

LABOR LAW—COMMON MARKET—PUBLIC POLICY REGARDING  
PERSONAL CONDUCT MAY ACT AS A RESTRAINT ON THE FREE  
MOVEMENT OF LABOR IN THE EUROPEAN ECONOMIC COMMUNITY.

Plaintiff, of Dutch nationality, arrived at Gatwick Airport in England with the intention of taking employment with the Church of Scientology of California at its headquarters in East Grinstead, England.<sup>1</sup> Upon being questioned by the immigration service,<sup>2</sup> plaintiff was refused entry because the government of the United Kingdom considers the activities of the Church of Scientology to be socially harmful<sup>3</sup> and, as a result, will not authorize the entry of a person who works for, or is seeking employment with, this organization.<sup>4</sup> Plaintiff sought entry alleging that a Member State of the European Economic Community (EEC), in basing a measure on grounds of public policy in respect of

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<sup>1</sup> The Church of Scientology was established in the United States and functions in the United Kingdom through a college at East Grinstead, Sussex.

<sup>2</sup> The United Kingdom vests its immigration officers with the power to refuse entry by virtue of section 4(1) of the Immigration Act of 1971. In addition, rule 65 of the "Statement of Immigration Rules for Control on Entry" reads:

Any passenger except the wife or child under 18 of a person settled in the United Kingdom may be refused leave to enter on the ground that the exclusion is conducive to the public good where:

- (a) the Secretary of State has personally so directed, or
- (b) from information available to the Immigration Officer it seems right to refuse leave to enter on that ground—if, for example, in the light of the passenger's conduct, character, or associations, it is undesirable to give him leave to enter.

<sup>3</sup> On July 25, 1968, the Minister of Health made a statement in the House of Commons in response to a question concerning the British Government's position on Scientology which included the following remarks:

Scientology is a pseudo-philosophical cult . . . . The Government are satisfied having reviewed all the available evidence that Scientology is socially harmful. It alienates members of families from each other and attributes squalid and disgraceful motives to all who oppose it; its authoritarian principles and practice are a potential menace to the personality and well-being of those so deluded as to become its followers; above all its methods can be a serious danger to the health of those who submit to them. There is evidence that children are now being indoctrinated. There is no power, under existing law to prohibit the practice of Scientology; but the Government have concluded that it is so objectionable that it would be right to take all steps within their power to curb its growth. . . . Foreign nationals come here to study Scientology and to work at the so-called college in East Grinstead. The Government can prevent this under existing law . . . and have decided to do so. The following steps are being taken with immediate effect:

- (e) Work permits and employment vouchers will not be issued to foreign nationals . . . for work at a Scientology establishment.

Written Answer 163, H.C. No. 1459/1967/68.

<sup>4</sup> There are no legal restrictions upon the practice of Scientology in the United Kingdom nor upon British nationals (with certain immaterial exceptions) who desire either to be members of or to work with the Church of Scientology.

individual conduct, was not entitled to take into account as a matter of personal conduct the fact that the individual is or has been associated with some body or organization whose activities the Member State considers to be contrary to the public good but which are not unlawful in that State. Plaintiff also argued that the State was not entitled to take into account the fact that the individual intended to take employment in the Member State with such a body or organization when the Member State placed no restrictions upon its own nationals who wish to take similar employment with such a body or organization. Plaintiff initiated an action before the Chancery Division of the High Court of the United Kingdom where a stay was ordered while the European Court of Justice interpreted the relevant provisions of the EEC Charter.<sup>5</sup> *Held*, question answered in the affirmative. Article 48 of the EEC Treaty of Rome<sup>6</sup> and article 3(1) of Directive 64/221<sup>7</sup> are to be interpreted as meaning that a Member State, in imposing restrictions based on policy grounds, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact

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<sup>5</sup> The Vice Chancellor of the Chancery Division submitted three questions to the Court of Justice of the European Communities for a preliminary hearing. The third question stated:

3. whether upon the proper interpretation of Article 48 of the Treaty Establishing the European Economic Community and Article 3 of Directive 64/221/EEC a Member State in the performance of its duty to base a measure taken on grounds of public policy exclusively on the personal conduct of the individual concerned is entitled to take into account as matters of personal conduct (a) the fact that the individual is or has been associated with some body or organization the activities of which the Member State considers contrary to the public good but which are not unlawful in that State; (b) the fact that the individual intends to take employment in the Member State with such a body or organization it being the case that no restrictions are placed upon nationals of the Member State who wish to take similar employment with such a body or organization.

Such preliminary rulings are taken pursuant to the Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11 (effective Jan. 1, 1958), art. 177 [hereinafter cited as EEC Treaty]. This marked the first time that the High Court of the United Kingdom had asked the Court of Justice for a preliminary ruling pursuant to article 177.

