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The Impact of the Treaty of Rome Upon Certain Aspects of the
United Kingdom's Immigration Law

by Reginald W. Curtis*

INTRODUCTION:

The purpose of this article is to examine the impact of the Treaty of Rome upon the immigration policies of the United Kingdom since the U.K.'s accession to the Treaty on January 1, 1973. To accomplish this, the article compares the hypothetical impact of the present law on a French national and on a United States national, both seeking employment in England. This article will demonstrate the considerable impact that the Treaty has had upon the employment market, and upon public security in the U.K. Prior to the Treaty, governments were mainly concerned with three things: protecting their citizens from alien competition in the local job market; keeping out undesirables such as terrorists and disease carriers; and protecting the national purse from the ravages of impoverished foreigners. The Treaty was designed to eliminate intra-European conflict and to create a single market for capital, goods, and labor. A single rationalized European market would be more efficient and would allow Europe to become an effective competitor of the United States and Japan.

This article is concerned principally with the effect of article 48 of the Treaty of Rome, which grants the right of free movement to workers, subject to certain limitations and with the various regulations and directives that implement article 48 under the authority of article 49. While "freedom of movement" for workers was a major objective of the Treaty, there was no intent to force workers to migrate from their economically depressed home areas. The Italian government even tried to introduce provisions to allow the member states to restrict emigration to prevent

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2 European Communities Act, 1972, ch. 68. The Immigration Act, 1971, ch. 77, took effect on the same date.

3 This was stated early in the discussions leading to the Treaty of Rome. B. Sundberg-Weitman, Discrimination on Grounds of Nationality 6 n.8 (1977).
draining the labor pool of a particular market. If, however, the flow of workers to a region became too great for that market to absorb, or if the region were experiencing a depression, the member state effected could request a suspension of the freedom of movement right for workers in that district to stop further economic and social deterioration. This provision, article 20 of Regulation 1612/68, actually has been used to protect the miners of the Belgian coal fields.

While non-EEC workers have to obtain visas and work permits, the EEC worker has in most cases, the full right of free movement within the Community since the expiration of the transitional period on January 1, 1970, and in the extended Community since January 1, 1973. This right has “direct effect,” and is enforceable by the workers concerned. The European Court of Justice also adopted that position in response to council directives that were complete and specific enough to be implemented. The Court has been very result oriented and has rarely de-

4 Id. at 147.
5 Regulation 1612/68, art. 20, 1968(O.J. COMM. EUR. (No. L 257/2) 475, 480 (Special Ed. 1972) [hereinafter cited as Regulation 1612/68].

The question of whether one can use “workers” rights from the Treaty of Rome against one’s own government appears still to be open. In Re Residence Permit for Egyptian National, 16 Comm. Mkt. L.R. 402 (1975), a German court held that “worker” referred only to nationals within another member state, and cited art. 1 of Regulation 1612/68, as authority. Id. at 404. Later cases appear to take the position that the rights of a “worker” may be enforceable against his own government if there is some connecting factor to the Community and it is not just a purely internal situation. See, e.g., Morson and Jhanjan v. Netherlands, 37 Comm. Mkt. L.R. 221, 231-32 (1983) (workers who the parents were claiming to join under authority of art. 10(1) of Regulation 1612/68, had never worked or resided outside of the Netherlands). See also Moser v. Land Baden-Württemberg, 41 Comm. Mkt. L.R. 720, 728 (1984); R. v. Saunders, [1979] 25 Comm. Mkt. L.R. 216, 227. A successful application occurred in Knoors v. Secretary of State for Economic Affairs, 25 Comm. Mkt. L.R. 357 (1979), where the plaintiff, a Dutch plumber who had gained his qualification and experience in Belgium, invoked Directive 64/427 (recognition of small trades and crafts) as giving him the same rights in his own country as had nationals of other member states coming in with the same qualifications as he possessed: if they were acceptable under the terms of the directive, then he must be also. Id. at 367.

TREATY OF ROME

clined an opportunity to deliver a ruling to buttress the authority of the Community and its institutions, or curb an attempt by the various member states to derogate from Treaty provisions. One learned commentator summed-up this teleological approach as follows:

The most striking feature of the European Courts’ judgments is the extent to which its interpretation of Community texts is based on policy considerations. By this is meant giving more weight to what the Court considers the law ought to be than what the authors of the text either said or might be supposed to have intended.10

The Treaty of Rome’s territorial reach extends over all of the European member states, and includes any offshore spheres of economic influence as in the case of Commission v. Ireland.11 The Court held that the Treaty applied not only within the twelve-mile limit of international law, but also to the much larger economic fishing zone.12 Overseas territories and countries associated with the member states are also within the scope of the Treaty if listed in annex IV.13 The right of “free movement of workers” does not extend, however, to either their workers within the Community proper, or to the European members’ workers who may be in these overseas associates.14 Article 135 of the Treaty provides for extending this freedom to offshore areas if there is unanimous approval;15 but as yet, this provision has not been employed. The Treaty speaks of “nationals” generally, and in many cases, the residents of overseas territories such as the islands of Saint Pierre and Miquelon by France are considered “nationals” by the related member state. But how can a Dutch immigration officer know that the “French” worker at the border is really from Saint Pierre and not entitled to “free movement,” when the passports issued by France are identical?16

While the United Kingdom may gain some trade advantages from the Treaty, the United Kingdom is a net loser in terms of freedom of movement for workers. Figures on worker movement indicate a marked

13 Treaty of Rome, supra note 1, annex IV.
14 Regulation 1612/68, supra note 5, art. 42.
15 Treaty of Rome, supra note 1, art. 135.
16 B. SUNDBERG-WEITMAN, supra note 3, at 137.
preference on the part of the other member state nationals for the U.K., and the old "white" colonies as the favorite destination for the migrating British. Of the 410,000 EEC nationals of other member states employed in the U.K. in 1979, 333,000 were Irish, 60,000 were Italian, 40,000 were French, and the remaining 80,000 were from the other states; in the same year, it was estimated that there were 72,000 U.K. nationals in the other member states, aside from Ireland; in 1981 the figure dropped to 46,000. Even if one excludes the workers from Ireland, it still leaves 180,000 EEC workers in the U.K., as opposed to 72,000 from the United Kingdom in the other member states. Also, with the rise in unemployment in the early 1980s, 46,000 U.K. workers emigrated to Australia in 1981, and another 23,000 emigrated to South Africa. On the basis of those figures, the United Kingdom is certainly not gaining any advantages in employment when the majority of its nationals is more willing to migrate across an ocean than to cross the English Channel or the Irish Sea.

THE CONCEPT OF "WORKER"

The first qualification for being a "worker" in the EEC is to be a national of a member state. Although this is not specified in article 48(1), it is specified in regard to discrimination in article 48(2). Other sections of the Treaty dealing with the concept of "freedom," such as article 52 and article 59, involving the right of establishment and the provision of services, specifically refer to "nationals" of the member states.

While the question of who is a "national" is a matter for the individual member states to decide, the concept of "worker" is a Community concern. In Unger, the European Court of Justice (E.C.J.) held that "worker" could not be a national concept because of the need for uniformity within the Community. If member states set their own criteria, there would be no uniformity since each could restrict various jobs merely by changing classifications and requirements:

If this could arise from internal law, each State would then have the power to modify the content of the concept of 'migrant worker' and to eliminate certain categories of persons at will from the protection of the Treaty . . . .

Articles 48 to 51 would thus be deprived of all meaning, and the

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18 Id.
19 See Treaty of Rome, supra note 1, art. 48(1), (2).
20 See id. arts. 52, 59.
above-mentioned aims of the Treaty hampered, if the content of such a
term could be unilaterally fixed and modified by internal law.22

Apparently, the definition of "worker" is quite broad, essentially
covering anyone who works for remuneration, whether blue collar or
white collar, labor or management.23 Also, a "worker" must intend to
work; hence, a student going to another member state to attend a
university, who happens to take a job in his off hours, would not be classified as
a worker.24 The dominant purpose of the student's visit determines his
status.25

Once a foreigner becomes employed, the question then becomes how
much must he work? The early cases took the view that "worker" meant
a full-time worker, or at least one who was usually employed or actively
seeking work. In 1968, the Landgericht of Wiesbaden, West Germany,
held that an Italian fugitive and returned deportee could not claim to be
a "worker" and thereby entitled to the limited public policy proviso ex-
ception in article 48(3), since he was "idle, had no money at his disposal,
and lived as a procurer."26

In 1974, in England, an Italian ex-student came before the Maryle-
bone Magistrate on charges of shoplifting and indecent exposure.27 The

22 Id. at 184, 3 Comm. Mkt. L.R. at 331 (the quotation is taken from the English translation of
the Dutch original as it appears in 3 Comm. Mkt. L.R.).
23 B. SUNDBERG-WEITMAN, supra note 3, at 143. Here, the author takes the view that unpaid
apprentices are probably also covered. Actual transnational movement appears to be critical, how-
ever. In R. v. Secretary of State for the Home Department, ex parte Ayub, 38 Comm. Mkt. L.R.
140, 148 (1983), Forbes, J., affirmed the decision of an immigration officer who had refused to grant
"worker" status to a U.K. national upon her return to the U.K. That status and the rights that
accompanied it only came into being if the worker left to accept employment actually offered or, if
going in search of work, had actually found it. Id. at 148. Therefore, a U.K. national could not
invoke the provisions of either Regulation 1612/68 or Directive 68/360 relating to "family" until she
actually had become a true worker, not just a prospective one. Id. at 147-48. Forbes, J., also ob-
served that he doubted if a national of a member state could ever invoke EEC workers rights with
regard to his own country. Id. at 149. See also discussion on the concept of "direct effect" of EEC
legislation with regard to a member state's own nationals, supra note 8.
Mkt. L.R. 454, 468 (para. 17 of judgment).
26 City of Wiesbaden v. Barulli, 7 Comm. Mkt. L.R. 239, 246 (1968). Besides the reference in
this case to "procuring," the courts have also frowned upon other "immoral" occupations, even
when they are not illegal. See, e.g., Re A Belgian Prostitute, 18 Comm. Mkt. L.R. 527, 531-32
(1976). See also, cases cited at note 252, infra. Sport, on the other hand, as long as it is done for
economic reasons, will be covered. See, e.g., Walrave and Koch v. Association Union Cycliste
Court of Justice has, however, attacked exceptions in the case of "all star" type games. These are
usually amateur, in any case.
student, Secchi, had quit his university studies in Italy, traveled across Europe, and arrived in England in October of 1974, where he took up "squatters" accommodation in London.\textsuperscript{28} During his travels in Europe and the United Kingdom, Mr. Secchi had supported himself by taking random menial jobs, such as dishwashing in restaurants, whenever inclination and opportunity coincided.\textsuperscript{29} Upon conviction, the magistrate considered a deportation recommendation.\textsuperscript{30} Mr. Secchi responded that he was a "worker" under article 48 and therefore could not be deported for such a minor offense.\textsuperscript{31} The magistrate disagreed.\textsuperscript{32} Secchi was not a "worker" within the meaning of the Treaty of Rome since taking occasional work out of necessity did not make one a "worker."\textsuperscript{33}

In 1981, the Court of Justice finally received an opportunity to consider this matter in a reference under article 177 from the Dutch Court of State, the Raad van State. Levin\textsuperscript{34} dealt with a refusal by the Dutch authorities to issue a residence permit as required under the Treaty. Mrs. Levin was a British subject who lived with her South African husband in the Netherlands.\textsuperscript{35} Although she had worked for a time after their arrival, she was not working when she applied for the permit and was still unemployed when the permit was refused a year later.\textsuperscript{36} After this refusal she obtained part-time work.\textsuperscript{37} She appealed the decision of the Amsterdam police to the Dutch Secretary of State for Justice.\textsuperscript{38} On the Secretary of States' decision to let the matter stand, Mrs. Levin appealed the Justice Division of the Raad van State. The Raad van State realized the key issue was the time requirement for "worker." The Raad van State submitted three questions to the Court of Justice under article 177:

1. To qualify as a worker, must the person earn the 'national' minimum requirement for subsistence, as defined by that particular member state?

