. Moreover, the power to legislate for the British islands (save for modifications of an institutional or constitutional nature), even at the request of the States of Jersey, resides first and foremost, and fundamentally, with the *Crown*, as a royal prerogative and by way of succession to the title of the Duchy of Normandy (see footnote 4 above, and the text relating thereto). The Crown exercises that power by means of orders adopted — typically by delegated authority from Parliament — on the advice of the Privy Council (Orders in Council). Orders in Council are also sent to the Royal Court for registration. Where the latter raises objections concerning the compatibility of an Order in Council submitted for registration with the constitutional privileges of the island, it is customary for the British Secretary of State for Home Affairs (the Home Office) to advise the Crown to desist from the request, in order to take into consideration such alternative proposals as may be made by the local legislature.
Finally, administration of the island is reserved for the Bailiff, chosen by the Sovereign, who also assumes the offices of chief legal officer and president of the States of Jersey. The administrative tasks assigned to the Lieutenant Governor, who represents the Crown in the island and constitutes the principal organ linking the States of Jersey and the British Government, have been redefined over the years and are now in practice fairly modest.

8 — Horner (op. cit. footnote 1, pp. 80-83) deduces Jersey's lack of international personality from the dual fact that the island: (i) does not participate in the conclusion of international agreements independently from the United Kingdom (the only instruments analogous to such agreements which can be found in practice being treaties for the prevention of double taxation concluded by Jersey with the United Kingdom and Guernsey in 1952 and 1956 respectively); and (ii) is not independently a member of international governmental organisations.

9 — Ibid., p. 89. The conclusion indicated in the text was also reached by the International Court of Arbitration in its decision of 30 June 1977 on the arbitration between France and the United Kingdom on the determination of the continental shelf (see *International Legal Materials*, 1979, p. 397, paragraphs 180-186).

10 — See footnote 4 above, and the text relating thereto. The Government of the United Kingdom (on behalf of the Crown) is also responsible for the defence of the British islands.

clause *conferring* on the parties the power to apply the agreement to certain dependent territories). [11]

However, before concluding international agreements which apply to the British islands — particularly when such application requires the adoption of new legislation in areas normally within the purview of the islands' legislative organs — the British Government does not fail, in practice, to consult the island authorities. [12]

5. In particular, and so far as is relevant for the purposes of this Opinion, the central authorities did, for example, consult the local authorities after the United Kingdom's application for accession to the European Communities, which was formally submitted in 1967. The question whether Jersey and the other British islands should join and become part of the Communities, or remain outside (whilst the United Kingdom joined the Communities in any event) raised a series of problems, especially on account of the smallness of the islands, their proximity to the Continent and their close economic links with the United Kingdom (and, to a lesser extent, France). It was a question, in particular, of determining what impact the United Kingdom's accession would have, in the event that the British islands did, or did not, contemporaneously join: (i) upon the special protection enjoyed by the islands' horticultural and agricultural industries, (ii) upon their traditional fiscal and customs privileges, (iii) upon measures for promoting financial activities on the islands, centred on strict banking secrecy and low rates of taxation, and (iv) upon local tourist businesses of a seasonal character, particularly in relation to immigration control and social security. [13]

6. Under Article 227(4) of the EC Treaty ('the Treaty'), 'the provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible'.

As a result of that provision, the accession of the United Kingdom to the European Communities would normally necessarily have implied the full applicability of the Treaty in the British islands as well, including Jersey. [14]

11 — It should be noted that the Vienna Convention on the Law of Treaties of 23 May 1969, drawn up by the International Law Commission of the United Nations, which codifies customary rules of public international law on the procedure for the formation of international treaties and the requirements for their validity and effectiveness, merely provides, as regards the territorial application of treaties, that 'unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party *in respect of its entire territory*' (see Art. 29; United Nations Treaty Series, vol. 788, p. 354). Although the expression 'entire territory' is not further defined, it has been held in legal writings to include the non-metropolitan territories of a State (see I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester, 1984 (2nd ed.), pp. 87-92).

12 — See *Royal Commission on the Constitution 1969-1973*, vol. I (Report), Part IX, paragraph 1362.

13 — In relation to Jersey, see Simmonds, *The British Islands and the Community*, cit., pp. 160-169.

14 — See Special Committee of the States of Jersey appointed to consult with Her Majesty's Government in the United Kingdom on all matters relating to the Government's Application to join the European Economic Community, *Report and Recommendations*, 1967, p. 2 (cited in Simmonds, *The British Islands and the Community*, cit., pp. 161 and 162).

7. However, by Article 26(3) of the Act concerning the Conditions of Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Communities and the Adjustments to the Treaties ('the Act of Accession'), [15] a new Article 227(5) was added, which ambiguously states: 'Notwithstanding the preceding paragraphs: (...) (c) this Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and to the European Atomic Energy Community signed on 22 January 1972.'

8. The special arrangements for the British islands, referred to in Article 227(5) of the Treaty, are those laid down by Protocol No 3 to the Act of Accession on the Channel Islands and the Isle of Man ('the Protocol'). The Protocol is attached to the Act of Accession and forms an integral part thereof (Article 158 of the Act of Accession).

As is well known, the solution to the problems referred to above (see point 5) which prevailed in the negotiations for the entry of the United Kingdom to the Communities was to grant generous derogations from application of the Treaty in full. As a result, the provisions of the Treaty not specifically mentioned in the Protocol are inapplicable to the British islands. [16]

9. The Protocol provides that the Channel Islands and the Isle of Man are included in the Community customs union, but excluded from the scope of the common agricultural policy. [17] Article 1 of the Protocol states that the Community rules on customs matters and quantitative restrictions are applicable to the British islands 'under the same conditions as they apply to the United Kingdom'. [18]

In the case of agricultural products which are the subject of a special trade regime, Article 1 provides that (i) levies and other import measures in relation to third countries laid down in Community rules and applicable by the United Kingdom and (ii) Community rules 'necessary to allow free movement and

15 — OJ, English Special Edition of 27 March 1972, p. 14

16 — See H. Smit and P. Herzog, *The Law of the European Community* (ed. D. Campbell) vol. 5, February 1989 (loose-leaf ed.), San Francisco, p. 6-216.119. I note in passing that, although the British Government initially declared that it wished to conclude an association agreement between the Communities and the British islands pursuant to Article 238 of the Treaty (see *The United Kingdom and the European Communities*, July 1971, Cmnd. 4715, paragraphs 123 and 124), the special provisions laid down in the Act of Accession and the Protocol do not constitute such a form of association. Associations of that kind are possible only between the Community and independent non-member countries.

17 — See J.-L. Dewost, *Dispositions générales et finales (Article 227)*, in J. Megret, M. Waelbroeck, J.-V. Louis, D. Vignes and J.-L. Dewost, *Le droit de la Communauté economique européenne. Commentaire du traité et des textes pris pour son application*, vol. 15, Brussels, 1987, p. 490.

18 — Also as regards the progressive reduction of customs duties and charges having equivalent effect applied to trade between the British islands and the Community, including new Member States.

observance of normal conditions of competition in trade in these products' are to be applicable in the British islands.

10. On the sensitive issue of freedom of movement for persons, Article 2 of the Protocol provides that 'the rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from Community provisions relating to the free movement of persons and services'.