<sup>6</sup> EEC Treaty, article 48 concerns the free movement of workers. Section 2 states:

Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

Section 3 states:

(3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

- (a) to accept offers of employment actually made;
- (b) to move freely within the territory of Member States for this purpose;
- (c) 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.

<sup>7</sup> Directive 64/221, art. 3(1), EEC Council, Apr. 4, 1964, 56 J. Off. Com. Eur. 850 (1964), 1 CCH COM. MKT. REP. § 1412.15 [hereinafter cited as Directive 64/221]. Directive 64/221 states that "[m]easures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned."

that the individual is associated with some body or organization the activities of which the Member State considers socially harmful even though no like restriction is placed upon nationals of the said Member State who wish to take similar employment with these same bodies or organizations. *Van Duyn v. Home Office*, Ct. of Justice of the Eur. Comm. (case 41/74), 15 Com. Mkt. L.R. 1, 2 CCH COM. MKT. REP. ¶ 8283 (Dec. 4, 1974).

One of the fundamental principles of the EEC Treaty establishing the European Economic Community is the abolishment, as between Member States, of obstacles to freedom of movement for workers.<sup>8</sup> More specifically, the EEC Treaty confers an enforceable right upon an individual of a Member State to enter another Member State as a worker subject only to limitations imposed by the receiving Member State in furtherance of its public policy, public security, or public health.<sup>9</sup> However, Directive 64/221,<sup>10</sup> which was issued in an effort to provide a minimum degree of uniformity,<sup>11</sup> narrowed the potential scope of such limitations by providing that these limitations must not be invoked to serve the economic ends of the Member State but rather must be based solely on the personal conduct of the individual concerned<sup>12</sup> as determined by an objective evaluation by authorities of the Member State.<sup>13</sup>

The EEC Treaty espouses the concept that "[t]he heart of the idea of free movement is equal treatment with nationals."<sup>14</sup> As a result, every worker of every Member State is entitled to work in the other Member States "under the same conditions as their Nationals."<sup>15</sup> The goal of abolition of all discrimination on grounds of nationality is achieved under the EEC Treaty by regulations and directives, the main regulation being 1612/68,<sup>16</sup> which prohibits a Member State from subjecting a worker to conditions that do not apply to their nation-

<sup>8</sup> EEC Treaty, art. 3(c).

<sup>9</sup> *Id.* art. 48(3).

<sup>10</sup> See note 7 *supra*.

<sup>11</sup> Poole, *Mobility of Labour and Job Opportunities*, 122 NEW L.J. 1147 (1972) [hereinafter cited as Poole].

<sup>12</sup> *Id.*

<sup>13</sup> Turack, *Freedom of Movement and Travel Documents in Community Law*, 17 BUFFALO L. REV. 435, 437 (1968). A German court held that although an Italian worker, who had been given a German work permit, did not meet the requirements of public order and health as prescribed by German law, he had "nevertheless complied with this concept under its broader definition as understood in the other continental countries, and thus could not be deported." *Common Market Cases and Rulings—Movement of Labor; Competition*, 5 VA. J. INT'L L. 229, 230 n.5 (1965).

<sup>14</sup> EEC Treaty, art. 48, para. 1002.13.

<sup>15</sup> *Id.*

<sup>16</sup> Regulation 1612/68, art. 3(1), EEC Council, Oct. 19, 1968, L257 J. Off. Com. Eur. 1 (1968), 1 CCH COM. MKT. REP. § 1031(c)(1) [hereinafter cited as Regulation 1612/68]. Regulation 1612/68 states:

Within the framework of this regulation, legislative, regulatory, or administrative provisions, or administrative practices of a Member State are prohibited:

—where they restrict employment offers and applications, access to employment, and the holding of jobs by foreigners, or make them subject to conditions that do not apply to their nationals . . . .

als.<sup>17</sup> Thus, nationals of any Member State are given equal rights to apply for an employment vacancy in any other Member State.<sup>18</sup> In addition, in cases of doubt, the measures implementing article 48 of the EEC Treaty must be interpreted in a manner that will not impair the legal position of migrant workers.<sup>19</sup>

In determining the scope of public policy under article 48(3) of the EEC Treaty,<sup>20</sup> it is up to the national and Community courts, not local officials, to decide whether any grounds for limiting free movement exist.<sup>21</sup> The concept of public policy must be applied by the court in each case.<sup>22</sup> Since the adoption of the EEC rules, local administrative authorities no longer have the power to exercise their discretion in determining public policy.<sup>23</sup> Public policy in article 48(3) is a concept of Community law and is not necessarily to be identified with any similar concept in any of the national systems of the European Economic Community.<sup>24</sup> However, all of these considerations must still be maintained within the framework of Directive 64/221,<sup>25</sup> which requires that measures taken on the ground of public policy be based exclusively on the personal conduct of the individual concerned.<sup>26</sup> In addition, when invoking public policy, these limitations must be restrictively interpreted.<sup>27</sup>