2. Also, does it matter if the worker supplements his salary from other sources such as investments or property income, in order to raise his income up to the subsistence level, or could the person live on a lower than subsistence level and still be considered a "worker"?

\textsuperscript{28} Id. at 385 (para. 6 of judgment).
\textsuperscript{29} Id. (para. 5 of judgment).
\textsuperscript{30} Id. (para. 7 of judgment).
\textsuperscript{31} Id. at 389 (para. 24 of judgment).
\textsuperscript{32} Id. at 391 (para. 34 of judgment).
\textsuperscript{33} Id. at 392-93 (para. 37 of judgment).
\textsuperscript{35} Id. at 1037, 34 Comm. Mkt. L.R. at 454.
\textsuperscript{36} Id., 34 Comm. Mkt. L.R. at 454.
\textsuperscript{37} Id. at 1055, 34 Comm. Mkt. L.R. 458.
\textsuperscript{38} Id. at 1037, 34 Comm. Mkt. L.R. 455.
3. Can a person be a "worker", even if his principal motive for going to another member state is other than to work?  

The Court of Justice first repeated its earlier ruling in Unger, where it had held that "worker" was a Community concept, and could not be defined by national law. The Court then examined Regulation 1612/68, which mentioned all forms of workers, such as permanent, seasonal, and frontier, in respect to residence permits. The only requirement was a job; there were no criteria as to hours worked or salary. Thereby, the Court rejected the Dutch government's advocated position for the subsistence level test, and held that it did not matter how much time was spent working, as long as the person worked and did not apply for public funds. The work still had to be more than a marginal activity; hence, Mr. Secchi's occasional dishwashing would probably fail. Also, the ruling prevented member states from disenfranchising workers of their rights under the Treaty merely by adjusting the legislation regarding minimum wages and hours worked. The established rule apparently allows any arrangement for funding, as long as the family can survive without recourse to public funds, and as long as the EEC national claiming these rights maintains worker status by continuing to hold some position that is genuine and more than occasional in time. The person will then be considered a worker and entitled to full protection of the Treaty:

It should however be stated that whilst part-time employment is not excluded from the full application of the rule of freedom of movement for workers, those rules cover only the pursuit of effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary ... [and that] those rules guarantee only the free movement of persons who pursue or are desirous of pursuing an economic activity.

On the question of primary motive, the E.C.J. looked at the wording of article 48(3) and the secondary legislation. Finding no requirement mentioned or implied, other than movement "for the purpose of" or "in order to" gain employment, the Court ruled this meant the person must have merely "intended" to be a worker. The Court found no support for the argument that, if movement to another member state were moti-

39 Id. at 1038, 34 Comm. Mkt. L.R. 456-57.
41 Id. at 1049, 34 Comm. Mkt. L.R. at 467.
42 Id., 34 Comm. Mkt. L.R. at 467.
44 Id. at 1050, 34 Comm. Mkt. L.R. at 468.
46 Id., 34 Comm. Mkt. L.R. at 468 (paras. 16, 17 of judgment).
vated by something other than employment or a specific job, one's worker status was suspect.\textsuperscript{47} Instead, it held that why one decides to emigrate to another member state is of no concern. Only the intention to work there in a genuine and effective activity is required: "Once that condition is satisfied, the motives which may have prompted the worker to seek employment in the member state concerned are of no account and must not be taken into consideration."\textsuperscript{48}

Tourists may also be covered within the freedom of movement concept, either as part-time workers or as receivers of services within article 59. "Motive" is the guiding concern; one's prime goal in emigrating must be either to provide service as a worker or to receive the services of another, such as medical treatment.\textsuperscript{49} In \textit{Watson and Belmann}, the Commission put forth the argument that tourists should also be included.\textsuperscript{50} Submissions from both the Italian and U.K. governments rejected that view, as did Advocate General Trabucchi.\textsuperscript{51} The Court declined to deal with the question, leaving it to the referring court, the Pretura of Milan, to decide upon application of their ruling, and just dealt with the issues generally under title III of part II of the Treaty.\textsuperscript{52} Some commentators have taken the position that tourists should be included because the goals of the Treaty will not be fulfilled until there is just one community market and tourism is a significant part of that market.\textsuperscript{53} Other commentators support the proposition because they feel that the Court has written its reasons for judgment in such broad language that the position advocated by the Commission cannot be excluded.\textsuperscript{54} The most reasoned position is that taken by Hartley, who feels that tourists are definitely outside the scope of the "freedom" provisions.\textsuperscript{55} The mere fact that tourists may do some work during their travels or are the recipient of services in hotels does not put them in the same category as workers who make their move with the specific intent required by the treaty.

Thus, . . . a political activist who comes to take part in a demonstration should not be regarded as covered by Community law merely because he intends to buy a cup of coffee before doing battle with the

\textsuperscript{47} \textit{Id.} at 1052, 34 Comm. Mkt. L.R. at 469-71.

\textsuperscript{48} \textit{Id.} at 1050, 34 Comm. Mkt. L.R. at 469.

\textsuperscript{49} \textit{Id.} at 1053, 15 Comm. Mkt. L.R. at 470.


\textsuperscript{51} \textit{Id.} at 1195, 1204-05, 18 Comm. Mkt. L.R. at 560-61.

\textsuperscript{52} \textit{See id.} at 1200-01, 18 Comm. Mkt. L.R. at 572-73. The reference to the E.C.J. by the Pretura did not specify whether Watson was working in Italy as an "au pair" for the Belmann children or was merely a tourist who happened to do occasional work. \textit{Id.} at 1191, 1202, 18 Comm. Mkt. L.R. at 558.


\textsuperscript{54} H. SMIT & P. HERZOG, \textit{supra} note 6, at 63.

\textsuperscript{55} T. HARTLEY, \textit{supra} note 10, at 97.
police: his purpose in coming to the country would not be to consume coffee.\textsuperscript{56}

**NON-EEC NATIONALS:**

Non-EEC immigrants are subject to the whole gamut of United Kingdom immigration law: the Immigration Act, 1971,\textsuperscript{57} which sets out the general framework; the Immigration Rules\textsuperscript{58} which set procedure; and, the Instructions for Immigration Officers,\textsuperscript{59} which elaborate upon the Immigration Rules and suggest how the immigration officer's discretionary powers should be used. The first principle is set out in section 3(1) of the Immigration Act, 1971, which states that everyone who is not a patrial (one having the right to abide in the U.K.), shall not enter the United Kingdom except as provided for in the Act.\textsuperscript{60} The Immigration Rules establish that each visitor can be examined and must furnish the immigration officer with any information he requires in deciding whether to grant leave to enter the U.K. and whether to set any terms.\textsuperscript{61} If the visitor is granted leave to enter, any restrictions or conditions will be noted on his passport or else given to him in writing.\textsuperscript{62}

\textsuperscript{56} Id. While a tourist is not within the provision upon entry into another member state, he later may be, if, while in the other member state, he decides to take work as defined in Levin. The change in intention brings about the change in status.

\textsuperscript{57} Immigration Act, 1971, ch. 77.

\textsuperscript{58} H.C. 169, reprinted in M. Supperstone, Immigration: The Law and Practice app. I 198 (1983) [hereinafter cited as the Immigration Rules]. The authority for the Immigration Rules is set out in the Immigration Act, 1971, ch. 77, § 3(2). While they are not "law," the Immigration Rules do carry a great deal of weight because the operation of the Immigration Service is guided by them. While they are not delegated legislation in the true sense, they are laid before both Houses of Parliament, and Parliament has 40 days to comment upon them. Also, while the Rules may not have the force of law, they are law as far as the appeal system is concerned, making a failure to implement the Rules a ground for appeal. See also R. v. Secretary of State for the Home Department, \textit{ex parte} Hosenball, [1977] 3 All E.R. 452, 458-59 (C.A.) (per Lord Denning M.R.) (altering an earlier opinion by Lord Roskill in R. v. Chief Immigration Officer, Heathrow Airport, \textit{ex parte} Salamat Bibi, [1976] 3 All E.R. 843, 848 (C.A.).


\textsuperscript{60} That section reads:

\texttt{3.-(1) Except as otherwise provided by or under this Act, where a person is not [a British citizen] —
(a) he shall not enter the United Kingdom unless given leave to do so in accordance with such Act; . . . .}

Immigration Act, 1971, ch. 77, § 3(1)(a). See also Immigration Rules, \textit{supra} note 58, para. 4.

\textsuperscript{61} Immigration Rules, \textit{supra} note 58, para. 3.

\textsuperscript{62} Id. para. 7.
worker does not require a visa under the Rules, he would be wise to obtain one, since it is considered an entry clearance certificate, which restricts the immigration officer at the point of entry to quite narrow grounds for refusal of leave to enter:

(i) that false representations were made, or material facts not disclosed, in the process of obtaining that clearance (visa); whether to the holders knowledge or not; or
(ii) that a change in circumstances since issue removes the basis of the holder's claim for admission; or
(iii) that entry should be refused for medical reasons, a criminal record, restricted returnability, because he is the subject of a deportation order, or because exclusion would be conducive to the public good.

While those grounds appear broad, the advantage of the visa is that potential problems are identified prior to leaving home, not at the immigration counter of a foreign airport. Problems with immigration are also easier to remedy in one's home country since all the records and public services are available there to substantiate one's claims. Without the visa, a person is subject to the full range of the immigration officer's discretion, and for some immigrants this can be a rude shock.

Barring any difficulty over the visa, an American worker will be admitted to the U.K. upon presentation of his passport and visa at point of entry, provided the officer believes that he will only stay as long as allowed, that he has sufficient funds to maintain himself, and that he can pay the cost of either a return journey or passage to a third country. If the worker does not meet all of these criteria, the officer can refuse him. If he suspects the American worker has come to live off public funds, the

63 Id. para. 10.
64 Id. para. 12.
65 Id. para. 13.
66 The question of what constitutes a "material fact" was considered in R. v. Secretary of State for the Home Department, ex parte Jayakody, [1982] 1 W.L.R. 405 (C.A.), where Lord Denning, M.R., ruled that, while there was a positive duty to disclose a material fact (even if not asked), to be material the fact must have been one that would have compelled the authorities to deny him entry: "It is not sufficient that he might have been influenced: It must be that he would have been influenced." Id. at 408 (emphasis in original).

