EDITORIAL COMMENTS

Community Law in the English Courts

This issue of the *Review* contains a leading article by Professor Mitchell on what was perhaps the most significant decision in the first group of English cases on points of community law which came before the courts in 1973 and 1974. The judgment of Lord Denning M.R. in *H. P. Bulmer Ltd.* v. *J. Bollinger SA* ([1974] 2 C.M.L.R. 91) in explaining the Court of Appeal's refusal to refer two questions put by the appellants in that action to the Court of Justice of the European Communities for a preliminary ruling in accordance with Article 177 (d) EEC has aroused considerable discussion and criticism both in Britain and in other member States. In particular, Lord Denning's suggested " guide-lines " on the exercise of the judicial discretion to refer or not to refer and certain of his comments as to the general impact of the EEC Treaty upon English law have given cause for concern. It is, however, fair to draw the attention of readers of this decision outside Britain to the especial circumstances of the stage reached in the litigation in *Bulmer* v. *Bollinger*, which would justify the decision not to refer, if not the arguments advanced on the reference procedure as a whole. The judgments of Stephenson L.J. in the Court of Appeal (at pp. 121–126) and of Whitford J. at first instance (and also in his earlier judgment in *Lerose Ltd.* v. *Hawick Jersey International Ltd.* [1973] C.M.L.R. 83)) are both instructive and reassuring.

Nearly three months before the decision in *Bulmer* v. *Bollinger* was handed down the first reference under Article 177 EEC was made by an English Court in *Van Duyn* v. *Home Office* ([1974] 1 C.M.L.R. 347) and the European Court has just given its ruling at the time of writing (Case 41/74, December 4, 1974). Miss Van Duyn, a Dutch national, had been refused leave to enter the United Kingdom on her arrival at Gatwick Airport in May, 1973, when she intended to take up employment as a secretary with the " College of Scientology " at East Grinstead in Sussex. The cult of scientology had been categorised by the then British Minister of Health in the House of Commons in July, 1968, as " socially harmful " and subsequent Governments had not been prepared to grant permits to foreign nationals for work at scientology establishments in Britain although no legal restrictions were placed upon British nationals wishing to become members of, or to take up employment with, the " Church of Scientology " in Britain. Miss Van Duyn sought a Declaration from the High Court that she was entitled to accept employment with the " College of Scientology " and to enter and reside in the United Kingdom for the purpose of that employment. On March 1, 1974, in the Chancery Division, Pennycuick V.-C. ordered the reference of four questions to the European Court, these including, *inter alia*, (i) whether Article 48 EEC and Council Directive 221/64 were directly applicable so as to confer rights upon individuals which were directly enforceable in the courts of member States,

and (ii) whether member States were entitled to take into account as matters of " personal conduct " (Article 3 (1) of Directive 64/221) the fact that an individual is or has been associated with an organisation not unlawful in that State and the fact that an individual intends to take up employment in the member State with such an organisation, it being the case that no restrictions are placed upon nationals of the member State who themselves wish to take up similar employment with such an organisation. The direct applicability of Article 48 EEC was not contested by the British Government in its written submissions but that of Article 3 (1) of Directive 64/221 was contested. The European Court has now ruled, consistently with its judgment in *Reijners* v. *Belgian State* (Case 2/74), that the provisions of Article 48 EEC are directly enforceable in national courts and that, while Directive 64/221 does not have direct applicability in its entirety, its Article 3 (1), requiring that measures restricting the freedom of movement of workers, when taken on grounds of public policy or of public security, should be based exclusively upon the personal conduct of the individual, does have such direct effect. The European Court further held, in a most pragmatic decision, that *present* association with an organisation considered as contrary to the public good may be considered as " personal conduct "; that member States, in justifying measures restricting free movement, cannot reasonably be required to make objectionable activities *unlawful*; that it is not *ipso facto* discriminatory for a member State to refuse entry to nationals of other member States because it objects to their personal conduct on grounds which apply equally to certain of its own nationals to whom it could not refuse entry; and that, although the justification of restrictions upon free movement by member States will be subject to review by the institutions of the Community, the circumstances justifying recourse to the concept of public policy may well differ from country to country and from one period to another. The ruling as a whole is full of interest (as is the submission in the case from the Commission to the European Court) and will be the subject of extended examination in a later issue of the *Review*. Its application by the Chancery Division of the High Court will mark an important milestone in the relationship between Community Law and English law; it clearly demonstrates both the utility and the sophistication of the reference procedure—and this at a most timely juncture in the evolution of that relationship.