

Case C-268/99

Aldona Malgorzata Jany and Others

v

Staatssecretaris van Justitie

(Reference for a preliminary ruling from the Arrondissementsrechtbank te 's-Gravenhage)

(External relations — Association agreements between the Communities and Poland and between the Communities and the Czech Republic — Freedom of establishment — Economic activities — Whether or not they include the activity of prostitution)

Opinion of Advocate General Léger delivered on 8 May 2001 I-8623

Judgment of the Court, 20 November 2001 I-8657

Summary of the Judgment

1. *International agreements — Agreements concluded by the Community — Direct effect — Conditions — Article 44(3) of the Association Agreement between the Communities and Poland*
(Association Agreement between the Communities and Poland, Arts 44(3) and 58(1))

2. *International agreements — Agreements concluded by the Community — Direct effect — Conditions — Article 45(3) of the Association Agreement between the Communities and the Czech Republic*
(Association Agreement between the Communities and the Czech Republic, Arts 45(3) and 59(1))
3. *International agreements — Association Agreement between the Communities and Poland — Right of establishment — Right implying rights of entry and residence — Limits on the exercise of those rights*
(Association Agreement between the Communities and Poland, Arts 44(3) and 58(1))
4. *International agreements — Association Agreement between the Communities and the Czech Republic — Right of establishment — Right implying rights of entry and residence — Limits on the exercise of those rights*
(Association Agreement between the Communities and the Czech Republic, Arts 45(3) and 59(1))
5. *International agreements — Association Agreement between the Communities and Poland — Right of establishment — Right implying rights of entry and residence — Limits on the exercise of those rights — National system of prior control making the issue of an entry and residence permit subject to substantive conditions — Whether permissible*
(Association Agreement between the Communities and Poland, Arts 44(3) and 58(1))
6. *International agreements — Association Agreement between the Communities and the Czech Republic — Right of establishment — Right implying rights of entry and residence — Limits on the exercise of those rights — National system of prior control making the issue of an entry and residence permit subject to substantive conditions — Whether permissible*
(Association Agreement between the Communities and the Czech Republic, Arts 45(3) and 59(1))
7. *International agreements — Association Agreement between the Communities and Poland — Right of establishment — ‘Economic activities as self-employed persons’ — Concept having the same meaning and scope as ‘activities as self-employed persons’ in Article 52 of the Treaty (now, after amendment, Article 43 EC)*
(EC Treaty, Article 52 (now, after amendment, Article 43 EC); Association Agreement between the Communities and Poland, Art. 44(4)(a)(i))

8. *International agreements — Association Agreement between the Communities and the Czech Republic — Right of establishment — ‘Economic activities as self-employed persons’ — Concept having the same meaning and scope as ‘activities as self-employed persons’ in Article 52 of the Treaty (now, after amendment, Article 43 EC)*

(EC Treaty, Article 52 (now, after amendment, Article 43 EC); Association Agreement between the Communities and the Czech Republic, Art. 45(4)(a)(i))

9. *International agreements — Association Agreement between the Communities and Poland — Right of establishment — Derogations — Public policy grounds — Criteria*

(Association Agreement between the Communities and Poland, Art. 53)

10. *International agreements — Association Agreement between the Communities and the Czech Republic — Right of establishment — Derogations — Public policy grounds — Criteria*

(Association Agreement between the Communities and the Czech Republic, Art. 54)

11. *International agreements — Association Agreement between the Communities and Poland — Right of establishment — ‘Economic activities as self-employed persons’ — Prostitution — Included — Conditions — Assessment by the national court*

(Association Agreement between the Communities and Poland, Art. 44)

12. *International agreements — Association Agreement between the Communities and the Czech Republic — Right of establishment — ‘Economic activities as self-employed persons’ — Prostitution — Included — Conditions — Assessment by the national court*

(Association Agreement between the Communities and the Czech Republic, Art. 45)

1. Article 44(3) of the Association Agreement between the Communities and Poland, which prohibits Member States from discriminating, in matters relating to establishment, against Polish nationals on the ground of their nationality, must be construed as establishing, within the scope of application of that Agreement, a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals. The direct effect which that provision must therefore be recognised as having means that Polish nationals

relying on that provision have the right to invoke it before the courts of the host Member State, notwithstanding the fact that the authorities of that State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment, in accordance with Article 58(1) of that Agreement.

(see para. 28 and operative part 1)

2. Article 45(3) of the Association Agreement between the Communities and the Czech Republic, which prohibits Member States from discriminating, in matters relating to establishment, against Czech nationals on the ground of their nationality, must be construed as establishing, within the scope of application of that Agreement, a precise and unconditional principle which is sufficiently operational to be applied by a national court and which is therefore capable of governing the legal position of individuals. The direct effect which that provision must therefore be recognised as having means that Czech nationals relying on that provision have the right to invoke it before the courts of the host Member State, notwithstanding the fact that the authorities of that State remain competent to apply to those nationals their own national laws and regulations regarding entry, stay and establishment, in accordance with Article 59(1) of that Agreement.

(see para. 28 and operative part 1)

3. The right of establishment, as defined by Article 44(3) of the Association Agreement between the Communities and Poland, means that rights of entry and residence, as corollaries of the right of establishment, are conferred on Polish nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen or

activities of the professions in a Member State. However, it follows from Article 58(1) of that Agreement that those rights of entry and residence are not absolute privileges, inasmuch as their exercise may, in some circumstances, be limited by the rules of the host Member State governing the entry, stay and establishment of Polish nationals.