67 For example, if one is accepted on the basis of being single, but, between the time of receiving the entry certificate and arrival, gets married. In R. v. Secretary for the Home Department, ex parte Zamir, [1980] A.C. 930, 950 (H.L.), Lord Wilberforce held as obiter that an immigrant had a high duty to meet "a positive duty of candour or all material facts which denote a change of circumstances since the issue of the entry clearance." Later the House of Lords altered that opinion. In R. v. Secretary of State for the Home Department, ex parte Khawaja, [1983] 2 W.L.R. 321, 330 (H.L.) (per Lord Fraser), their Lordships, with Lord Wilberforce dissenting, expressed that view that the standard set down in Zamir was too high and that, while one did not have to volunteer every fact, there remained the possibility of refusal of clearance in circumstances where omission of the fact was deceitful.
immigration officer must refuse him entry.\textsuperscript{68}

The normal "visitor's leave of six months" will usually be extended in the case of a worker to one year; the time allotted in the work permit.\textsuperscript{69} Paragraph 27 of the Rules states that for a worker to enter the U.K. to seek employment, he \textit{must} have a work permit issued by the Department of Employment.\textsuperscript{70} The exceptions to that statement are few, and are only for limited periods.\textsuperscript{71} Usually, once the worker and his prospective employer have agreed to the position and salary, it is the prospective employer's duty to apply to the Department of Employment for the work permit for the named worker for the specific position.\textsuperscript{72} The employer must also show that there exists a genuine vacancy which cannot be filled within the U.K.\textsuperscript{73} If the Department of Employment decides to issue the permit, it will usually be for one year, the permit will name the employee, the location, and the specific type of work to be done. If the Department refuses to issue the work permit, the decision is final;\textsuperscript{74} there is no right of appeal.\textsuperscript{75} Without the permit, the worker will be denied entry to the U.K. if the immigration officer suspects that the applicant might take up employment.\textsuperscript{76}

Work permits can be extended beyond the initial twelve months provided certain criteria are met.\textsuperscript{77} If the permit has been issued for a period other than of twelve months, the application for a stay must be approved by the Department of Employment.\textsuperscript{78} Approval is necessary for an extension of time to be granted.\textsuperscript{79} In the normal case, the permit is issued for twelve months and the worker is given leave to enter for a like period; the leave can be extended if the worker is still at his original job and his employer wants to retain him.\textsuperscript{80} If the worker wishes to change employers or job category, then the extension must be approved by the Department of Employment.\textsuperscript{81} In any event, extensions are generally for an additional three years.\textsuperscript{82} If, however, the worker is not in his approved

\begin{footnotesize}
\begin{enumerate}
\item[68] Immigration Rules, \textit{supra} note 58, para. 27.
\item[69] Id. para. 20.
\item[70] Id. para. 27.
\item[71] Id.
\item[72] Id. para. 31.
\item[73] Id. para. 100.
\item[74] Id.
\item[76] Immigration Rules, \textit{supra} note 58, paras. 17, 27.
\item[77] Id. para. 116.
\item[78] Id.
\item[79] Id.
\item[80] Id.
\item[81] Id. para. 27.
\item[82] Id. para. 116.
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employment when he applies for an extension of leave, the officer must consider the application in light of all relevant circumstances. This would include consideration of the position for which the permit was issued, and an examination of the general considerations listed in paragraph 97 of the Rules: whether any false statements have been made in any of the applications; whether undertakings regarding purposes and length of stay have been honored; and, whether the applicant's character, conduct, or associations indicate a threat to the security of the nation. The mere fact an applicant satisfies all the formal requirements is not conclusive; the final decision is entirely within the officer's discretion and judgment.

Even if he possesses a passport, visa, and work permit, the American worker in question may still be denied entry if the immigration officer suspects that he is too old for the position, that he has no intent of taking the job specified, or that he is incapable of taking the job for physical reasons. In the case of an expired permit, the officer has the discretion to allow entrance if he believes that the late arrival was beyond the control of the worker, and if the job is still open. In deciding whether to grant leave to enter and on what conditions, the officer has extensive powers of examination. Paragraph 14 of the Rules gives this power and the courts have held that it can continue for as long as it takes to assemble the required information.

If an American worker came to the U.K. as a visitor and happened to find employment, he could apply for the permit. In most cases, however, it would be refused. Under the Rules, any application to vary leave should be refused automatically without recourse to the Department of Employment unless there was leave to work granted in the original leave to enter, as in the case of a student. Even then the officer has the discretion to forward the application to the Department of Employment provided the applicant's record is clean and he has not breached any conditions contained in the original leave.

If a worker stays in the approved employment for four years, he can then apply for "settled" status which removes the time limitation on his

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83 Id.
84 Id. para. 97.
85 See id. paras. 17, 28.
86 Id. para. 28.
87 Id. para. 14.
89 Immigration Rules, supra note 58, para. 100.
90 Id. para. 107.
Factors considered in deciding to grant settled status are the workers personal circumstances, the job he holds, and the expected duration of the position. Once it is granted, settled status removes the worker's need to register with the police. The family of the U.S. worker can enter and stay with him as long as he can provide for them without recourse to public funds. "Family" in this context means spouse and unmarried children under eighteen years of age. Each dependant must still obtain his own entry clearance, but once that is granted the dependant enters for the same period as the worker and without any restrictions on obtaining employment. Children who do not qualify under the eighteen and unmarried rule may still be admitted in the "most exceptional circumstances," but this is rare.

Once he is accepted as settled, the worker can expand the scope of his family in certain cases. A widowed father over age sixty-five, a widowed mother of any age, or both parents as long as one is over sixty-five can be admitted provided three conditions are met: (1) the worker has the means to provide for them; (2) they can obtain entry clearance; and (3) it is shown that they are "wholly" or "mainly" dependant upon the U.K. child. Not only must the worker be able to support the parent, he must also be able to support anyone who might claim entry as a dependant of the parent or grandparents. A final requirement is that those dependants who wish to join the U.K. relative/worker must be without any other close relation in the home country to which they can turn.

Dependants, other than parents and grandparents, may be admitted provided they are mainly dependant upon the relation in the U.K. and are living alone in the "most exceptional circumstances." The final formality is registration with the police; both the worker and members of his family must register as aliens once they have been given limited leave to enter for more than three months.

If the worker loses his job, quits his job, or breaks any condition of his leave before he becomes settled, his leave can be varied. The worker has the right to appeal the reduction unless it is done by personal

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91 Id. para. 133.  
92 Id. paras. 97, 100.  
93 Id. para. 137.  
94 Id. para. 40.  
95 Id. paras. 46, 50.  
96 Id. paras. 47-53.  
97 Id. para. 51.  
98 Id. para. 52.  
99 Id.  
100 Id.  
101 Id.  
102 Id. para. 74.  
103 Id. para. 98.
order of the Secretary of State for the Home Department on the basis that it is for the public good for political or security reasons. If he was refused leave to enter the U.K. because of a problem with the visa, his health, or a criminal record, he can only appeal from outside the U.K. and only if it was not done on the personal order of the Secretary of State for the Home Department as conducive to the public good.

**The E.E.C. Worker:**

A French worker is entitled to enter the U.K. on the production of either a passport or an identity card per article 2(1) of Directive 68/360. No other document, such as a visa, can be demanded. The family of the worker is entitled to the same rights of entrance. The governments of member states are required to issue these documents to their citizens; the documents must be valid for all member states and any areas he may have to traverse to get to the member state of his choice; and member states must not require any form of exit visa or permission from their own nationals or those of other member states.

The provisions of article 3 of Directive 68/360 were considered in *R. v. Pieck* in 1979 when the Pontypridd Magistrates’ Court asked the Court of Justice for a ruling on the phrase “no entry visa or equivalent document may be demanded.” In that case, the defendant’s passport had been stamped upon re-entry to the U.K., from one of his periodic visits to his home in the Netherlands, with the words “leave to enter” for six months. Mr. Pieck had been in the U.K. periodically since 1973, and since 1977 had been in full-time employment as a printer in Cardiff. During this time he had neglected to obtain a residence permit. In 1979, Mr. Pieck was charged with overstaying the six months leave given on his last return. The Court of Justice repeated the position it had taken in *Sagulo*, that the residence permit was only evidentiary; the right of residence was guaranteed in the Treaty of Rome and a mere

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104 Id. para. 95.
105 Immigration Act, 1971, ch. 77, § 13(5).
107 See id. art. 3(1).
108 See id. art. 3(2).
109 Id. art. 2(2), (3), (4).
111 Directive 68/360, supra note 106, art. 3(2).
113 Id., 29 Comm. Mkt. L.R. at 222.
114 Id. at 2174, 29 Comm. Mkt. L.R. at 223.
failure to comply with formalities did not extinguish that right.\footnote{116} In regard to the "leave to enter" that had been stamped on his passport, the Court held that there was no authority in the treaty to justify that practice.\footnote{117} Article 3(1) of Directive 68/360 required entry upon the presentation of only a passport or identity card; article 3(2) said that no further "documents" should be required.\footnote{118} The Court agreed with the submission of Advocate General Warner who said that the English version of the directive using the word "documents" was deceptive; the better interpretation was evident in the other languages of the Community, where the word "requirement" was used.\footnote{119} On that interpretation, the stamping of the passport at the point of entry was the equivalent of a visa: [T]he phrase "entry visa or equivalent requirement" covers any formality which is coupled with a passport or identity card check at the border, whatever may be the place or time at which the leave is granted and in whatever form it may be granted.\footnote{120}

Once the worker has been admitted into another member state and has found a job, he must be issued an "EEC nationals residence permit."\footnote{121} The permit must be valid for five years and be automatically renewable.\footnote{122} Members of his family are also entitled to a residence permit if they can produce an identity card or passport and show their association with the worker.\footnote{123} If the worker is employed for more than three months but less than one year, the member state can issue a temporary residence permit instead of the usual five-year version.\footnote{124} For work

\footnote{117}{1980 E. Ct. J. Rep. at 2185, 29 Comm. Mkt. L.R. at 240 (para. 10 of judgment).}
\footnote{118}{Id., 29 Comm. Mkt. L.R. at 240.}
\footnote{119}{Id. at 2190, 29 Comm. Mkt. L.R. at 234.}
\footnote{120}{Id. at 2185, 29 Comm. Mkt. L.R. at 240. A.C. Evans takes the view that workers could refuse to fill out the customary "landing cards," because those could be considered a "requirement" within the scope of the rulings of the Court of Justice. Evans, Entry Formalities in the European Community, 6 EUR. L. REV. 3, 6 (1981).}
\footnote{121}{Directive 68/360, supra note 106, art. 6(3).}
\footnote{122}{Id. arts. 4(2), 4(3), 6(1).}
\footnote{123}{Id. art. 4(3)(c), (d), (e). The "family" of a worker is defined in Regulation 1612/68, supra note 5, art. 10(1), (2), as all of his children who are under 21 years of age or are dependent upon him, as well as the spouse. "Family" also includes parents and grandparents of the worker and his spouse. Id. at 10(1)(b). Member states should facilitate the admission of family members who are dependent upon the worker or who live under his roof in his home country. Id. art. 10(2). Though not an absolute right, the instruction to facilitate might be invoked in cases of obvious administrative inertia. The only restriction to apply here is that art. 10(3) requires the worker to have accommodation must be that "normal" for the area. Id. Therefore, even if his accommodation in the U.K. is of a much higher standard than what he has at home, if it is below average for that region, it will not suffice.}
\footnote{124}{Directive 68/360, supra note 106, art. 6(3).}
of less than three months duration, no permit is required.125 Once the worker has a permit, it can only be lost by loss of worker status or absence from the member state for more than six months.126 If the absence is to complete military service in his home country, the continuous period of six months does not apply since it is not a matter within the worker's control.127

While article 2(1) of Directive 68/360 appears to refer only to those workers who are taking-up a specific offer of employment, it also seems to cover those who are entering in search of work.128 These prospective workers will have a minimum period of three months to search, as long as they do not apply for public funds.129 The Immigration Rules go beyond the Community requirement and allow a stay of six months without a residence permit.130 After six months, if the prospective worker has not been a charge on public funds and has also obtained employment, he will be entitled to a residence permit.131 If he has found no job, or has become a public charge, he will lose his right to stay; however, the decision is subject to appeal.132 The Rules state that if the worker has ceased to be a “worker” during the term of the residence permit, the permit may be varied after he has been given a written warning.133 This implies that if the worker obtains work, obtains the residence permit, and then quits his job or only works sporadically, then he can be asked to leave.134 However, the Rules go on to say that, in the normal case, the first residence permit should only be renewed for twelve months if the worker has been involuntarily unemployed for the last twelve months or more.135 If at the end of this twelve month renewal period he is still unemployed

125 Id. art. 8(1)(a).
126 Id. arts. 6(2), 7.
127 Id. art. 6(2).
128 Id. art. 8(1).
130 Immigration Rules, supra note 58, para. 142.
131 Id.
132 Id. para. 140.
133 Id. para. 143.
134 Id. para. 144.
135 For the EEC authority, see Directive 68/360, supra note 106, art. 7(1), (2).
involuntarily, he may then be refused a renewal. Therefore, while the Directive speaks of a residence permit that is valid for five years and is automatically renewable, the U.K. government has adopted the view that the worker ceases to be a "worker" if his voluntary or involuntary unemployment extends to twenty-four months. Only "workers" are entitled to residence permits.