That provision is to be read in conjunction with Article 6 of the Protocol, which provides that 'in this Protocol, Channel Islander or Manxman shall mean any British citizen [19] who holds that citizenship by virtue of the fact that he, a parent or grandparent was born, adopted, naturalised or registered in the island in question; but such a person shall not for this purpose be regarded as a Channel Islander or Manxman if he, a parent or a grandparent was born, adopted, naturalised or registered in the United Kingdom. Nor shall he be so regarded if he has at any time been ordinarily resident in the United Kingdom for five years.' [20]

11. Finally, by a brief provision in Article 4, the Protocol lays down a general principle of non-discrimination: 'The authorities [of the British islands] shall apply the same treatment to all natural and legal persons of the Community.'

12. In addition to the legislative context of the questions referred, it is necessary to consider the relationship between Jersey and the United Kingdom as regards the particular aspects, which are closely interlinked, [21] of the grant of British citizenship and immigration control.

19 — See the New Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland on the definition of the term 'nationals' (OJ 1983 C 23, p. 1), which replaced, as from 1 January 1983 — the date of the entry into force of the British Nationality Act 1981 — the declaration made at the time of signature of the Treaty of Accession. The original text of Article 6 of the Protocol referred to 'any citizen *of the United Kingdom and Colonies*': see footnote 3 above.
In other words, by the effect of Article 2 of the Protocol, British citizens whose only link with the United Kingdom consists of a link with one of the Channel Islands are for all practical purposes excluded from the definition of 'British citizens' for the purposes of the Treaties establishing the Communities.

20 — It has been observed that, since a large number of residents had left the Channel Islands and moved to the United Kingdom during the Second World War, at the end of which significant migration took place in the opposite direction, the definition in Article 6 of the Protocol was such as to make the description of 'Channel Islander' inapplicable to over 50% of the island population at the time. According to the statement at the hearing by the Lieutenant Governor's representative, the 1981 census shows that citizens of Jersey, as defined in the protocol, constituted about 20% of the total population at the time.

21 — Through the determination of nationality, Member States are able to regulate the class of persons exempt from immigration controls under domestic law (see, for example, A. C. Evans, 'Nationality Law and the Free Movement of Persons in the EEC: With Special Reference to the British Nationality Act 1981', in *1981 Yearbook of European Law*, 1982, p. 173).

13. Like the other British islands, Jersey forms part, together with the United Kingdom and the Republic of Ireland, of the so-called 'common travel area', within which there are no systematic immigration controls on internal journeys (by contrast with journeys begun or ending outside the common area). [22]

14. The British Nationality Act 1981 [23] provides that a person born in the United Kingdom of a father or mother who is (a) a British citizen or (b) settled in the United Kingdom acquires British citizenship. [24]

Under Section 50(1) of the British Nationality Act 1981, the term 'United Kingdom' (unless the context otherwise requires) includes Great Britain, Northern Ireland, the Channel Islands and the Isle of Man. Persons born in Jersey of a parent or parents having British citizenship or settled on the island therefore enjoy the so-called 'common nationality status' and are British citizens who, as such, have the right of abode in the United Kingdom. [25]

15. Similarly, all British citizens have the right of abode in Jersey (as a part of the United Kingdom for nationality purposes) and — as the Royal Court notes in the question referred — cannot be deported from the territory of the island. [26]

22 — See Section 1(3) of the Immigration Act 1971 (1977 c 77), which provides: 'Arrival in and departure from the United Kingdom on a local journey from or to any of the Islands (that is to say, the Channel Islands and Isle of Man) or the Republic of Ireland shall not be subject to control under this Act, nor shall a person require leave to enter the United Kingdom on so arriving ...; and in this Act the United Kingdom and those places ... are collectively referred to as "the common travel area".'
Moreover, under Section 1(1) of Schedule 4 to the same Act: 'Where under the immigration laws of any of the Islands a person is or has been given leave to enter or remain in the island, or is or has been refused leave, this Act shall have effect in relation to him, if he is not [a British citizen], as if the leave were leave (of like duration) given under this Act to enter or remain in the United Kingdom, or, as the case may be, as if he had under this Act been refused leave to enter the United Kingdom.'
The main provisions of the Immigration Act 1971, the British Nationality Act 1981 and the Immigration Act 1988 were extended to the Jersey legal system by Order of the Queen in Council, the Immigration (Jersey) Order 1993 of 30 July 1993, SI 1993/1797. See footnote 7 above.

23 — (1981 c 61).

24 — Ibid., Sections 1(1) and 50(2). It should be noted that (save for a few exceptions, which are not relevant for the purposes of this Opinion) the provisions of the British Nationality Act 1981 are stated to be applicable to the British islands by Section 53(5) of the Act.

25 — See Section 2(1)(a) of the Immigration Act 1971, as substituted by Section 39(2) of the British Nationality Act 1981, cited in footnote 23 above.
Under Section 1(1) of the Immigration Act 1971: 'All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with this Act to enable their right to be established or as may be otherwise lawfully imposed on any person.'

26 — See Section 3(5) of the Immigration Act 1971 (cited in footnote 22), which provides: 'A person *who is not a British citizen* shall be liable to deportation from the United Kingdom —
(a)if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave; or
(b)if the Secretary of State deems his deportation to be conducive to the public good; or
(c)if another person to whose family he belongs is or has been ordered to be deported' (emphasis added).

It can, however, be inferred from the order for reference that British citizens are subject to the Jersey criminal courts' power of binding over. The court may, as an alternative to imposing the punishment, ask the offender to agree to appear before the same court for sentencing, if requested to do so, at a fixed date or after a fixed period, usually between two and three years, with an obligation in the meantime to be of good conduct and fulfil the conditions imposed by the court for the application of that procedure. Such conditions may include an obligation to leave Jersey territory and not return there for the period specified. Should the offender not agree, or — if he agrees — breach the order binding him over, provision is made for him to be brought back before the same court and punished for the original offence which gave rise to the adoption of the measure. [27]

16. As for persons without British citizenship, they may enter and remain in Jersey (as in any other part of the United Kingdom) without any need for the relevant permits, where they are entitled to do so by virtue of a right of freedom of movement deriving from Community legislation. [28]

However, as already stated, [29] a person who is not a British citizen is liable to deportation from Jersey — in the event that a criminal court convicting him so recommends [30] — if the Lieutenant Governor deems such deportation to be conducive to the public good.

17. Under the special provisions of Schedule 4 to the Immigration Act 1971, concerning integration of the British islands' immigration law with the law of the United Kingdom, a deportation order requiring the person to whom it is addressed to leave Jersey and not return takes effect throughout the United Kingdom ('as if the order were a deportation order made against him under this Act'). [31]

Although the British Secretary of State may in individual cases direct that a deportation order made in Jersey is not to take effect

27 — In addition, the order for reference shows that even British citizens are subject to certain statutory limits on the purchase and letting of residential property, laid down by the Housing (Jersey) Law 1949 and the Housing (General Provisions) (Jersey) Regulations 1970 in respect of any person, irrespective of nationality, who does not satisfy the criteria of connectedness with the island expressly laid down.
In its observations, the Commission also referred to the existence of public control on the engagement by the island's employers of persons who are not Jersey workers. I assume that the Commission intended to refer to the rules laid down by Article 4 of the *Loi sur les Étrangers* of 1937 (see I. A. Macdonald, *Immigration Law and Practice*, London, 1983 (3rd ed.), p. 75). The order for reference has, however, entirely ignored the existence of such control.