The Court's holding in *Van Duyn*<sup>28</sup> allows a Member State to consider as a matter of personal conduct the association of an individual with a body or organization, the activities of which the Member State considers as contrary to the public good but which are not unlawful in that State. In so holding, the Court determined that "present" association in an organization reflects "participation" in the activities of that organization and thus, it is considered part of his personal conduct within the meaning of article 3 of Directive 64/221.<sup>29</sup>

<sup>17</sup> *Id.*

<sup>18</sup> Poole, *supra* note 11, at 1147.

However, the EEC Treaty, art. 48, para. 1007.01, provided that the free movement of workers would be introduced only gradually in the course of a transition period and the final stage of this period was reached with the adoption of Regulation 1612/68. *See* note 16 *supra*.

<sup>19</sup> *Nonnenmacher v. Bestuur der Sociale Verzekering, Ct. of Justice of the Eur. Comm.* (case 92/63), June 9, 1964, 10 *Recueil* 557, 3 *Com. Mkt. L.R.* 338 (1964).

<sup>20</sup> *See* note 6 *supra*.

<sup>21</sup> *Jett, The Free Movement of Labor in the EEC*, 8 *TEX. INT'L L.F.* 375, 385 (1973) [hereinafter cited as *Jett*].

<sup>22</sup> Judgment of Oct. 26, 1962, *Verwaltungsgerricht, Berlin* (case VG IA 98/62), 1 *CCH COM. MKT. REP.* § 1-2.82.

<sup>23</sup> *Id.*

<sup>24</sup> Judgment of Nov. 14, 1966, *Landgericht, Wiesbaden* (case 4 T 427/66), 7 *Com. Mkt. L.R.* 239, 242 (1968). *See Jett, supra* note 21, at 385.

<sup>25</sup> Directive 64/221, *supra* note 7.

<sup>26</sup> *Id.*

<sup>27</sup> *Sotgui v. Deutsche Bundespost, Ct. of Justice of the Eur. Comm.* (case 152/73), Feb. 12, 1974, 2 *Recueil* 153, 2 *CCH COM. MKT. REP.* § 8257. A limitation "must not be given weight which goes beyond the object for which the clause of limitation had been inserted." *Id.* at 159, 2 *CCH COM. MKT. REP.* at ¶ 9165-4.1.

<sup>28</sup> *Ct. of Justice of the Eur. Comm.* (case 41/74), 15 *Com. Mkt. L.R.* 1, 2 *CCH COM. MKT. REP.* ¶ 8283 (Dec. 4, 1974).

<sup>29</sup> Directive 64/221, *supra* note 7.

The holding further allows an area of discretion for the Member States in which to determine if personal conduct is violative of their policy. According to the Court, this is true even though the Member State is not required to make the activities unlawful in that State.

There are several weaknesses in the Court's determination concerning an individual's "association" with an organization which a Member State considers as being contrary to that State's public good. First, there is the differentiation between "present" association and "past" association. Neither "past" associations with an organization nor previous convictions of crimes can, in general, justify a decision refusing an individual the right to move freely within the Community.<sup>30</sup> Thus, the Court held that "present" association is part of an individual's personal conduct, and Miss van Duyn was an active member of the Church of Scientology upon her arrival in England. However, this leaves open the question of whether an individual who intends to take employment with an organization which a Member State considers adverse to the public good, but who is not presently associated with that organization, can be denied entry to the Member State. For instance, would the results have been different if Miss van Duyn was not, nor had ever been, associated with the Church of Scientology?

In this regard, the United Kingdom's policy is not to allow any individual of another Member State leave to enter for the purpose of taking employment with the Church of Scientology.<sup>31</sup> However, this policy is not within the interpretation of "personal conduct" as given by the Court. The Court only spoke in relation to "present" association. Therefore, it would appear that an individual who is purely seeking employment, but who is in no way associated with the objectionable organization, should be permitted to enter the Member State and take up employment with that organization. Employment with an organization does not necessitate "identification" with that organization's aims and thus would not amount to an association with that organization.

Finally, the Court in *Van Duyn* allowed a Member State, on grounds of public policy, to prevent a national of another Member State from taking gainful employment within its territory with an organization deemed contrary to the public good when no similar restriction is placed upon its own nationals. The Court's rationale was based upon the limitations, justified on grounds of public policy, in article 48(3).<sup>32</sup> However, the Court failed to resolve the issue by conveniently neglecting to state what limitations they used and how they applied them. Somewhat more convincing in the Court's rationale is its reliance on the principle that a State has a duty to readmit its own nationals<sup>33</sup> and

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<sup>30</sup> *Id.*

<sup>31</sup> See note 3 *supra*.