At various points in time, the EEC worker will also be considered as "settled" in the U.K. and given indefinite leave to stay; this will also apply to his family. The worker will be considered settled if he has reached the retirement age of that member state and has been in continuous residence for the last three years. He must also have been employed for the past twelve months, in any member state. A worker forced to stop work because of a job related illness or injury (if a permanent incapacity) will be considered settled. Those who are permanently incapacitated for non-job related reasons will be considered settled if they were in continuous residence in the U.K. for the two years preceding the incapacity. The family members of these retired or incapacitated workers are also considered settled, as are the family members of a deceased worker who died on the job from an accident or from a job related illness. Similarly, the family members of a worker who dies from causes unrelated to employment are considered settled if the worker spent the final two years working in the U.K.

The right of a family member to a residence permit can be questioned if the family member is no longer dependant upon the worker. The family member is then faced with the choice of either establishing his claim as a worker in his own right, or leaving the member state in question. The choice is even more limited in the case of a non-EEC national spouse, since the loss of the connection to the worker removes the right to obtain work in the U.K. without the necessary work permit.

This question came before the Queen's Bench Division of the English High Court in R. v. Sandhu in 1982. Mr. Sandhu was an Indian

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136 Id., art. 6(1)(b).
137 Immigration Rules, supra note 58, para. 144.
138 Directive 68/360 supra note 106, art. 7(2).
139 See id. at 4(3). The members of a worker's family are also entitled to take employment on the same basis as the worker, even if they are not EEC nationals. Regulation 1612/68, supra note 5, art. 11.
140 Immigration Rules, supra note 58, para. 147(a).
141 Id.
142 Id.
143 Id. para. 147(b).
144 Id. para. 147(c), (d).
145 Id. para. 147(e). Regulation 1251/70, art. 2, 1970(II) O.J. EUR. COMM. (No. L 142/24) 402, 403 (Special Ed. 1972) [hereinafter cited as Regulation 1251/70].
national married to a German woman. In 1975, they were married and moved to the U.K., where he took a job with the Post Office.\textsuperscript{147} In 1976, a child was born into the family and, as their living accommodation was too small, Mrs. Sandhu and the baby returned to Germany to live with her parents until better quarters could be arranged.\textsuperscript{148} The marriage deteriorated and the separation appeared to be on its way to becoming a permanent condition.\textsuperscript{149} When Mr. Sandhu applied for a renewal of his residence permit, he was refused on the authority of an earlier decision of the Immigration Appeal Tribunal in \textit{Grewal}, which held that if there was a separation, the non-EEC national spouse lost his or her status under the Treaty.\textsuperscript{150} The Court did not agree. It held that there was no hard and fast rule of law as suggested in \textit{Grewal}.\textsuperscript{151} EEC law was the foundation,\textsuperscript{152} and the Treaty and secondary legislation, especially Regulation 1612/68, articles 10(1) and (2), contained strong emphasis on the "family," and leading the Court to the conclusion that rights could not be removed without an examination of all the circumstances.\textsuperscript{153} Therefore, Sandhu could not be deprived of his treaty rights merely by the unilateral act of the EEC partner leaving.\textsuperscript{154}

The Court of Appeal did not agree. Eveleigh, L. J., in delivering the leading judgment, held that \textit{Grewal} was correct in holding that the non-EEC spouse’s rights under the Treaty were predicated upon the exercise by the EEC partner of his or her right to freedom of movement.\textsuperscript{155} It was the EEC worker who had the right to have his family join him, it was not an independent right of the family member.\textsuperscript{156} Any right given to a family member under the Treaty that was independent of the dependence or connection to the EEC worker, would be very specific in detailing the rights of the family member. For example, the right to remain in the other member state if the EEC worker has been killed at work is specifically provided for in treaty.\textsuperscript{157} Therefore, in instances such as the present, where the right to a residence permit is conditional upon his ties to the EEC national spouse, once that connection is severed, here the wife’s departure for Germany, he has lost his right to stay.\textsuperscript{158} He has no

\begin{itemize}
\item \textsuperscript{147} \textit{Id.} at 555 (para. 7 of judgment).
\item \textsuperscript{148} \textit{Id.}
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.} (paras. 8-10, 14 of judgment). \textit{See} Grewal v. Secretary of State for the Home Department, [1979-80] Imm. A.R. 119 (Imm. App. Trib.).
\item \textsuperscript{151} Sands, 34 Comm. Mkt. L.R. at 554-55, 560-561 (paras. 5, 26, 30 of judgment).
\item \textsuperscript{152} \textit{Id.} at 560-61 (para. 30 judgment).
\item \textsuperscript{153} \textit{Id.} at 563 (paras. 31-33 of judgment).
\item \textsuperscript{154} \textit{Id.} (para. 37 of judgment).
\item \textsuperscript{156} \textit{Id.} at 136 (para. 10 of judgment).
\item \textsuperscript{157} \textit{Id.} at 137 (para. 12 of judgment).
\item \textsuperscript{158} \textit{Id.} at 136 (para. 14 of judgment).
\end{itemize}
independent right; it is only a derivative of the EEC worker's right to be joined by her family.\textsuperscript{159}

The EEC worker can only be refused leave to enter, or expelled, upon public policy grounds as set forth in article 48(3) of the Treaty: public policy, public security or public health, or the failure to work. Voluntary unemployment is seen as grounds for removal. Other offenses normally considered under the Rules to justify expulsion, such as failure to register with police or failure to take employment, do not apply to the EEC worker. In this regard, the residence permit requirement set forth in article 4 of Directive 68/360, has been held to be only evidentiary: the right of residence is not conditional upon its acquisition.

The first reference to come before the Court of Justice in this regard was Royer.\textsuperscript{160} In that case, one Jean Noel Royer, a French tradesman, entered Belgium in late 1971 in order to join his wife in Liége, where she was the manageress of a café/dance hall.\textsuperscript{161} In early 1972 he was detained by the police as an illegal resident because he had failed to register on the population record.\textsuperscript{162} Also, the Procureur Général of Liége was in the midst of an anti-gangster campaign and Mr. Royer had been charged in France with several armed robberies, as well as being sentenced to two years for procuring.\textsuperscript{163} He was expelled on the basis of his failure to register, but he returned shortly thereafter.\textsuperscript{164} He was again detained by the police, and this time the Minister of the Interior ordered his expulsion on the grounds of public policy.\textsuperscript{165} In a challenge to the Minister's order before the Tribunal de Première Instance of Liége, Mr. Royer alleged that the actions of the government were illegal: he was the husband of a "worker" and therefore entitled to the right of residence in Belgium granted in Directive 68/360.\textsuperscript{166} The Court of Justice agreed with Mr. Royer: the Treaty of Rome grants the right of residence, formalities such as residence permits are merely evidence of that right.\textsuperscript{167} The Court continued on and held that the reference in article 1 of the Directive is to be read as "must issue" upon presentation of the specified documents: there is no allowance for discretion.\textsuperscript{168} While the Court did agree that the failure to comply with residence documentation could be
made the subject of penalties, it did not justify the use of the public policy exception nor did it allow penalties to be so severe that freedom of movement would be discouraged.\textsuperscript{169} The exercising of a right given in the Treaty could not generate, by itself, a reason to use the public policy powers.\textsuperscript{170}

The Court's ruling in \textit{Royer} was repeated a year later in \textit{Sagulo}\textsuperscript{171} when the German Amtsgericht Reutlingen made an article 177 reference concerning the nature of the residence permit and any penalties that could be imposed for failure to conform. The Court referred to \textit{Royer} and repeated its opinion that the residence permit specified in Directive 68/360 was merely evidentiary of a right granted in the Treaty.\textsuperscript{172} Also, while penalties short of deportation could be imposed, they must not be so disproportionate as to curtail the movement of workers.\textsuperscript{173} On the matter of confusion in the German legislation, the Court was quite critical: EEC nationals could only be made subject to the requirements of the EEC residence permit of Directive 68/360; they were not subject to any national residence permit requirements nor could their refusal to comply with those laws be taken into account when charged with failure to acquire the EEC permit.\textsuperscript{174}

\textbf{CONTROLS ON THE ENTRY AND STAY:}

As previously discussed, the reasons for a refusal of leave to enter

\textsuperscript{169} \textit{Id.}

\textsuperscript{170} \textit{Id.}, 18 Comm. Mkt. L.R. at 644.


\textsuperscript{173} Id. at 1506, 1507-08, 20 Comm. Mkt. L.R. at 595-96, 597 (paras. 12, 13 of judgment and para. 4 of Ruling). In its ruling on that point, the court broke with its earlier opinion in \textit{Watson and Belmann}, which had held that any fine or penalty imposed for failure to comply with local rules must be related to a similar offense for nationals, i.e., the doctrine of "national treatment." \textit{See} 1976 E. Comm. Ct. J. Rep. at 1199, 18 Comm. Mkt. L.R. at 572. In \textit{Sagulo}, the Court held that "national treatment" was not an appropriate test, because there was no directly comparable permit — some member states did not have local "residence permit" requirements, therefore those member states could impose greater fines on nationals of other member states than might have been the case for their own nationals when charged with similar administrative offenses. 1977 E. Comm. Ct. J. Rep. at 1509, 20 Comm. Mkt. L.R. at 595-96 (para. 12 of judgment). However, in the second part of \textit{Sagulo} the German concept of proportionality was retained in their ruling that the penalty, while it could be higher than the "national" average for similar offenses, could not be so disproportionate as to discourage movement of workers. \textit{Id.} 20 Comm. Mkt. L.R. at 596 (para. 13 of judgment). \textit{See also} Evans, \textit{Ordre Public, Public Policy and United Kingdom Immigration Law}, 3 EUR. L. Rev. 370, 377-78 (1978); \textit{R. v. Pieck}, 1980 E. Comm. Ct. J. Rep. 2171, 29 Comm. Mkt. L.R. 220. (para. 20 of judgment) (where the court appeared to return to the doctrine of \textit{Watson and Belmann}).

are numerous: e.g., the use of false representations and in some cases, failure to disclose a material fact; a change in circumstances since the clearance was issued; restricted returnability;\(^{175}\) an outstanding deportation order; medical grounds; a criminal conviction; and, a finding by the Minister that deportation would be conducive to the public good.

After entrance, the worker can still be deported on the order of the Minister if the worker has breached a condition of the leave or a time limit;\(^{176}\) if the Minister deems it conducive to the public good;\(^{177}\) or by court recommendation following a conviction.\(^{178}\) Under EEC law, however, the only grounds upon which a worker can be denied entry, or deported, are if he has become a charge on public funds, or on public policy grounds.\(^{179}\) The effect of EEC law therefore, is to limit the use of a government's executive power in this sphere to instances of public health and public order-public security (which includes criminal convictions).