28 — See Section 7(1) of the Immigration Act 1988, footnote 22 above.

29 — See footnote 25 above, and the text relating thereto.

30 — See Sections 3(6) and 6 of the Immigration Act 1971, cited in footnote 22 above.

31 — See Schedule 4, Paragraph 3(1) of the Immigration Act 1971, cited in footnote 22 above.

outside the island, [32] the national court has stated that there are no actual precedents to that effect. In practice, a deportation order made by the competent authorities of one of the British islands takes effect not only over the territory of the particular island concerned but throughout the United Kingdom.

II — Factual background to the main proceedings

18. The facts of the case pending before the Royal Court may be summarised as follows. Mr Rui Alberto Pereira Roque, a Portuguese citizen, first arrived in Jersey in February 1992 in order to join his family which was resident there, and was admitted without any restrictions, in accordance with Section 7(1) of the Immigration Act 1988. [33]

In October 1993, at the age of 19, Mr Pereira Roque, who had for some months been a night porter employed by a hotel, was charged with the theft of UKL 1 300 at his place of work. Having pleaded guilty, he was placed on probation for a year and required to complete 80 hours' community service. On that occasion, he was warned in an interview with the Jersey Immigration Department that a recommendation for deportation would be made if he were convicted of another offence.

Having found new employment in April 1994, again as a hotel porter, Mr Pereira Roque committed three thefts of personal property belonging to clients and another employee, and was sentenced in October 1994 to 14 weeks' imprisonment. The probation order was annulled, although the court that convicted him did not consider it appropriate to recommend his deportation from Jersey.

19. In December 1994, at the request of the Chief Inspector of Immigration, Mr Pereira Roque's lawyer submitted written observations on the proposal to recommend his client's deportation. The order for reference shows that, although the Chief Inspector had also proposed in his request that an interview should take place with Mr Pereira Roque in order to consider the appropriateness of such a recommendation, the interview never took place.

On 22 December 1994, the Lieutenant Governor ordered Mr Pereira Roque's deportation from Jersey, as being conducive to the

32 — See Schedule 4, Paragraph 3(2) of the Immigration Act 1971, cited in footnote 22 above.

33 — See footnote 27 above, and the text relating thereto. The Community rules on freedom of movement for workers within the Community — including the eponymous Council Regulation (EEC) No 1612/68 of 15 October 1968 (OJ, English Special Edition 1968 (II) p. 475) as subsequently amended — became fully applicable to the movement of Portuguese workers between Portugal and the territory of other Member States on 1 January 1992, as provided for by Council Regulation (EEC) No 2194/91 of 25 June 1991 on the transitional period for freedom of movement of workers between Spain and Portugal, on the one hand, and the other Member States, on the other hand (OJ 1991 L 206, p. 1).

public good, by a measure lacking a statement of reasons and not subject to administrative appeal. [34] On 3 January 1995, Mr Pereira Roque applied to the Royal Court for judicial review of the *lawfulness* of the measure in question. At his request, the Royal Court stayed the order pending determination of the substantive application.

20. The applicant submits that the exercise of the Lieutenant Governor's power of deportation is limited by Article 4 of the Protocol, which requires the Jersey authorities to apply the same treatment to all natural and legal persons of the Community in relation to situations which, in territories where the Treaty is fully applicable, are governed by Community law. At the material time, Mr Pereira Roque enjoyed a right to enter and remain in the United Kingdom in accordance with the Community legal order, in his capacity as a worker and/or a dependant of a worker. [35] He therefore came within the terms of Article 4.

Since British citizens who are not Jersey citizens cannot be deported from Jersey, it follows, in the applicant's submission, that the same treatment must apply to a citizen of another Community country who — like himself in this case — exercises the right to freedom of movement for work purposes.

21. In any event, even if a deportation order issued by the Jersey authorities against a person in Mr Pereira Roque's position were accepted as lawful, such a measure would bind the person to whom it was addressed, until such time as it might be revoked, to remain permanently outside the territory not only of Jersey but of the United Kingdom as a whole. That being so, a measure of that kind could not be adopted otherwise than in compliance with British legislation.

In other words, Mr Pereira Roque submits, even deportation orders adopted by the Jersey authorities against natural persons in the Community holding rights which, in territories where the Treaty is fully applicable, are governed by Community law, must comply with the principles laid down by Community legislation. The concepts of 'public good' and 'public policy' should therefore be evaluated on the basis of the procedures and

34 — Section 15(1)(a) of the Immigration Act 1971, which provides for an appeal against a deportation order by the Secretary of State (in the absence of a prior recommendation by the criminal court) before an adjudicator and, at second instance, the Immigration Appeals Tribunal, not having been extended to Jersey. See Macdonald, op. cit. footnote 27, p. 74.

35 — The right of dependants of a worker, who is a citizen of a Member State, to settle with him (irrespective of their own nationality) in the territory of another Member State in which he works is laid down by Article 10(1) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475). Those persons are the spouse of the worker and their descendants who are under the age of 21 years or are dependants, and dependent relatives in the ascending line of the worker and his spouse.

substantive criteria laid down by Article 48(3) of the Treaty [36] and Directive 64/221. [37]

Therefore, Mr Pereira Roque argues, the measure adopted against him was unlawful; deportation from Jersey of a person convicted of minor offences — as in this case — is not, he submits, conducive to the public good and is in any event disproportionate to the offence committed, in that it involves, *inter alia*, the separation of the person concerned from his family. The unlawfulness of the measure is, he submits, all the more evident in that the Jersey legal system does not provide for an appeal procedure involving review of the *substance* of the measure.

Mr Pereira Roque also criticises as illogical the arguments of the Lieutenant Governor, who assimilates Jersey to the United Kingdom (in support of the view that the prohibition on deporting British citizens from the island is not discriminatory) and, at the same time, maintains that the concept of public policy may be understood differently under the two legal systems, even though deportation — which is a measure intended to operate throughout the common travel area — requires in view of its effects that the reasons justifying it should be uniformly defined.

22. In response, the Lieutenant Governor submits that, under public international law, States may deport foreigners but not their own citizens. Exercise of the power of deportation is always 'discriminatory' by nature, but without thereby assuming any relevance for the purposes of Article 4 of the Protocol. Moreover, Article 48(3) of the Treaty and Directive 64/221 allow the deportation of citizens of other Member States, notwithstanding the general prohibition of discrimination on grounds of nationality laid down by Article 6 of the Treaty.

36 — That provision expressly safeguards such limitations on the fundamental rights of freedom of movement for workers guaranteed by the Treaty — including the right 'to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action' — as are justified on grounds of public policy, public security or public health.