(see para. 28 and operative part 2)

4. The right of establishment, as defined by Article 45(3) of the Association Agreement between the Communities and the Czech Republic, means that rights of entry and residence, as corollaries of the right of establishment, are conferred on Czech nationals wishing to pursue activities of an industrial or commercial character, activities of craftsmen or activities of the professions in a Member State. However, it follows from Article 59(1) of that Agreement that those rights of entry and residence are not absolute privileges, inasmuch as their exercise may, in some circumstances, be limited by the rules of the host Member State governing the entry, stay and establishment of Czech nationals.

(see para. 28 and operative part 2)

5. On a joint reading, Articles 44(3) and 58(1) of the Association Agreement between the Communities and Poland, which respectively prohibit Member States from discriminating, in matters relating to establishment, against Polish nationals on the ground of their nationality, and set out the powers of the host Member State to apply national rules on entry, residence and establishment, subject to the condition that they do not render it impossible or excessively difficult for Polish nationals to exercise the rights granted to them under Article 44(3), do not in principle preclude a national system of prior control which makes the issue by the competent immigration authorities of leave to enter and remain subject to the condition that the applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success.

ment, against Czech nationals on the ground of their nationality, and set out the powers of the host Member State to apply national rules on entry, residence and establishment, subject to the condition that they do not render it impossible or excessively difficult for Czech nationals to exercise the rights granted to them under Article 45(3), do not in principle preclude a national system of prior control which makes the issue by the competent immigration authorities of leave to enter and remain subject to the condition that the applicant must show that he genuinely intends to take up an activity as a self-employed person without at the same time entering into employment or having recourse to public funds, and that he possesses, from the outset, sufficient financial resources and has reasonable chances of success.

(see para. 31 and operative part 3)

(see para. 31 and operative part 3)

6. On a joint reading, Articles 45(3) and 59(1) of the Association Agreement between the Communities and the Czech Republic, which respectively prohibit Member States from discriminating, in matters relating to establish-
7. Article 44(4)(a)(i) of the Association Agreement between the Communities and Poland must be construed as meaning that the 'economic activities as self-employed persons' referred to in that provision have the same meaning

and scope as the ‘activities as self-employed persons’ referred to in Article 52 of the Treaty (now, after amendment, Article 43 EC).

of ‘economic activities as self-employed persons’ any meaning other than its ordinary meaning of economic activities carried on by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under that person’s own personal responsibility.

There is nothing in the context or purpose of that Agreement to suggest that it intended to give to the concept of ‘economic activities as self-employed persons’ any meaning other than its ordinary meaning of economic activities carried on by a person outside any relationship of subordination with regard to the conditions of work or remuneration and under that person’s own personal responsibility.

(see paras 37 and 50 and operative part 4)

(see paras 37 and 50 and operative part 4)

9. Conduct which a Member State accepts on the part of its own nationals cannot be regarded as constituting a genuine threat to public order within the context of the Association Agreement between the Communities and Poland.

8. Article 45(4)(a)(i) of the Association Agreement between the Communities and the Czech Republic must be construed as meaning that the ‘economic activities as self-employed persons’ referred to in that provision have the same meaning and scope as the ‘activities as self-employed persons’ referred to in Article 52 of the Treaty (now, after amendment, Article 43 EC).

Applicability of the public-policy derogation set out in Article 53 of that Agreement is thus subject, in the case of Polish nationals wishing to pursue an activity in a self-employed capacity, within the meaning of the Agreement, in the territory of the host Member State, to the condition that that State has adopted effective measures to monitor and curb activities of that kind when they are also pursued by its own nationals.

There is nothing in the context or purpose of that Agreement to suggest that it intended to give to the concept

(see para. 61)

10. Conduct which a Member State accepts on the part of its own nationals cannot be regarded as constituting a genuine threat to public order within the context of the Association Agreement between the Communities and the Czech Republic.

activity, working conditions and conditions of remuneration;

—under that person's own responsibility; and

Applicability of the public-policy derogation set out in Article 54 of that Agreement is thus subject, in the case of Czech nationals wishing to pursue an activity in a self-employed capacity, within the meaning of the Agreement, in the territory of the host Member State, to the condition that that State has adopted effective measures to monitor and curb activities of that kind when they are also pursued by its own nationals.

—in return for remuneration paid to that person directly and in full.

(see para. 61)

It is for the national court to determine in each case, in the light of the evidence adduced before it, whether those conditions are satisfied.

11. Article 44 of the Association Agreement between the Communities and Poland, which provides for rules on establishment, must be construed as meaning that prostitution is an economic activity pursued by a self-employed person as referred to in that provision where it is established that it is being carried on by the person providing the service:

(see para. 71 and operative part 5)

—outside any relationship of subordination concerning the choice of that

12. Article 45 of the Association Agreement between the Communities and the Czech Republic, which provides for rules on establishment, must be construed as meaning that prostitution is an economic activity pursued by a self-

employed person as referred to in that provision where it is established that it is being carried on by the person providing the service:

— in return for remuneration paid to that person directly and in full.

— outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;

It is for the national court to determine in each case, in the light of the evidence adduced before it, whether those conditions are satisfied.

— under that person's own responsibility; and

(see para. 71 and operative part 5)