While on its face the "public policy proviso" contained in article 48(3) of the Treaty of Rome appears similar to the U.K.'s traditional use of the Minister's personal discretion when he "deems it conducive to the public good," actually the Court of Justice has narrowed its scope considerably. English Courts left unfettered the traditional use of this power by the Minister: an alien had no "right" either to enter the U.K. or to remain there. Parliament, after considerable discussion, showed no inclination to alter the status quo; therefore, the courts took the view that it must be satisfactory.\(^{180}\)

In *Schmidt v. Secretary State for the Home Office*, a group of Scientology students challenged the Minister's refusal to extend their leave of entry to complete their studies.\(^{181}\) The students charged that the Minister's decision should be quashed because he had tainted his discretion by taking a public position supporting control of Scientology in the U.K., and because he would not grant them a hearing (the time having expired).\(^{182}\) The majority of the Court of Appeal agreed with Judge Un-\(^{goed-Thomas who dismissed the action for failure to disclose a cause.}^{183}\)

\(^{175}\) Restricted returnability is not a factor in the EEC context, since art. 3(4) of Council Directive 64/221 says that the member state that issues the worker the identity card or passport has to receive the worker back even if the document has expired, even if there is a question as to his right to the document, e.g., that he is not a national of that member state. Council Directive 64/221, art. 3(4) 1963-1984 O.J. EUR. COMM. 117 (Special Ed. 1972) [hereinafter cited as Directive 64/221].

\(^{176}\) Immigration Rules, *supra* note 58, para. 148(a).

\(^{177}\) *Id.* para. 148(b).

\(^{178}\) *Id.* para. 148(d).


\(^{182}\) *Id.* at 152-53.

\(^{183}\) *Id.* at 160.
In his separate opinion, Lord Denning, M.R., rejected defendant’s argument that the exercise of the public policy power should be limited to three cases; the safety of the realm, the observance of the law of the land, and the preservation of the standard of morality generally accepted in the country. Instead, His Lordship held that the Minister had broad discretion in the application of the public good proviso, provided it was exercised for a proper purpose: “I think the Minister can exercise his power for any purpose which he considers for the public good or to be in the interests of the people of this country.”

The Court dismissed the claims of a right to a hearing, referring to the earlier decisions in *Venicoff* and *Soblen*, which had held that while the Minister may grant a hearing, unless it is required by statute, it was a matter totally within his discretion; a refusal could not be challenged. Due to concern over the lack of a right to a hearing, the government of the day, in guiding the Immigration Act, 1971, through Parliament, agreed to a non-statutory informal hearing procedure for deportation cases based on the personal order of the Minister and justified by security or political reasons. While this “advisory panel” does not have the force of law for its existence, the reference to a “right” of review by a three person panel is found in the House of Commons debates, and is now also set forth in the Immigration Rules. Application of this procedure was examined in *R. v. Secretary of State for the Home Department, ex parte Hosenball*, where the Court of Appeal again upheld the wide discretion allowed to the Minister in the previous cases: “But this is no ordinary case. It is a case in which national security is involved, and our history shows that, where the state itself is endangered, our cherished freedoms may have to take second place. Even natural justice itself may suffer a set-back.”

The Court of Appeal also held that while the deportee must have access to the reasons for the order, access can be limited if the Minister feels it is in the national interest. Therefore, while the courts can examine the actions of the advisory panel and Minister through judicial review, this examination will be limited to the concept of “fairness.” In

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184 *Id.* at 169 (opinion of Lord Denning, M.R.).
185 *Id.* “Proper purpose” being the exercise of his discretion for the public good, not as a means of circumventing deficiencies in the extradition legislation, as unsuccessfully alleged in *Soblen*. [1963] 2 Q.B. at 302 (opinion of Lord Denning, M.R.).
186 Schmidt, [1969] 2 Ch. at 170.
187 See *id.* at 171.
189 See Immigration Rules, *supra* note 58, para. 150.
190 [1977] 3 All E.R. 452.
192 *Id.*
Hosenball, the government's disclosure of only minimal data in the reasons it gave for the deportation was held to be fair because of the national security considerations involved. The general position under the Immigration Act, 1971, and the Immigration Rules can be set out as follows:

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<thead>
<tr>
<th>Cause</th>
<th>Reason</th>
<th>Remedy</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Refusal of leave to enter</td>
<td>(i) On personal order of the Minister; deems it conducive to the public good.</td>
<td>No appeal and no advisory board.</td>
</tr>
<tr>
<td></td>
<td>(ii) Order of the Immigration Officer; deems it conducive to the public good.</td>
<td>Appeal to an Adjudicator.</td>
</tr>
<tr>
<td>2. Refusal of leave to enter</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Deportation order.</td>
<td>(i) Order of the Minister; conducive to the public good.</td>
<td>Appeal to the Immigration Appeal Tribunal.</td>
</tr>
<tr>
<td>4. Deportation order.</td>
<td>(ii) Order by the Minister; conducive to public good, security or political reasons.</td>
<td>Hearing before the three man advisory panel.</td>
</tr>
</tbody>
</table>

The only person without a remedy is someone who has been refused entry on the personal order of the Minister on public policy grounds. If the same grounds are used by the Minister against an EEC worker, even for security and political reasons, he will at least be allowed an appearance before the advisory panel. It should also be noted that in many ways, the subject can be blown out of proportion; few people are refused leave to enter on public policy grounds. The number deported on pub-

193 Id. at 459.
194 Immigration Act, 1971, ch. 77, §§ 3(1)(a), 13(5); Immigration Rules, supra note 58, paras. 85(a), 89.
195 Immigration Act, 1971, ch. 77, § 3(1)(a), 13(1); Immigration Rules, supra note 58, paras. 85(b) 89.
196 Immigration Act, 1971, ch. 77, §§ 3(5)(b), 15 (1)(a); Immigration Rules, supra note 58, paras. 148(b), 151, 159.
197 Immigration Act, 1971, ch. 77, §§ 3(5)(b), 15(3); Immigration Rules, supra note 58, paras. 148(b), 150, 159.
198 With regard to the advisory panel, Mr. Merlyn Rees, the Home Secretary during the Hosenball affair, said that "no Home Secretary could lightly disregard the advice of the panel or the advice that comes from the panel." 926 PARL. DEB., H.C. (5th ser.) 497 (1976-77).
199 In J. EVANS, supra note 17, the author gives the example of the West German political activist Rudi Dutschke, who was deported from Britain in the early 1970s. Id at 272-73. Also, an Italian trade unionist with Marxist leanings was allowed to stay in 1975, after the deportation process was dropped in his regard. Id. A recent case was the refusal of leave to enter for the case of a Soviet "peace movement" leader. The Guardian Weekly, Jan. 6, 1985, at 3. Likewise was the treat-
lic policy grounds is also minimal, and the vast majority of these have the right of appeal under section 13(7) of the Immigration Act, 1971.\textsuperscript{200} Aside from espionage offenses, which is usually what "national security or political reasons" connotes, the usual application of the "conducive to the public good" proviso has been in cases such as marriages of convenience;\textsuperscript{201} a criminal conviction, even a minor one, of an illegal alien;\textsuperscript{202} the possession of a small amount of cannabis for personal use;\textsuperscript{203} and violation of the Immigration Rules.\textsuperscript{204}

Under U.K. law, a criminal conviction may provide a bar to entrance or a cause for deportation. The Immigration Rules are quite specific on the matter of a previous criminal record, and unless there are strong compassion grounds, the worker must be refused leave to enter.\textsuperscript{205} Essentially, all that is required is a conviction in any country, of an offense listed under the Extradition Act, 1870,\textsuperscript{206} or an offense which would make him returnable under the Fugitive Offenders Act, 1967.\textsuperscript{207} After entry, there is more leeway concerning offenses committed within the U.K. Section 6(1) of the Immigration Act, 1971, allows an order to be made by the Minister under a court recommendation in sentencing.\textsuperscript{208} The defendant must be over seventeen years of age and it must be an offense which may subject defendant to a term of imprisonment.\textsuperscript{209} The final order should not be made however, until all time periods for notice of appeals have expired, and any appeals so launched have been concluded.\textsuperscript{210}

\textsuperscript{200} According to figures cited by Evans, of the 116 persons deported between 1973 and 1976 under the public policy grounds, only one order, Hosenball's was made using the national security, or political grounds of (S.15(3)) to which the advisory panel procedure applies; 115 had full appeal rights before the Immigration Appeal Tribunal. J. EVANS, supra note 17, at 302. Evans also relates that the level of successful appeals is quite high, considering the type of action: in 1980, 11 appeals were allowed, 41 denied; in 1981, 9 appeals were allowed, 34 denied. Id. at 381 n. 63.

\textsuperscript{201} See, e.g., Marriages of Convenience Against the Public Good, The Times, Jan. 14, 1983, at 7, col. 5 (reporting the decision in three joined cases; R. v. Immigration Appeal Tribunal, ex parte Ullah; R. v. Immigration Appeal Tribunal, ex parte Cheema; R. v. Immigration Appeal Tribunal, ex parte Kawol); Osama v. Immigration Officer, 1978 Imm. A.R. 8.

\textsuperscript{202} See e.g., Butt v. Secretary of State for the Home Department, 1978-79 Imm. A.R. 82. (Imm. App. Trib.).

\textsuperscript{203} See e.g. Scheele v. Immigration Officer, 1976 Imm. A.R. 1 (Imm. App. Trib.).

\textsuperscript{204} R. v. Immigration Appeal Tribunal, ex parte Ajaib Singh, 1978 Imm. A.R. 59 (Q.B.).

\textsuperscript{205} Immigration Rules, supra note 58, para. 83.

\textsuperscript{206} Extradition Act, 1870, 33 & 34 Vict., ch. 52, § 27, sch.1.

\textsuperscript{207} Fugitive Offenders Act, 1967, ch. 68, §§ 1-4, sch.1.

\textsuperscript{208} Immigration Act, 1971 ch. 77, § 6(1).

\textsuperscript{209} Id. § 3(6).

The courts have been quite compassionate in this area. In *R. v. Caird*,211 Sachs, L.J., of the Criminal Division of the Court of Appeal, held that the test for deciding whether or not to recommend deportation, was to weigh the potential detriment to society of allowing the defendant to remain against the defendant's personal history: the crime, his past criminal record, and the chance of a repeat of the crime.212 Only after the submissions were received and all of these matters considered, should a decision be made.213 In *R. v. Nazari*, Lawton, L.J., added two more factors: consideration of the effect of an order on the "innocent" members of the family; and automatic recommendation of an order to deport in all cases involving a conviction of an illegal immigrant, even for a minor offense.214 Both decisions, held that a conviction for a minor crime, on its own, would not justify a recommendation for deportation, and that any consideration of what the defendant's circumstances would be upon arrival in his home country, was a problem for the Home Secretary, not the courts.215

If the recommendation is made, the Minister is to act only after giving the recommendation full consideration. The final decision should be made only after consideration of all known factors, including the alien's age, length of stay, strength of ties to the U.K., work record and character, family situation, previous criminal record and the crime involved, submissions from the worker, and, finally, compassionate circumstances.216 In cases of young offenders, if the Minister does decide to order deportation, he may opt for "supervised departure" if the alien agrees, thereby sparing the youth the stigma of actually being the subject of a deportation order.217 As a final consideration, the Rules allow a deportation order even where the court has not recommended one; hence, the Minister may issue an order if, in his discretion, he "deems it conducive to the public good."218

The public policy, public security provision of article 48(3) of the Treaty of Rome has narrowed the scope both of the traditional U.K. law, as embodied in the phrase "if the Secretary of State deems his deportation to be conducive to the public good",219 and of the criminal law. Article 48(3) allows the member states to derogate from the general right

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212 See id. at 510.
213 See id.
216 Immigration Rules, *supra* note 58, para. 156.
217 *Id.*
218 *Id.* para. 157.
of freedom of movement, by stating that it is "subject to limitations justi-
ified on grounds of public policy, public security or public health."220
The secondary legislation limiting the ambit of that power is article 1 of
Directive 64/221, which says the directive shall apply to all nationals of
member states who are residing in, or who will travel to another member
state, as a worker, and to any members of his family covered by the
Treaty.221 The directive also applies to all measures concerning entry,
issue and renewal of residence permits, and expulsions regarding workers
and members of their families.222