37 — Council Directive 64/221/EEC 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 or public health (OJ, English Special Edition 1963-1964, p. 117).
Under Article 3 of the directive, which has been recognised by the Court as having direct effect in the legal systems of Member States (see Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337, at paragraphs 6 and 7), measures removing aliens from their territory adopted by Member States on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned. They are not automatically justified by the mere existence of criminal convictions, as a possible deterrent, by way of general prevention, to other aliens present in the territory (Case 67/74 *Bonsignore* v *Stadt Köln* [1975] ECR 297), save where the circumstances which gave rise to the previous convictions demonstrate the existence of personal conduct which, by indicating a propensity to commit another breach of the peace and public security, constitutes a current threat to public order (Case 30/77 *R* v *Bouchereau* [1977] ECR 1999).
Save where reasons inherent to State security dictate otherwise, the grounds on which a given restrictive measure is based must be brought to the knowledge of the person concerned with sufficient detail and precision to enable him to defend himself effectively (Joined Cases 115/81 and 116/81 *Adoui* v *Belgian State and City of Liège*; *Cornuaille* v *Belgian State* [1982] ECR 1665); the person concerned must also be given the opportunity to try the remedies allowed to citizens against administrative measures (Articles 6 and 8 of the directive).
Finally, Article 9 of the directive provides — where there is no right of appeal to a court of law, or where such appeal may be brought only in respect of the legal validity of the contested measure, or where the appeal cannot have suspensory effect — that a Community citizen threatened with deportation is entitled to have his case examined, before the measure is implemented, by an independent advisory authority of the host country before which full exercise of the rights of the defence is guaranteed (Case C-175/94 *R* v *Secretary of State for the Home Department*, ex parte *Gallagher* [1995] ECR I-4253).

Furthermore, acceptance of Mr Pereira Roque's arguments would lead to the bizarre result of giving the citizens of all the Member States the right to enter and remain on Jersey territory, without being subject either to immigration control or to the possibility of deportation, even for purposes other than those contemplated by Community law. That, in the Lieutenant Governor's submission, would amount to contradicting the legislative principle that the Treaty provisions on free movement of persons are not applicable on the island.

In addition, the Lieutenant Governor submits, the non-discrimination clause laid down in the Protocol cannot be read as requiring the Jersey authorities to grant equal treatment to British citizens and other Community citizens, either by introducing restrictions on the right of the former to enter and remain on the island, or, vice versa, by removing the current restrictions in that respect imposed on the latter.

In his view, therefore, Article 4 of the Protocol does not limit the power of the island's competent authorities to deport Community citizens on grounds of public policy or for other reasons.

23. In the alternative, the Lieutenant Governor maintains that there are other reasons why the argument that he is obliged to exercise his own power of deportation in the same manner as the United Kingdom authorities is untenable. It would, in his submission, be a way of surreptitiously making the Treaty provisions on free movement of persons applicable on the island, and also infringe the principle, established by the Court of Justice, that Member States remain free to determine their own public policy needs in the light of national requirements.

Moreover, the justification for the deportation order is to be assessed by determining whether or not the presence of the person concerned on the island constitutes a genuine and sufficiently serious threat to society; it is therefore quite logical, he submits, for the competent national authority to be required to interpret the concept of public policy from time to time with reference to the nature and requirements of the society in whose territory the offender finds himself.

III — Whether the Royal Court may refer questions to the Court of Justice pursuant to Article 177 of the Treaty

24. In formulating my solution to the questions referred, I shall take as the starting point the judgment of the Court of Justice in Case C-355/89 *Department of Employment* v *Barr and Montrose Holdings*, [38] which has been relied upon in support of the respective

38 — [1991] ECR I-3479.

and opposing positions taken in these proceedings, both by the parties to the main action and by the British and French Governments and the Commission.

That case is relevant, first of all, in verifying whether the Court of Justice has jurisdiction to provide the interpretations requested by way of preliminary ruling, given that the Royal Court — as stated above (see footnote 7) — forms part of the legal system of the island and not of the British legal system.

It is sufficient here to repeat what the Court said in *Barr and Montrose Holdings* concerning a request for a ruling on interpretation under Article 177 of the Treaty, submitted by a court of the Isle of Man: 'according to Article 1(3) of the Treaty of Accession [of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community], the provisions concerning the powers and jurisdiction of the institutions of the Communities are to apply in respect of Protocol No 3 which, according to Article 158 of the Act of Accession, forms an integral part thereof. Accordingly, the jurisdiction in preliminary ruling proceedings conferred on the Court by Article 177 of the Treaty extends to Protocol No 3.

Furthermore, it would be impossible to ensure the uniform application of Protocol No 3 in the Isle of Man if its courts and tribunals were unable to refer questions to the Court concerning the interpretation of that protocol, the interpretation and validity of the Community legislation to which that protocol refers, and the interpretation and validity of measures adopted by the Community institutions on the basis of Protocol No 3.

It follows that in order to ensure the uniform application of that protocol, the Deputy High Bailiff's Court must be regarded as a court or tribunal empowered to refer questions on those matters to the Court of Justice pursuant to Article 177 of the Treaty.' [39] That conclusion is fully applicable, *mutatis mutandis*, to the present case.

IV — Question 1

25. That is not all. The aspects of the judgment on the merits of the case in *Barr and Montrose Holdings* concerning interpretation of the obligation to apply the same treatment laid down by Article 4 of the Protocol are particularly relevant for the purposes of this Opinion.

39 — Paragraphs 8 to 10 of the judgment.

In that case, Mr Barr, a British citizen, and Montrose Holdings Limited, which employed him as a company lawyer, were charged with infringement of the Isle of Man Control of Employment Act, which restricted access to employment on the island to 'Isle of Man workers' and workers holding a special permit issued by the Department of Health and Social Security. Appearing before the Deputy High Bailiff's Court, Mr Barr and Montrose Holdings pleaded that the legislation in question was unlawful for breach of Article 4 of the Protocol; the contested provisions exempted the police service and other activities in the service of the Crown on behalf of the United Kingdom Government from the permit requirement, thereby, in their submission, reserving more favourable treatment for citizens of the United Kingdom and the Republic of Ireland.

26. In reply to the questions from the Isle of Man court, seeking an interpretation of the Protocol, the Court of Justice began by accepting the argument of the British Government, holding that 'the rule laid down in Article 4 of Protocol No 3 cannot be interpreted in such a way as to be used as an indirect means of applying on the territory of the Isle of Man provisions of Community law which are not applicable there by virtue of Article 227(5)(c) of the EEC Treaty and Article 1 of Protocol No 3, such as the rules on the free movement of workers.' [40]

40 — Paragraph 16 of the judgment.

27. On the other hand, the Court rejected the interpretation of Article 4 — likewise advocated by the British Government — to the effect that the principle of equal treatment laid down by that article was limited exclusively to the free movement of goods, dealt with in Article 1 of the Protocol.

The Court stated that, by its wording, Article 4 applied to natural and legal persons, and 'must therefore be regarded as an independent provision so far as its scope is concerned. It must be interpreted as precluding any discrimination between natural and legal persons from the Member States in relation to situations which, in territories where the Treaty is fully applicable, are governed by Community law.' [41] Since access to employment is one of those situations, the Court concluded that Article 4 applies thereto, notwithstanding the inapplicability to the Isle of Man of the Community rules on free movement of workers. [42]

41 — Paragraph 17 of the judgment.