<sup>32</sup> See note 6 *supra*.

<sup>33</sup> "Everyone has the right to leave any country, including his own, and to return to his country." Universal Declaration of Human Rights, art. 13(2), G.A. Res. 217 (III), U.N. Doc. A/810 at 71 (1948).

that a national shall not be arbitrarily deprived of the right to enter his own country.<sup>34</sup> Although this is the extent of the Court's rationale for its holding on this issue, it may be presumed that because of the right of a national to enter his own country, there should be an element of discrimination by a State in favor of its own nationals so far as entry into the State is concerned. Obviously, this is true to a certain extent. It cannot be denied that a Member State would be justified in refusing to admit a drug addict who is a national of another Member State even though it would be obligated to admit a drug addict who was one of its own nationals.<sup>35</sup> But this is simply a gloss by the Court and a closer look reveals the inadequacies in the Court's rationale.

At this point it is helpful to recall several important points. First, a fundamental principle of the EEC Treaty is to establish the freedom of movement of workers between Member States.<sup>36</sup> A second principle is grounded in the desire to abolish any discrimination on grounds of nationality.<sup>37</sup> Finally, the basis for invoking public policy in article 48(3) is the personal conduct of the individual concerned.<sup>38</sup> However, this last concept is an autonomous concept created by the EEC Treaty, thus requiring interpretation first in the context of Community law, with national criteria becoming relevant only to its application. If it were otherwise, a Member State could arbitrarily set limits to the interpretation of public policy resulting in a variety of obligations and restraints upon the freedom of movement of workers among the various Member States. This would turn the concept of freedom of movement of workers into a complete mockery, and yet this is exactly what the Court is permitting because of its failure to construct guidelines or establish adequate restrictions.

The keystone to the freedom of movement of workers is uniformity. As stated in *Sotgui v. Deutsche Bundespost*:

Freedom of movement must be regarded as one of the fundamental liberties guaranteed to workers in the member states, the exception which results from paragraph 4 of Article 48, ought to be interpreted at the same time strictly and in a uniform manner in each of these States, which excludes the ability, for this purpose, of referring to national criteria. What would in effect be the substance of freedom of movement if it were dependant [*sic*] on one State or another automatically invoking in some way or other the exemption of paragraph 4 in entrusting to a public administration in the light of its internal law, the task of carrying out such activity as seemed to it to answer to a requirement of general interest?<sup>39</sup>

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<sup>34</sup> International Covenant on Civil and Political Rights, art. 12(4), G.A. Res. 2200A, 21 U.N. GAOR Supp. 16, at 52, U.N. Doc. A/6316 (1966).

<sup>35</sup> Directive 64/221, art. 4 and annex B(1).

<sup>36</sup> See note 8 *supra*.

<sup>37</sup> See note 6 *supra*.

<sup>38</sup> See note 7 *supra*.

<sup>39</sup> *Sotgui v. Deutsche Bundespost*, Ct. of Justice of the Eur. Comm. (case 152/73), Feb. 12, 1974, 2 Recueil 153, 169, 2 CCH COM. MKT. REP. § 8257 ¶ 9165-9.

The problem of discrimination on the part of a Member State on grounds of public policy becomes particularly acute when the activities involved are considered contrary to the public good but are not considered as unlawful, thus entitling its own nationals to be employed by the undesirable organization. As stated earlier, it is understandable that limited discrimination should be allowed, as in the case of a Member State admitting a drug addict into that State if the addict is a national of that State. In such a situation the activity is uniformly considered as illegal in all the Member States. But the situation is different when the activity is not unlawful within the Member State. In applying Community law, if the personal conduct is acceptable when exercised by a national of a Member State, then that conduct must also be acceptable by that Member State when exercised by a national of a different Member State. This meets with the spirit of uniformity and nondiscrimination as required by the EEC Treaty.<sup>40</sup> Thus, a Member State is not entitled to take into account, as matters of personal conduct, employment by an organization whose activities are considered to be against the public good but are not considered as being unlawful in that State when its own nationals are free to take up similar employment.

The Court in *Van Duyn* completely failed in establishing judicial standards with which to measure personal conduct in its application to public policy. However, since this case consisted of a determination by the European Court of Justice of the questions referred to it by the Chancery Division of the High Court of the United Kingdom, the outcome of the case is to be determined by the Chancery Division of the High Court, where the inadequacies of the European Court of Justice opinion may be corrected. Thus, the final outcome of Miss van Duyn's case is yet to be determined.

*William A. O'Dell*

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<sup>40</sup> See note 6 *supra*.