A major concern has been to define the scope of the words "public
policy." Hartley says that it is somewhat analogous to the concept of
"the public interest," and, that, like the French concept of "ordre pub-
lic," does not require violence.223 He also feels that it will never be de-
defined, since by its very nature, the meaning of the concept will itself
change as society evolves.224 Smit and Herzog take much the same posi-
tion, however they believe that it also includes the concept of "public
good."225 The public security aspect is easier. This is used to control
aliens engaged in espionage and terrorism.226 Hartley feels that while it
is covered by the "public order" concept, it was added as a separate con-
cept because of the importance which the member states attached to it.227

While the words "public order," "public interest," and "public
good" themselves are expansive, the directives and the courts have taken
a narrower view. The first limitations are contained in articles 2 and 3(1)
of Directive 64/221, which state that the provisions cannot be used for
economic reasons228 and that all such uses must be justified on grounds
of public policy, security or health, and cannot support arbitrary uses of
national power.229 Also, as was seen earlier, non-compliance with na-
tional measures regarding registration and police permits does not justify

220 Treaty of Rome, supra note 1, art. 48(3).
221 Council Directive 64/221, supra note 175, art. 1.
222 Id. art. 2(1).
223 T. HARTLEY, supra note 10, at 151-52.
224 Id. at 152.
225 H. SMIT & P. HERZOG, supra note 6, at 617.
226 T. HARTLEY, supra note 10, at 153.
227 Id.
228 Directive 64/221, supra note 175, arts. 2, 3(1). There is similar provision in the Treaty of
Rome, supra note 1, art. 36. Additionally, the E.C.J. has noted that Italy could not use the "public
health" proviso as a disguise for an economic measure in regard to the importation of pork. Com-
229 See Directive 64/221, art. 3 (French version), J.O. COMM. EUR. (No. L 56) 850 (1964). In
B. SUNDBERG-WEITMAN, supra note 3, at 229-30, the author feels that the limitation applies to all
member states. See also T. HARTLEY, supra note 10, at 155.
the use of the public policy power to deport. The failure to register with the police is seen as an internal matter, and, while sanctions are allowed, failure to register is not a "public policy" matter that justifies deportation. The Court of Justice has also said that all instances of derogation will be "strictly" interpreted in light of prevailing Community institutions:

It should be emphasized that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by institutions of the Community.

While the derogation must be examined in light of Community concepts, the Court clearly recognized that each member state had to decide upon the particular circumstances which will justify its application within their boundaries; it was not a matter that could be determined by hard and fast rules. This flexible approach was demonstrated in two early cases concerning the article 3 proscription that measures shall only be used because of the "personal conduct" of the worker, and that previous criminal convictions do not, by themselves, justify the use of these measures.

In Bonsignore, an Italian youth of twenty-one accidentally killed his younger brother while showing him an illegal pistol. He was charged with manslaughter and illegal possession of a firearm and convicted on both; but only a fine was imposed on the firearm charge. The Court felt that on compassion grounds, no good would be served by imposing a sentence on the manslaughter; remorse and personal loss suffered by the worker were sufficient punishment. The Oberstadtdirecktor of Köln however, decided to issue a deportation order believing it would serve as a warning to the immigrant population.

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235 Id. at 298, 15 Comm. Mkt. L.R. at 473.
236 Id. at 299, 15 Comm. Mkt. L.R. at 473.
237 Id. at 309, 15 Comm. Mkt. L.R. at 476.
238 Id. at 307, 15 Comm. Mkt. L.R. at 488.
While all the parties agreed that Mr. Bonsignore was a "worker," and that article 3(1) of the Directive applied, limiting its application to reasons of "personal conduct," various German districts read the national legislation as also allowing deportation of EEC nationals in cases where his "presence may prejudice other important interests of the Federal Republic." Mr. Bonsignore appealed to the Oberverwaltungsgericht of Köln and because the matter was also the subject of some controversy within the German courts, the case was referred to the Court of Justice to determine the effect of article 3(1) and (2) on the German legislation. The Court of Justice held that the German legislation was excessive, and application must be confined to the ambit of the directive. Since the directive allowed only individual conduct to be a factor, the use of the power as a warning to the immigrant population was a violation.

Personal conduct was also a central issue in Van Duyn. There a Dutch girl tried to enter the U.K. to assume a secretarial position at the Scientology headquarters in East Grinstead. At that time, the U.K. government believed Scientology was a threat to the mental health of those people it ensnared, and decided to take legal action to discourage its practice. One of these measures was to refuse nationals of other member states the right to enter if they were taking employment with the group. Miss Van Duyn challenged the decision claiming that she was a worker and as such, could only be refused entry on public policy grounds because of personal conduct. All she was doing was working for the church, and it was the church, not her, that was the object of the government concern. Before making a decision, Pennycuick, V-C, made a referral to the Court of Justice, on the question of the meaning of "personal conduct": Could it include membership in an organization, even though the organization itself was still lawful? The Court of Justice said yes; membership in an organization, especially present membership, could signify agreement with both policies and goals of the organization. Participation in its activities would be even stronger evidence of identification:

239 Id. at 299, 15 Comm. Mkt. L.R. at 474.
240 Id. at 299-300, 15 Comm. Mkt. L.R. at 474-75.
241 Id. at 299, 15 Comm. Mkt. L.R. at 474.
244 Id. at 1339-40, 15 Comm. Mkt. L.R. at 4.
245 Id. at 1340, 15 Comm. Mkt. L.R. at 4.
246 Id. at 1343-44.
247 Id. at 1341, 15 Comm. Mkt. L.R. at 5-6.
Although a person’s past association cannot, in general, justify a decision refusing him the right to move freely within the Community, it is nevertheless the case that present association, which reflects participation in the activities of the body or of the organization as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct within the meaning of the provision cited.  

The Court felt that, while these measures only fell upon non-U.K. citizens and the sanctions taken against the Church were purely administrative, it did not matter; since Scientology had been declared socially harmful, the measures taken were allowed under U.K. law. There was no discrimination based on nationality, since under the Treaty and international law, a country cannot refuse to allow its own citizens to return.

In *Adoui v. Belgian State*, a French national was the subject of a deportation order from Belgium. While she had a previous criminal record in France, there was no evidence that she had committed any crime or antisocial act in Belgium. The Court of Justice ruled that, while a member state had more leeway in dealing with nationals of the other member states than its own, as in its power to deport, this leeway was limited. In this case, even if she were guilty of prostitution, there was no evidence that prostitution was a crime in Belgium, since it appeared only to be the subject of local administrative rules. The Court

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249 *Van Duyn*, 1974 E. Comm. Ct. J. Rep. at 1349, 15 Comm. Mkt. L.R. at 17 (para. 17 of judgment). Apparently, she had also taken courses on the doctrine of the Church, as well as working for it for six months in Rotterdam before attempting to take up the position in England. While the focus in the case is on present conduct, there appears to be some sympathy for the idea that, in certain cases, past conduct alone might be sufficient. In instances where there was a conviction for a very heinous crime or something radically against public sympathy, it might be proper to refuse entry into a member state as a means of preserving the public peace. Accord *R. v. Bouchereau*, 1977 E. Comm. Ct. J. Rep. 1999, 2013, 20 Comm. Mkt. L.R. 800, 823 (para. 30 of judgment).


251 *Id.* at 1351, 15 Comm. Mkt. L.R. at 18 (paras. 22, 23 of judgment). This rather expansive interpretation of “public policy” in *Van Duyn* was the subject of much academic criticism and subsequent rulings, by the Court of Justice have been substantially tighter, apparently reflecting agreement by the court. B. Sundberg-Weitman, *supra* note 3, at 235; Singer, *Free Movement of Workers in the EEC: The Public Policy Exception*, 29 STAN. L. REV. 1283 (1972).

252 1982 E. Comm. Ct. J. Rep. 1665, 35 Comm. Mkt. L.R. 631. Prostitution had been for subject of an earlier case before the Belgian Conseil d'Etat in Correleyn v. Belgian State, 1970 R.C.D.I.P. 503, where the court held that, under Directive 64/221, it must be individual conduct alone and not just a criminal conviction. In Belgium, Miss Correleyn had a “spotless” record as a waitress. A previous conviction, in France for having a “house of ill-repute” did not, in itself, justify a deportation order from Belgium.


254 See *id.* at 1707, 35 Comm. Mkt. L.R. at 601 (para. 7 of judgment).

255 *Id.* at 1720, 35 Comm. Mkt. L.R. at 647.
ruled that unless there was a criminal offense, measures could not be taken against nationals of other member states unless it had adopted similar "repressive measures or other genuine and effective measures intended to combat such conduct of its own nationals." 256

Interpreting the word "justified" in article 48(3) was a task for the Court in 1975. In *Rutili*, 257 the French government attempted to curb the union and political activities of an Italian National who was working in the Paris region. 258 They considered his enthusiasm dangerous to the state, and after aborted attempts to deport him, decided to confine him to one department (province), by the means of a notation on his EEC residence permit rendering it invalid in five departments in the Paris area. 259 One of the restricted areas even contained the street where his family lived. 260

On reference from the Tribunal Administratif of Paris, the E.C.J. held that movement could not be restricted within a member state on public policy grounds; it could only be used to keep him out altogether. 261 The Court also held that only genuine and sufficiently serious threats to public policy, caused by the worker's presence, could justify the use of article 48(3) powers. 262 The Court indicated that partial internal residence bans might be allowed if they were done on the same grounds for nationals, and, under French law, such bans could only be used in cases of national emergency or as part of a criminal sentence under article 44 of the French Penal Code. 263

With regard to procedure, the Court held that the provisions of articles 6, 8, and 9 of the Directive must also be complied with, that is, the right to a notice stating the reasons and access to an appeal process. 264

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256 *Id.* at 1708, 35 Comm. Mkt. L.R. at 662 ( paras. 8, 9 of judgment).
258 *Id.* at 1222, 17 Comm. Mkt. L.R. at 142-43.
259 *Id.* at 1221, 17 Comm. Mkt. L.R. at 142.
261 *Id.* at 1234, 17 Comm. Mkt. L.R. at 157 (para. 48 of judgment).
262 *Id.* at 1231, 17 Comm. Mkt. L.R. at 155 (para. 28 of judgment).
263 *Id.* at 1235, 17 Comm. Mkt. L.R. at 157 (para. 49 of judgment). In the later case of *R. v. Saunders*, 1979 E. Comm. Ct. J. Rep. 1129, 25 Comm. Mkt. L.R. 216, the Court of Justice reaffirmed that opinion, holding that internal restrictions or movement of nationals of the member state were allowed as they were part of the normal criminal sentencing process, and art. 48 of the Treaty of Rome was just concerned with the free movement of workers among the member states, not nationals within their own member state. In 1981, Goff, L.J., in *R. v. Governor of Pentonville Prison ex parte Healy*, The Times L.R. 302 (Q.B. May 11, 1984), held that *R. v. Saunders* was not confined to nationals of the member state alone, but applied to all workers within its jurisdiction and subject to its penal laws. There, Mr. Healy's detention and return to Ireland was just a part of the criminal law process "analogous to the implementation of domestic criminal law." *Id.* at 303.
Mr. Rutili had been first ordered to be deported on August 12, 1968.\textsuperscript{265} It was not until the E.C.J. hearings began, some six years later, that he finally received the reasons for the French government's actions.\textsuperscript{266} The fact that one of the reasons given was his trade union activities, a right guaranteed under the Treaty, did little to improve the French case in the eyes of the Court.\textsuperscript{267}