42 — Paragraph 18 of the judgment. Having established that, the Court enquired whether any discrimination between Community workers on grounds of citizenship as regards only those types of employment constituting derogations — of which Mr Barr's employment as a company lawyer was not one — necessarily had the effect of rendering the entire Isle of Man system of controlling employment incompatible with Article 4 of the Protocol. The Court replied to that question in the negative; the requirement of a work permit for all citizens of Member States, when applied by the island authorities in a non-discriminatory manner, did not in the majority of cases constitute an infringement of the obligation under Article 4 to ensure equal treatment, and had to be held compatible with Community law.

28. Those principles are to be applied in these proceedings. The problem before the Court, it should be remembered, is whether a deportation order of the kind adopted by the Lieutenant Governor of Jersey against Mr Pereira Roque is compatible with the prohibition on discrimination laid down by Article 4 of the Protocol.

29. Let me say at once that Article 4 must be considered applicable here, notwithstanding the inapplicability to the island of Jersey, referred to above, of the Community rules on the free movement of workers. In the circumstances of this case (see points 18 and 19 above), such a provision undeniably has a significant impact on the practical opportunities for a Community citizen such as Mr Pereira Roque to take up employment on the island [43] (or alternatively to reside there as a dependant, in the wake of a parent who is a worker).

The British Government's argument, therefore, to the effect that the judgment in *Barr and Montrose Holdings* must be interpreted as entirely excluding immigration control from the scope of Article 4 of the Protocol, seems to me to be without merit.

30. As for the allegedly discriminatory character, in favour of British citizens, of the deportation measures from Jersey which the Lieutenant Governor has the power to adopt under Section 3(5)(b) of the Immigration Act 1971, it seems to me that some remarks are called for as to the power which States enjoy in this area under international law.

31. The determination of nationality essentially constitutes the means for defining the human dimension of the State, and in international law it is traditionally regarded as the

43 — See Plender, op. cit. footnote 1, pp. 157 and 158. In that respect, I note that, although the Commission, supported by the French Government, has cast at least one doubt on Mr Pereira Roque's actual status as a 'worker' at the material time, that was taken as read by the national court. It should be remembered that the term 'worker', which is used in the Treaty but has never been defined, has been broadly interpreted by the Court, so that it appears to be sufficient for the person concerned to pursue for a certain period of time, in return for remuneration, actual and genuine employment in the interests of another person and under that person's direction (see, *inter alia*, Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035 and Case 66/85 *Lawrie-Blum* v *Land Baden-Württemberg* [1986] ECR 2121). On the basis of that principle, the Court has held that the persons who may legitimately avail themselves of Community rules on free movement include part-time workers (Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741), temporary, seasonal and apprentice workers (Case C-3/90 *Bernini* v *Minister van Onderwijs en Wetenschappen* [1992] ECR I-1071) and students undergoing periods of practical training as part of a training programme (Case C-27/91 *Union de Recouvrement des Cotisations de Sécurité Sociale et d'Allocations Familiales de la Savoie* v *Hostellerie Le Manoir* [1991] ECR I-5531). The right to enter the territory of another Member State and reside there for a reasonable period of time is, however, also enjoyed by Community citizens who, whilst not having a job, are in search of employment (see, *inter alia*, Case C-292/89 *R* v *Immigration Appeal Tribunal*, ex parte *Antonissen* [1991] ECR I-745).

sole prerogative of the State, [44] even if potentially subject to certain restrictions deriving from customary law or treaties. [45]

32. In Community law as well, this Court has always recognised the exclusive jurisdiction of the Member States to determine unilaterally the conditions for the acquisition and loss of their respective nationalities, provided that — presumably on account of its indirect effects on the determination of the scope of the fundamental freedoms guaranteed by the Treaty *ratione personae* [46] — such jurisdiction is exercised in compliance with Community law. [47]

The Treaty on European Union itself, whilst establishing citizenship of the Union, [48] has not in any way encroached on the exclusive jurisdiction of the Member States to determine nationality, as is clear from the relevant provisions of the Treaty and the Declaration on Nationality of a Member State annexed to the Final Act. [49]

33. Finally, the scope and content of the nationality of a Member State may well differ for the purposes of national and of Community law. That is the case here, in that citizens of the British islands, whilst being British citizens to all intents and purposes under domestic law and coming within the definition of 'British citizens' for the

44 — See the judgment of the International Court of Justice of 6 April 1955 *Liechtenstein* v *Guatemala* ('Nottebohm') (Second Phase), ICJ Reports, p. 4, especially p. 23. In that judgment, the International Court of Justice gave its oft-cited definition of 'nationality' as 'a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the judicial expression of the fact that the individual upon whom it is conferred, either directly by law or as a result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with any other State.'
See also the opinion of the Permanent Court of International Justice of 7 February 1923 in the case of *Nationality Decrees in Tunis and Morocco*, P. C. I. J., Ser. B, No 4, p. 24. It is useful to recall, on the semantic level, that, whilst the terms 'nationality' and 'citizenship' are largely regarded as interchangeable in common parlance (see C. Parry, *Nationality and Citizenship Laws of the Commonwealth and the Republic of Ireland*, London, 1957, pp. 3-8), they are used to emphasise two different aspects of the way in which a person belongs to the State, namely, the collection of rights which are relevant in the context of international law, such as the right to diplomatic protection and to the issuing of a passport, and rights which are relevant in the domestic legal system, such the right of residence and the right to vote; see A. Karinen, *Expulsion in Europe. The Member States' Sovereignty and the Individual's Rights*, Institutet för Europeisk rätt vid Stockholms Universitet, No 34 (1996), p. 40.

45 — See Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, reproduced in A. J. I. L., vol. 24 (1930). p. 192. Such restrictions determined by international law appear, however, to be rare and to have no legally binding force; according to Advocate General Trabucchi in Case 21/74 *Airola* v *Commission* [1975] ECR 221, especially p. 233, they appear to include fundamental human rights. See S. O'Leary, 'Nationality Law and Community Citizenship: A Tale of Two Uneasy Bedfellows', in *1992 Yearbook of European Law*, 1993, p. 353, especially p. 356.

46 — See O'Leary, op. cit. footnote 45, pp. 378 and 379.

47 — See Case C-369/90 *Micheletti* v *Delegación del Gobierno en Cantabria* [1992] ECR I-4239, paragraph 10.

48 — See Articles 8 to 8e of the Treaty. Citizenship of the Union is reserved for 'every person holding the nationality of a Member State' (Article 8).

49 — That declaration states: 'The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.' Under the general rule of interpretation laid down by the Vienna Convention on the Law of Treaties of 23 May 1969, cited in footnote 11, 'the context [in which the terms of the treaty are to be given their ordinary meaning], for the purpose of the interpretation of a treaty, shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty' (Article 31(2)).

purposes of the Treaties establishing the Communities which is set out in the United Kingdom Government's 1983 Declaration, do not enjoy the benefit of the Treaty provisions on the free movement of persons. [50]

34. The entry and deportation of aliens are also matters that are traditionally regarded as the sole prerogative of the State, since they concern powers of self-protection that are inherent in the essential public interests and the very sovereignty of each State.

35. That principle remains intact, even though it is recognised that the discretionary power to deport aliens whose presence in the territory is considered undesirable is limited by the bilateral relationship established, with concomitant reciprocal rights and obligations, between the State granting entry to an alien and the State of which the alien is a national. Under that relationship, it is the latter State which bears the obligation of allowing entry to its own citizens who have been lawfully deported from another State, whilst the host State, for its part, is obliged to give fair and reasonable treatment to aliens on its territory.

That being so, a State's discretion in the matter of deportation is limited by the function and purpose of the power in question, which must thus be exercised in good faith (that is, not for ulterior motives, such as genocide, expropriation or abandonment of the individual to persecution in his State of origin) and on reasonable grounds (such as infringement of the rules on immigration control of the host State, involvement in criminal activities or other considerations of policy or public safety). The reasons underlying deportation are, moreover, to be carefully weighed by the State adopting the measure in order to take account of the countervailing interests of the alien (including his individual rights, the right not to be separated from his family, property and other possible ties with the State of residence, and his legitimate expectations). [51]

36. That explains, *inter alia*, how the exercise of the power of deportation (or the power to refuse entry or residence) can only affect aliens.

That has also been acknowledged in Community law, as the expression of a principle of public international law, which the Treaty has left in force in relations between Member States. The Court has held that deportation measures adopted by Member States against aliens from other Community countries — in accordance with the conditions laid down

50 — See footnote 19 above.

51 — See G. S. Goodwin-Gill, 'The Limits of the Power of Expulsion in Public International Law', in *The British Year Book of International Law 1974-1975*, Oxford, 1977, p. 55, especially pp. 56-122; I. Brownlie, *Principles of Public International Law*, Oxford, 1990 (4th ed.), p. 520.

by Article 48(3) of the Treaty and Directive 64/221, and in any event on grounds other than failure to complete formalities concerning the control of aliens — do not give rise to discriminatory restrictions on the free movement of persons. [52]

37. I consider in the light of the above — in answer to the first question referred — that the obligation to accord the same treatment to Community persons, imposed on the Jersey authorities by Article 4 of the Protocol, is not in this case infringed by the mere fact that citizens of other Community States, unlike British citizens, are subject to immigration controls on the island and to the adoption of coercive measures removing them from its territory.

38. Since the Protocol is an integral part of the Treaty (see point 8 above), the obligation to 'apply the same treatment to all natural and legal persons of the Community' is as a matter of logic to be interpreted in the light of Community law.

In that regard, it is necessary to recall the principles laid down by the Court of Justice in application of Article 6 (formerly Article 7) of the Treaty concerning the general clause prohibiting discrimination on grounds of nationality, of which Article 4 cited above may reasonably be regarded as the corresponding provision in the Protocol. [53] According to the Court's case-law, Member States must in principle accord aliens from other Community countries the treatment reserved for their own citizens, which does not prevent different treatment of the two categories from being justified, and thus free of discriminatory effects contrary to Community law, [54] in situations which are legally distinguishable in accordance with non-arbitrary and reasonable criteria.

39. In the specific area of equal treatment of workers, the general principle laid down by Article 6 is applied in practice by Articles 48 to 51 of the Treaty. Here the general prohibition of discrimination on grounds of nationality entails that citizens of other Member States may not be treated differently from those of the host State as regards the conditions of access to work and employment, especially in relation to remuneration,

52 — See the judgment in *Van Duyn* v *Home Office*, cited in footnote 37 above, at paragraphs 22 and 23; Case 48/75 *Royer* [1976] ECR 497, at paragraph 41; judgment in *Adoui and Cornuaille*, cited in footnote 37 above, at paragraph 7; Case C-370/90 *R* v *Immigration Appeal Tribunal and Singh*, ex parte *Secretary of State for the Home Department* [1992] ECR I-4265, at paragraph 22; Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, at paragraph 28.

53 — See Plender, op. cit. footnote 1, p. 156.

54 — See, *inter alia*, Case 810/79 *Überschär* v *Bundesversicherungsanstalt für Angestellte* [1980] ECR 2747; Case 293/83 *Gravier* v *Ville de Liège* [1985] ECR 593; Case 308/86 *Lambert* [1988] ECR 4369; Case 42/87 *Commission* v *Belgium* [1988] ECR 5445; Case C-357/89 *Raulin* v *Minister van Onderwijs en Wetenschappen* [1992] ECR I-1027; Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073.

dismissal, re-employment and social protection. [55]

The Court of Justice has, however, held that there is no unlawful discrimination where a Member State applies its own legislation on immigration control, on the basis of objective criteria, to workers from other Member States, provided such legislation does not entail undue restrictions on such workers' right of entry and residence. [56]

40. Leaving aside the question whether the Bailiwick of Jersey is a part of the United Kingdom from the point of view of international law and all purposes relevant thereto (see point 4 above), there is no doubt as regards nationality that Jersey citizens are British citizens and enjoy common nationality status. [57] Such decisions on matters of nationality are clearly the sole prerogative of the United Kingdom. [58]

Moreover, since all British citizens have the right of abode in any part of the United Kingdom, they are not liable to administrative deportation measures from its territory. [59] The entry and deportation of aliens are also matters which are undoubtedly the sole prerogative of the United Kingdom. [60]

Contrary to Mr Pereira Roque's contention, therefore, the deportation of British citizens by the Jersey authorities — that is to say, the deportation of citizens of the United Kingdom from the territory of the United Kingdom — is precluded by a principle of public international law, and is not the result of a legislative decision allegedly within the discretion of the State.

41. In those circumstances, I do not see how, in view of the clear distinction between the position of British citizens and that of aliens, even if they are Community nationals, the fact that the Jersey authorities retain the power to deport citizens of a Community Member State or to refuse them entry or residence on the island can be regarded as discriminatory in its effects.

42. Above all — as the Lieutenant Governor, the British Government and the Com-

55 — See, *inter alia*, Case 44/72 *Marsman* v *Rosskamp* [1972] ECR 1243 and Case 237/83 *Prodest* v *Caisse Primaire d'Assurance Maladie de Paris* [1984] ECR 3153. Apart from discrimination overtly based on nationality, the principle of equality of treatment also prohibits any form of covert discrimination which arrives at the same result, even though based on other distinguishing criteria: see, *inter alia*, Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153; Case 61/77 *Commission* v *Ireland* [1978] ECR 417; Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225; Case C-237/94 *O'Flynn* v *Adjudication Officer* [1996] ECR I-2617.

56 — See the judgments in Case 118/75 *Watson and Belmann* [1976] ECR 1185 and in Case 8/77 *Sagulo, Brenca and Bakhouche* [1977] ECR 1495, paragraphs 4 and 5 (concerning the obligation on Community nationals to notify their presence to the police authorities of the host Member State, in the absence of disproportionate penalties for breach of that obligation).

57 — See footnote 24 above, and the text relating thereto.

58 — See footnote 43 above, and the text relating thereto.

59 — See footnote 25 above, and the text relating thereto.

60 — See points 34 to 36 above.

mission point out — the opposite solution would lead to manifestly illogical results. Since the Jersey authorities' power of deportation is not subject to the substantive and procedural limitations laid down by Article 48(3) of the Treaty and Directive 64/221 (see point 44 below), Community citizens would enjoy on the island (in whose territory the rules on free movement do not apply) an absolute and unlimited right of residence, far broader than that granted to them in other Member States (see point 21 above).