As was mentioned in \textit{Rutili}, the procedural safeguards of Directive 64/221 must be complied with. The first safeguard is that the worker must be officially informed of the reasons for the action, unless it is a security matter.\textsuperscript{268} He must also be notified of the decision itself, whether it is a refusal to issue a residence permit, or to renew it, or to expel him.\textsuperscript{269} The worker has at least one month to comply except if he has never had a residence permit, in which case he may have as little as fifteen days.\textsuperscript{270}

Article 8 states that nationals of other member states are to have the same administrative remedies as nationals of the member state in question.\textsuperscript{271} Also, in the case of a refusal to renew a residence permit, or an expulsion of someone who holds a residence permit, the decision should not be executed, except in cases of urgency, until an opinion has been obtained from a "competent authority."\textsuperscript{272} This opinion must be obtained in situations where the national administrative remedies referred to in article 8 do not give the right to appeal to a court of law, where such an appeal is not concerned with the merits of the case, and in cases where the appeal does not have suspensory effect.\textsuperscript{273} The worker must also be given the right of representation in his appearance before a "competent authority," which must not be the same body that makes the actual decision.\textsuperscript{274} The hearing before a competent authority allows the worker to state his side of the case before the order is executed. It is an attempt to remedy, in part, those instances where an immigration officer's refusal to renew a residence permit has the same effect as a deportation order, and where the only remedy the worker has is judicial review. In many cases the court will not be concerned with the merits of the workers case, just

\begin{thebibliography}{9}
\bibitem{} \textit{Id.} at 1221, 17 Comm. Mkt. L.R. at 142.
\bibitem{} \textit{See id.} at 1228, 17 Comm. Mkt. L.R. at 152 (paras. 5, 6 of judgment).
\bibitem{} \textit{See id.} at 1235, 17 Comm. Mkt. L.R. at 157 (para. 52 of judgment). Access to unions is given in Regulation 1612/68, \textit{supra} note 5, art. 8(1).
\bibitem{} Directive 64/221, \textit{supra} note 175, art. 6.
\bibitem{} \textit{Id.} art. 7.
\bibitem{} \textit{Id.}
\bibitem{} \textit{Id.} art. 8.
\bibitem{} \textit{Id.} art. 9(1).
\bibitem{} \textit{Id.}
\bibitem{} \textit{Id.}
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with the question of whether the decision was within the scope of the officer's power.

In the case of a refusal to issue the first residence permit or an expulsion before the first permit is issued, the worker may request a hearing by the competent authority.\textsuperscript{275} Here again he also has the right to appear in person, except in cases of national security.\textsuperscript{276} The major difference under this procedure is the worker's status in the other member state; if the worker is refused entry, he must go home and appeal from there. If the worker is allowed in, but has never received a residence permit, then he has the right to a hearing before the competent authority before the order is executed. After the hearing, if unsuccessful, the worker still has the full range of administrative remedies. In the case of a worker who holds a residence permit, however, unless it is a case of urgency, the authorities must hold a hearing before a competent authority before they can issue the final order. Again, even if the worker is unsuccessful here, he still has the full scope of administrative remedies allowed by the member state to its own citizens. The major problem with those remedies is that there may be no review on the merits, just on the legality of the decision. Also, if the order is not suspended pending appeal, the worker may have to conduct his appeal from outside the U.K.

The abuse in \textit{Rutili}, was quite extreme. For the French government to withhold the reasons for its actions for six years was clearly a violation of article 6. The exception allowing a government to refrain from giving reasons is designed to protect intelligence matters and police informers in cases where the reasons for the decision, if they are disclosed, will identify the source of the information, or otherwise harm the security of the state or its servants. In \textit{Rutili}, all that was protected was the government of the day from political embarrassment. It is obvious that a guarantee to a hearing is meaningless unless the member state notifies the worker of his right to appeal or to a hearing, the applicable time restrictions for lodging the appeal, and the reasons for the decision so he can make an effective presentation.\textsuperscript{277}

\textsuperscript{275} \textit{Id.} art. 9(2).
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} The usual practice is England in criminal cases not just to notify the convicted worker that the deportation order was being made as the result of the court's recommendation in compliance with Immigration Act, 1971, ch. 77, § 6(1). In \textit{R. v. Secretary of State for the Home Department, ex parte Santillo}, 1980 E. Comm. Ct. J. Rep. 1585, 1603, 29 Comm. Mkt. L.R. 213, 216, it was held that as long as the parties were cognizant of the reasons for the deportation order, the order was valid. In \textit{R. v. Dannenberg}, [1984] 2 All E.R. 481 (C.A.), the Divisional Court held that, in a criminal case, the very procedure, i.e., the submissions at trial regarding the possibility of deportation, etc., guaranteed that all the parties would know the details. \textit{Id.} at 486. The Court of Appeal disagreed and declared the "opinion" invalid unless it also stated the reasons for its exclusion. \textit{Id.} at 487. Without these reasons, neither the worker nor the Minister would know for certain on what grounds the court decided to make the recommendation and the relative weight it chose to assign to
The suspensory effect of the notice of appeal was noted a year later in *Royer*. In *Royer*, the E.C.J. ruled that, where the worker was already within the other member state, the deportation order could not be issued, even if the worker had never held a residence permit, until all appeals were concluded. These rights, again, are subject to the justified urgency exception. In *Pecastaing*, this issue was again considered where two questions referred to the Court of Justice from the Tribunal de Premiere Instance of Liége involved the meaning of “urgency” in article 9 and the suspensory effect of appeals. The E.C.J. held that the remedies contained in article 8 included all forms of review available in the member state concerned, both administrative and judicial. The Court went on to say that urgency under article 9 could only be justified in exceptional cases. In the usual case the worker must be allowed to stay until the appeal procedures have been complied with, and until he has presented his defense. Even in an ordinary case, however, the worker could be deported before his appeals are finished, as long as he has completed his presentation. The Court also concluded that in unusual cases involving national security, it might be possible for a member state to execute the deportation order even before the competent authority has delivered its opinion, as long as the worker has made his appearance.

The scope of the provision was narrowed further in 1977 by the ruling of the Court of Justice in *R. v. Bouchereau*. The Court held that the referring court’s recommendation that the worker be deported as part of the sentence on his conviction for the possession of drugs would be a “measure” as contemplated within article 2(1) of Directive 64/221. Therefore, in order that article 3(1) and (2) of the Directive be complied with, the recommendation must be based on the worker’s personal conduct alone; any previous criminal convictions could only be considered insofar as the convictions indicate a propensity toward conduct making those factors. *Id.* Since that decision, the Home Office has issued Circular 49/1984, which draws attention to the conflict with EEC Law and suggests that the courts give their reasons for recommending deportation in all cases invoking EEC nationals. *See Halsbury’s Laws of England, 1984 Annual Abridgment* para. 1286 (M. Mugford ed. 1985).

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280 *Id.* at 696-97, 29 Comm. Mkt. L.R. at 688-90.
281 *Id.* at 712-13, 29 Comm. Mkt. L.R. at 706 (paras. 11, 12 of judgment).
282 *Id.* at 715, 29 Comm. Mkt. L.R. at 708 (para. 19 of judgment).
284 *Id.*, 29 Comm. Mkt. L.R. at 707-08 (para. 18 of judgment).
285 *Id.* at 713-14, 29 Comm. Mkt. L.R. at 706-07 (para. 13 of judgment).
him a present threat.\textsuperscript{288} The Court agreed with the Commission's submission, and rejected the somewhat semantic argument of the government of the U.K., when it held that a measure includes any action which affects the rights of Community nationals to free movement.\textsuperscript{289} Here a court's recommendation would have legal effect, even though it was not binding; that is, a defendant could be detained in custody until the Minister had made his decision.\textsuperscript{290} The provisions of articles 3(1) and (2) therefore apply, and any recommendation must be based on the defendant's personal conduct alone.\textsuperscript{291} Past crimes will be considered only if they indicate a present threat to public policy.\textsuperscript{292} Before that decision may be made, however, the court must decide whether the situation allows the use of the public policy proviso.\textsuperscript{293} It was the view of the Court of Justice that three conditions must be satisfied before the exclusionary power could be used: first, there must be a disturbance of the social order (this would be satisfied by the commission of a crime as was the case here); second, it must present a genuine and sufficiently serious threat to the requirements of public policy; and third, the case must "affect one of the fundamental interests of society."\textsuperscript{294}

The matter of an "opinion from a competent authority" as required in article 9(1) of the Directive was considered in Santillo.\textsuperscript{295} Santillo, an Italian worker who had entered the U.K. in 1969, was charged and convicted on several counts of indecent assault and assault causing bodily harm against prostitutes.\textsuperscript{296} He was sentenced to eight years and recommended for deportation.\textsuperscript{297} His application for leave to appeal to the Court of Appeal was dismissed.\textsuperscript{298} In 1979, with his sentence two thirds complete, he was to be released and then deported on order of the Minister.\textsuperscript{299} Santillo claimed that the deportation order was invalid, because article 9(1) required the Minister to obtain an opinion from a competent authority before he made his decision, and this had not been done.\textsuperscript{300}

\textsuperscript{288} Id. at 2012-13, 20 Comm. Mkt. L.R. at 823 (para. 28 of judgment).
\textsuperscript{289} Id. at 2011, 20 Comm. Mkt. L.R. as 822 (para. 21 of judgment).
\textsuperscript{290} Id. at 2012, 29 Comm. Mkt. L.R. at 822 (para. 23 of judgment).
\textsuperscript{291} Id. at 2013, 29 Comm. Mkt. L.R. at 823 (para. 29 of judgment).
\textsuperscript{292} Id. at 2012-13, 20 Comm. Mkt. L.R. as 823 (para. 28 of judgment).
\textsuperscript{293} Id. at 2013, 29 Comm. Mkt. L.R. at 823 (para. 30 of judgment).
\textsuperscript{294} Id. at 2014, 20 Comm. Mkt. L.R. at 824 (para. 35 of judgment). On the basis of this test, the referring court felt that Mr. Bouchereau's criminal record was not of such a caliber as to indicate that he was a genuine threat to a fundamental interest of society.
\textsuperscript{296} Id. at 1589, 28 Comm. Mkt. L.R. at 311.
\textsuperscript{297} Id., 28 Comm. Mkt. L.R. at 311.
\textsuperscript{298} Id., 28 Comm. Mkt. L.R. at 311.
\textsuperscript{299} Id., 28 Comm. Mkt. L.R. at 311.
\textsuperscript{300} Id., 28 Comm. Mkt. L.R. at 311.
The Court of Justice did not agree, and accepted the submission of the U.K. government and A. G. Warner\(^3\) that a criminal court could be a competent authority as long as the requisites of independence, and counsel for the plaintiff, were met.\(^3\) The English courts met these requirements.

In regard to the opinion however, the Court of Justice held that, while in principle the recommendation of the Court had complied with the requirements of article 9, the opinion should be followed quite closely in time by the order, if such is to be made.\(^3\) All relevant factors in existence at the time of the decision should be considered before it is made:

It is indeed essential that the social danger resulting from a foreigner's presence should be assessed at the very time when the decision ordering expulsion is made against him as the factors to be taken into account, particularly those concerning his conduct, are likely to change in the course of time.\(^3\)

The question of who can be a "competent authority" has never been an issue, aside from the criminal court in Santillo. All that is required in article 9(1) is that it should not be the same authority as the one empowered to make the decision.\(^3\) Therefore, the use of the three man advisory panel, used in U.K. security cases, probably qualifies. Similarly, the adjudicators and the Immigration Appeal Tribunal, who function under sections 13, 14, and 15 of the Immigration Act, 1971, probably also constitute the type of administrative bodies contemplated in article 8, especially since they are quasi-judicial in nature and are subject to judicial review.