43. I therefore propose that — subject to the qualifications which follow (see points 46 to 52 below) — the answer to the first question referred by the Royal Court should be that Article 4 of the Protocol does not entail a prohibition on deporting citizens of a Member State other than the United Kingdom from Jersey territory. The exemption from immigration controls on Jersey territory and the prohibition of deportation apply only to British citizens united to Jersey citizens by the bond of a common citizenship.

V — Question 2

44. As regards the two remaining questions, there cannot in principle be any question of the substantive and procedural limitations laid down by Article 48(3) of the Treaty and Directive 64/221 [61] applying to administrative action by the Jersey authorities.

That conclusion seems to me to follow from the Court's ruling in *Barr and Montrose Holdings*, cited above. [62] The obligation to apply the same treatment under Article 4 of the Protocol cannot be interpreted in such a way as to deduce from it an indirect means of applying on the territory of the British islands Community rules which, pursuant to Article 227(5)(c) of the EEC Treaty and Article 1 of Protocol No 3, cannot be applied there, such as the rules on the free movement of workers.

45. Having said that, I now turn to the essential qualifications which I wish to add.

46. Let us consider for a moment the precise content (apart from the application of the substantive and procedural limits laid down by Article 48(3) of the Treaty and Directive 64/221, which, as has been mentioned, are not relevant in the main proceedings) of the principle of equal treatment for national and foreign workers, with which Member States

61 — See footnotes 35 and 36 above, and the text relating thereto.
62 — See footnote 37 above, and the text relating thereto.

are in principle required to comply — as regards the right of entry and residence —, particularly in view of the recent recognition of citizenship of the European Union, which is acquired and lost together with national citizenship.

47. In the area of immigration control, it is quite clear that, for a Community national who has lawfully become established and integrated in the territory of another Member State — and whose situation is thus comparable in a number of respects with that of a citizen of that State —, a deportation measure has considerably more serious and 'punitive' consequences than, say, an initial refusal of entry, since deportation necessarily entails the abandonment of work or school, family, friends and home.

Community law is developing ever more markedly towards assimilation of the rights of other Community nationals to those of citizens of the host Member State. Not only has the Treaty on European Union created citizenship of the Union, [63] but the Court of Justice has for some time — to give just one example [64] — taken the view that a similar requirement of assimilation existed between those two categories of persons as regards the right of access to civil and criminal justice. [65]

By contrast, citizens of a Member State convicted of serious offences, not being liable to deportation, are required to undergo penalties which may be severe, but always within their own State. Aside from the authority of the public international law principle cited above, however, it is legitimate to ask why similar treatment could not and should not be offered to Community nationals who have lawfully emigrated to and settled in the territory of the State in question. [66]

48. I therefore consider that, whilst under Community law Member States still retain the power to deport other Community

63 — See footnote 48 above, and the text relating thereto. It should be noted in particular that, under Article 8a of the Treaty, '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'. Recognition of the fundamental freedom of movement and residence as an individual right of the Union's citizens raises the question of the dissociation of its exercise from purely economic considerations, on a new political and juridical basis, potentially capable of leading to the abolition not only of the conditions laid down by secondary legislation but also of the reservations contained in Articles 48, 55 and 56 of the Treaty: See A. Pliakos, 'Citoyenneté', in C. Gavalda and R. Kovar (ed.) *Répertoire de droit communautaire Dalloz*, Paris, 1992-(loose-leaf ed., June 1995), vol. 1, paragraph 35.

64 — See also my recent Opinion of 1 July 1997 in Case C-85/96 *María Martínez Sala* v *Freistaat Bayern* [1998] ECR I-2691, in which I interpreted Articles 8 and 8a of the Treaty as meaning that a Community citizen however authorised or admitted to reside or stay in the territory of a Member State is entitled to the education allowance provided for by national legislation, irrespective of whether that person holds a valid residence permit, *on the same conditions as citizens of the host State*.

65 — See, *inter alia*, Case 137/84 *Mutsch* [1985] ECR 2681; Case 186/87 *Cowan* v *Trésor Public* [1989] ECR 195; Case C-43/95 *Data Delecta and Forsberg* v *MSL Dynamics* [1996] ECR I-4661.

66 — Even in international law, moreover, there is debate as to the extent of a State's discretion to deport from its territory persons who have been established there for so long that they may be considered to have effectively acquired its nationality: See Brownlie, op. cit. footnote 51, p. 520.

nationals, the duty to apply the same treatment requires — apart from the substantive and procedural limitations laid down by Article 48(3) of the Treaty and Directive 64/221 — that recourse to such measures against that category of immigrants should increasingly be the exception, and should be limited to cases where the continued presence of the alien in the State's territory constitutes a genuine and sufficiently serious threat to its fundamental interests. [67]

49. In my view, similar considerations apply, *mutatis mutandis*, as regards the limits within which the Jersey authorities may treat citizens of other Member States of the Community differently from British citizens in the matter of immigration control.

In particular, I cannot endorse the observations of the Commission to the effect that, by shifting the equal treatment analysis from the *possibility of adopting the measure* to the *severity of the measure in relation to the facts relied upon to justify it*, the end result would be to apply the principle of proportionality, a distinct and separate Community rule not contemplated by the Protocol, in breach of the principle laid down by the Court in *Barr and Montrose Holdings*.

In reality, the very opposite seems to me to be true; on the assumption that the Jersey authorities have the power to deport non-British Community citizens, the obligation to apply the same system to all natural persons of the Community, regardless of their nationality, cannot be said to be satisfied save in so far as the deportation measures adopted by the island authorities at their discretion satisfy a fundamental requirement of proportionality. [68]

In other words, in this field it is in fact proportionality which ensures equality of

67 — See C. Vincenzi, 'Deportation in Disarray: The Case of EC Nationals', Crim. L. R., 1994, p. 163, especially pp. 174 and 175; Karinen, op. cit. footnote 44, p. 58; Goodwin-Gill, op. cit. footnote 51, p. 153.

68 — The principle at issue in this case that compliance with the prohibition on discrimination is achieved by ensuring that any limitations imposed on the individual's right to equality of treatment are appropriate and necessary has been applied many times and in various circumstances in the case-law of the Court: See the judgments in *Watson and Belmann* and *Sagulo, Brenca and Bakhouche*, cited in footnote 56 above, paragraphs 20-22 (concerning the proportionality of penalties prescribed by Italian public security law for failure to comply with administrative formalities in relation to the entry and residence of foreigners); judgments in Case 114/76 *Bela-Mühle* v *Grows-Farm* [1977] ECR 1211, paragraph 7, Case 116/76 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1977] ECR 1247, paragraphs 17-25, and Joined Cases 119/76 and 120/76 *Ölmühle Hamburg* v *Hauptzollamt Hamburg-Waltershof*, *Becher* v *Hauptzollamt Bremen-Nord* [1977] ECR 1269, paragraph 7 (in which the Court held that a Community system for disposing of stocks of skimmed-milk powder held by the intervention agencies, which linked the grant of aid to animal rearers to the obligatory purchase of such milk at a price severely disproportionate to that of products of comparable value as foodstuffs, constituted a discriminatory distribution of the economic burdens arising from the system between the various agricultural sectors, to the benefit of milk producers and the detriment of animal rearers, in breach of the principle of non-discrimination between Community producers and consumers laid down by Article 40(3) of the Treaty); judgment in Case 106/83 *Sermide* v *Cassa Conguaglio Zucchero* [1984] ECR 4209, paragraph 28 (in which it was held that, where elements in the common organisation of the markets are differentiated according to region or according to other factors affecting production or consumption, the principle of non-discrimination between Community producers and consumers may be said to have been complied with only where the differentiating criteria used are objective in character and ensure a proportionate division of the advantages and disadvantages for those concerned); judgment in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 38 (concerning the proportionality of a derogation on public security grounds from the prohibition on sex discrimination in relation to taking up employment as a police officer); judgment in Case C-127/92 *Enderby* v *Frenchay Health Authority and Secretary of State for Health* [1993] ECR I-5535, paragraph 29 (concerning the proportionality of the difference in remuneration between two functions of equal value — one performed almost exclusively by women and the other preponderantly by men — allegedly justified by the scarcity of candidates for the function carrying higher remuneration).

treatment; *for the very reason that British citizens are not liable to deportation measures*, the Jersey authorities are required, by Article 4 of the Protocol, to adopt such measures against citizens of Member States other than the United Kingdom only in cases where the continued presence of the Community immigrant in the territory of the island constitutes a genuine and sufficiently serious threat to the fundamental interests of the local community, such as those relating to public policy, public security or public health.

50. So far as concerns, in particular, recourse to the justifications of 'public policy' and 'public security' — which the island authorities are to interpret and apply by reference to the fundamental interests of Jersey society at the material time —, it also follows from the principle of non-discrimination that the personal conduct of a Community national cannot constitute a genuine and sufficiently serious threat to the fundamental interests of the Bailiwick where, faced with similar conduct by British citizens, the Jersey authorities do not usually adopt restrictive measures which, although of a different type, are in practice designed to restrain such conduct.

51. On that premiss, I am in agreement with the Commission in finding that — in order to assess whether the use of deportation in an individual case against a non-British Community citizen may be regarded as proportionate, that is to say in compliance with the obligation to apply the same treatment under Article 4 of the Protocol —, the appropriate comparison is with the Jersey criminal courts' practice of binding over (see point 15 above).

Although that restrictive measure involves bargaining with the offender and has effects which are limited in time, the two types of measure have important similarities, as was recognised by Advocate General Warner in the *Saunders* case. [69] In that respect, I regard as being of some significance the observations of the Lieutenant Governor and the British Government — which the Royal Court will have means of verifying in detail — to the effect that the Jersey criminal courts quite frequently bind over offenders convicted of theft, and that in the overwhelming majority of cases such measures concern persons originating in the United Kingdom.

52. Finally, the prohibition of discrimination on grounds of nationality pursuant to Article 4 of the Protocol, interpreted in the manner indicated above, entails an obligation on the part of the Jersey authorities, in each individual case where the question of the

69 — With reference to a deportation order recommended, in other national proceedings (*R* v *Secchi*), by a British Metropolitan Stipendiary Magistrate, which is a first-instance criminal court that does not have the power to bind over an offender (see the judgment in Case 175/78 *R* v *Saunders* [1979] ECR 1129 and the Opinion, p. 1136, especially p. 1139).

possible deportation of a Community national arises, to balance the interests protected by the measure to be adopted against the fundamental rights of the individual concerned. Such rights include, in particular, the right to his private and family life, taking into account also the length of his previous residence in the territory of the Bailiwick.

VI — Question 3

53. My answer to the Royal Court's third question, however, would be that Article 4 of the Protocol does not preclude the competent Jersey authorities from deporting a citizen of another Member State from the island's territory even where the public policy considerations on which those authorities base their decision would not in practice justify that person's deportation from the United Kingdom.

That solution follows from the premiss set out above. In the matter of deportation, the Jersey authorities are to interpret and apply 'public policy' and 'public security' by reference to the fundamental interests of Jersey society, given that the case-law of the Court of Justice, whereby the concept of public policy, where it limits the fundamental principles of equal treatment and freedom of movement, is to be interpreted strictly and subject to control by the Community institutions, [70] does not apply to Jersey or to the action of its administrative authorities.

54. That solution does, however, have important consequences as regards the point — not expressly raised by the Royal Court in its questions — concerning the effectiveness in the territory of the United Kingdom *outside Jersey* of a deportation order from the territory of the Bailiwick, adopted by the island authorities.

55. As indicated above, [71] Schedule 4, Section 3 of the Immigration Act 1971 provides that such an order is to take effect throughout the United Kingdom, save where, in an individual case, the British Secretary of State expressly limits the effects of the measure to the territory of the island.

However, such an automatic extension must be excluded precisely by reason of the inapplicability to Jersey of the substantive and procedural restrictions on deportation laid down by Article 48(3) of the Treaty and Directive 64/221, which raises the possibility of a deportation measure being adopted on the basis of justifying grounds which are

70 — See Case 36/75 *Rutili* v *Minister for the Interior* [1975] ECR 1219, paragraph 27.

71 — See footnotes 30 and 31 above, and the text relating thereto.

somewhat different from those required by Community rules in the United Kingdom. In other words, it is the extension of the deportation measure to the territory of the United Kingdom as a whole which must be the subject of an express provision.

56. I therefore agree with the Commission's conclusions as regards the situation where the Secretary of State does not expressly provide for the territorial effect of a given deportation measure adopted by the Lieutenant Governor against a non-British Community citizen to be limited to Jersey. Such an omission cannot in any case empower the United Kingdom authorities to refuse the person concerned entry to the national territory (save, of course, for Jersey), so long as the refusal is based on the measure in question.

VII — Conclusions

In the light of the above considerations, I propose that the Court should reply as follows to the questions referred by the Royal Court of Jersey:

(1) Article 4 of Protocol No 3 to the Act of Accession of the United Kingdom to the European Communities does not confer on citizens of a Member State other than the United Kingdom immunity from deportation from the territory of the Bailiwick of Jersey, notwithstanding that British citizens are not subject to immigration controls in that territory or liable to be deported from it.

(2) Article 4 of the Protocol does, however, preclude the competent Jersey authorities from deporting a citizen of a Member State other than the United Kingdom from Jersey unless that person's continued presence in the territory of the Bailiwick constitutes a genuine and sufficiently serious threat to its fundamental interests, such as those relating to public policy, public security or public health.

The island authorities are to interpret and apply those concepts having regard to the fundamental interests of Jersey society at the material time.

In particular, the personal conduct of a non-British Community citizen cannot be regarded as giving rise to a genuine and sufficiently serious threat to the fundamental interests of Jersey where it is shown that, in the case of similar conduct by British citizens, the Jersey authorities do not usually adopt restrictive measures which, although of a different type, are in practice designed to restrain such conduct, such as binding over.

Moreover, the justification for a deportation order must be assessed by balancing the interests involved against the fundamental rights of the individual concerned, such as, in particular, the right to his private and family life, taking into account also the length of his previous residence in the territory of the Bailiwick.

(3) Article 4 of the Protocol does not preclude the competent Jersey authorities from deporting a citizen of a Member State from the island's territory where the public policy considerations on which those authorities base their decision would not in practice lead to that person's deportation from the United Kingdom. However, a deportation order adopted by the Jersey authorities against a citizen of a Member State does not take effect outside the territory of the island, even in the absence of an express measure by the British Secretary of State limiting the territorial effect of the order.