While U.K. laws regarding appeals and hearings generally comply

\(^3\) See id. at 1614, 28 Comm. Mkt. L.R. at 322 (opinion of Warner, A.G.).

\(^3\) Id. at 1600-01, 28 Comm. Mkt. L.R. at 329 (para. 17 of judgment).

\(^3\) Id. at 1601, 28 Comm. Mkt. L.R. at 329 (para. 18 of judgment).

\(^3\) Id. at 1601, 28 Comm. Mkt. L.R. at 329. The subsequent disposition of this case is not without criticism. In both the Divisional Court and the Court of Appeal, the idea expressed was that, while there should have been a later review, the law was in fact complied with because the review was held (the trial) and the opinion given (the recommendation) before the order was made. It was the opinion of both levels that even if there was a requirement for a hearing to be held closer to the point that the actual decision to make the deportation order was made, it did not matter in this instance because there were no new factors to be considered that would have altered the Minister's decision to deport. 29 Comm. Mkt. L.R. 212, 217 (1980), [1981] 1 Q.B. 778, 785 (C.A.). Leave to appeal to the House of Lords was denied. [1981] 1 W.L.R. 529 (H.L.). For criticism, see Barav, Court Recommendation to Deport and the Free Movement of Workers in EEC Law, 6 EUR. L. REV. 139 (1981); Ellis, Deportation of A National After Imprisonment, 97 L.Q. Rev. 533 (1981). Sufrin, supra note 59, at 196. Most commentators believe that the correct procedure would be to have the matter considered again before the deportation order is signed, in all cases where the sentence also includes imprisonment for more than six months.

\(^3\) Directive 64/221, supra note 175, art. 9(1).
with articles 8 and 9 of Directive 64/221, there could be some conflict generated by section 13(4) of the Immigration Act, 1971, which says that an adjudicator must automatically dismiss an appeal if he finds that the worker appealing is already the subject of an existing deportation order.\(^\text{306}\) Under the provisions of article 9(1), a worker has the right to the hearing before the competent authority if he has already entered the member state in question.\(^\text{307}\) Evans takes the position that, in order to comply with EEC law, the adjudicator must give the worker a sufficient hearing to enable him to decide whether to recommend that the deportation order be lifted or not.\(^\text{308}\)

Two recent cases, \textit{Rubruck} and \textit{Lubbersen}, concerned this problem in part, where the procedural route to a review was a denial of leave to remain after failure by EEC nationals to obtain residence permits.\(^\text{309}\) In an earlier case, the House of Lords had held that once "leave to enter" has expired, there is no appeal against a refusal to extend it.\(^\text{310}\) The appeal must be launched before the initial leave has expired, or in some cases after that point in time, as long as the delay has been caused by the department itself failing to give its answer before the leave has expired.\(^\text{311}\)

The Immigration Appeal Tribunal felt that EEC cases could be handled under the same procedure as section 14(1) of the Immigration Act, 1971, even though it was not a case of leave being given by the U.K. government in the usual sense.\(^\text{312}\) While the EEC national had limited leave to enter for six months to search for work and acquire a residence permit, upon its expiration, he either retained his worker status through employment and stayed under EEC law, or if still unemployed, he came within the U.K. law.\(^\text{313}\) In that sense, the Tribunal said there was "leave" from the U.K. government involved, the application being conditional on the worker being unsuccessful.\(^\text{314}\) Therefore, the Tribunal would consider all cases involving "residence permits" and EEC nationals, as coming within the sphere of the Tribunal as an appeal to have "limited leave to enter" extended.\(^\text{315}\)

To summarize, the EEC "public policy, public security" derogation,
has been considerably tightened over the past ten years. Today, that standard is subject to strict criteria: the wide discretionary power of the Secretary of State for the Home Department conferred by the Immigration Act, 1971, no longer applies in regard to EEC workers. Before the Minister can order the deportation of the EEC worker because he "deems it conducive to the public good," he has to satisfy himself that the conduct in question meets the criteria required for the "public policy, public security" proviso. The conduct of the worker in question must create a disruption of some sort, including criminal acts that present a genuine and sufficiently serious threat to the fundamental interests of society.

To deny an EEC worker entry requires some extreme conduct on his part in the past and also, a strong indication that he presents a current threat. Such might be the case with a former member of an extremist or terrorist group who still displays some sympathy toward their goals, or a confirmed serious criminal, kidnapper, or murderer. After entry into another member state, some form of action by the worker in that member state is required before measures may be invoked, especially if the worker has succeeded in obtaining a residence permit. The member state cannot exclude the EEC worker just because he has a criminal record. Even if the worker later commits a criminal offense within the U.K., it probably would have to be a felony or other indictable offense, or involve a violent act because otherwise the requirement of a "genuine and sufficiently serious threat to a fundamental interest of society," strictly interpreted, is difficult to meet. One wonders whether the type of administrative action taken in Van Duyn against the Church of Scientology would have complied with the current requirements set forth in Adoui that the measures must also apply to the member states's own nationals and must constitute "repressive measures or other genuine and effective measures intended to combat such conduct."\(^{316}\)

**Conclusion**

Considerable concessions have been made to the EEC worker. Unlike an American worker, an EEC worker is not required to obtain the

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\(^{316}\) Member states must take into account the European Convention on Human Rights whenever they propose to invoke the public policy proviso and must be sure that the procedural guarantees for a "fair hearing" have been complied with: "[R]estrictions [imposed must be only those] necessary for the protection of those 'interests in a democratic society'." Rutili, 1975 E. Comm. Ct. J. Rep. at 1232, 17 Comm. Mkt. L.R. at 154 (para. 32 of judgment); Pecastiang, 1980 E. Comm. Ct. J. Rep. at 708, 29 Comm. Mkt. L.R. at 708-09 (para. 23 of judgment). The position of the English courts was formerly that the Convention was not part of the law of England, and that it would only be considered when it would clarify ambiguous legislation, but that appears to have changed, at least with regard to EEC nationals. See, e.g. R. v. Immigration Officer, *ex parte* Salamat Bibi, [1976] 3 All E.R. 843, 847 (C.A.) (per Lord Denning M.R.).
work permit that is the sine qua non for all non-EEC workers. Instead, an EEC worker can enter the U.K. for up to six months, in order to search for a job, merely by producing an identity card. Once an EEC worker has shown that he has “average” accommodations available, he can bring in his family, which includes his spouse, children under twenty-one or dependant upon him, and his parents and grandparents. The member state shall also facilitate the admission of any other member of his family who are either dependant upon him, or live under his roof at home. An American worker is limited to his spouse and his unmarried children under eighteen. Only four years later, if he has been awarded “settled” status, may he then bring in his parents and grandparents, provided they are over sixty-five, and provided he can show that he will be financially responsible for their welfare. For all other relations, admission will be allowed only in the “most exceptional circumstances.”

After one year, an American worker must apply for an extension of leave if he wishes to remain. And, if he wishes to change his job or employer, he must also obtain the approval of the Department of Employment. The EEC worker is virtually without constraint. He is barred from only true “public sector” jobs that have as a component part the exercise of discretionary powers. The EEC worker can also claim to be “settled” in the U.K., as a right, if he has reached retirement age, or he is permanently incapacitated because of accident or illness caused by the job. The American worker must first spend four years in approved employment, and the final decision on his status is discretionary, not by right. If he does receive settled status he and his family can stop reporting to the police, in all cases except for family members who are non-EEC nationals, while a EEC worker and his family never have to report.

The American worker faces the possibility of a refusal of leave to enter because: the immigration officer believes that there has been a false representation made; the worker has a criminal record; there has been a failure to disclose a material fact; there has been a change of circumstances since the clearance was granted; or because the Minister deems it

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317 Section 48(4) of the Treaty of Rome says that “[t]he provisions of the Article [freedom of movement] shall not apply to employment in the public service.” Treaty of Rome, supra note 1, art. 48(4). The Court of Justice has held that this provision only applies to actual offers of employment, i.e., once a worker is actually within the “public service” he is entitled to the full range of protection and “rights” due him as a worker. See, e.g., Sotgiu v. Deutsche Bundespost, 1974 E. Comm. Ct. J. Rep. 153, 162 (para. 4 of judgment). In Commission v. Kingdom of Belgium, 1981 E. Comm. Ct. J. Rep. 2393, 2407-08 (paras. 12, 13 of judgment), the Court went further and limited the concept of public service to the nature of the tasks that the job entailed: only where there was a true use of discretion or other civil-service-type power, could the member state claim the protection of this section. Airlines, bus companies, railroads, etc., were not considered as “public service” employer merely because they were owned by the government.
conducive to the public good. In contrast, the EEC worker can only be excluded because of public policy considerations.

In the case of the American worker, if the Minister refuses leave to enter on public policy grounds, then the worker has no right to either a hearing or an appeal. He is left with only judicial review, which in these cases would be almost always useless. The EEC worker, on the other hand, will get at least a hearing before a "three man advisory panel," as well as judicial review. Also, while the American worker can be refused entry because of his criminal record, such will not be a consideration in regard to our EEC worker unless there is further evidence to show either that he plans to repeat the crime within the U.K. or that his original crime was so heinous that his presence would cause a breach of the peace. If the American is later convicted of an offense in the U.K., and the court recommends deportation, he may be deported at any time after due consideration of the case by the Minister. After Santillo, the EEC worker would probably get another review of his case before the order is signed, if a lapse of six months or more separates the time of the recommendation from the time of the proposed order.

In summary, two factors stand out. The ruling of the Court of Justice in Levin opens the way for couples composed of male aliens and EEC women to use the right of freedom of movement. As long as the woman works enough to maintain her status as a worker, the family will have the right of residence in another member state even though the major portion of the family's income will come from the earnings of the non-EEC husband. However, unless there is a radical increase in the number of these mixed marriages between women of EEC member states, and men who are non-EEC nationals, the Levin decision is unlikely to become a matter of concern.

The second factor is more significant. Unless the U.K. authorities have received information from the intelligence community or Interpol that an EEC worker is suspect for some reason, the worker cannot be challenged at the point of entry once he has claimed worker status. The result of R. v. Pieck is that, unless the authorities already possess information indicating a problem that could remove worker status or unless the worker is obviously mentally disturbed, the immigration officer cannot proceed with any form of inquiry or "fishing expedition."

Once the worker is admitted, aside from a criminal investigation, he will not become the subject of scrutiny until he applies for a residence permit. Even then, while article 5 of Directive 64/221 allows a check of police records in the other member states, this can only be done on an occasional basis and only when considered essential. Since the residence permit grants no rights, but is only evidence of rights granted under the treaty, it is conceivable that the authorities may never have occasion to
examine a worker's record, since he may never bother to apply for the residence permit. Later, if the EEC worker commits an offense and is convicted, he can only be deported if the crime was "serious" and a "genuine threat" to public security "affecting a fundamental interest" of society. It is questionable just how many offenses will ever be found to meet that test.

It would appear that perhaps Sufrin is correct in his assessment of the decision in *R. v. Pieck*. He says that, because of the limitations placed on immigration control at point of entry, perhaps the U.K. can no longer rely on that as its mainline of defense, but must inevitably go the way of the member states on the continent and extend the usual system of police registration and other checks to all immigrants.318

Perhaps in the final analysis, this "freedom of movement" will be found not to have presented any real difficulties. It is probable that, no matter what the rulings of the Court of Justice may be, national courts will always be generous to their own governments whenever national security is a consideration. As to the more stringent requirements applied to deportations on a court's recommendation, that also will probably be only a minor obstacle. In light of the difficulty which most ex-convicts experience in attempting to secure gainful employment, the member state will likely be able to deport them later merely because of their failure to regain their worker status.

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318 Sufrin, supra note 59, at 186.