OPINION OF ADVOCATE GENERAL TESAURO

delivered on 20 May 1992 *

Mr President,
Members of the Court,

1. The issue raised in this case is both simple in its presentation and delicate as regards its implications. The Court is called upon to determine whether Community law grants a right of residence to a national of a non-member country who is the spouse of a Community national when the latter returns to work in his or her own country after having worked in another Member State.

2. The facts of the case may be summarized as follows. In October 1982 Mr Singh, an Indian national, married Miss Purewal, a British national, in the United Kingdom. From February 1983 until the end of 1985 the couple resided in Germany, where they were employed.

When they returned to the United Kingdom to run a business, Mr Singh was initially granted limited leave to remain pursuant to the Immigration Act 1971, and then, in October 1986, a twelve-month extension of that leave.

However, since in July 1987 a decree nisi of divorce was made against him, the date of expiry of his leave to remain was brought forward to 5 September 1987.

In December 1988 the Secretary of State for the Home Department made a deportation order against Mr Singh pursuant to Article 3 of the Immigration Act 1971, on the ground that Mr Singh had remained in the United Kingdom after the expiry of his leave to do so.

Mr Singh's appeal to an adjudicator against that decision was dismissed by a decision of 3 March 1989.

In August 1989 the Immigration Appeal Tribunal allowed the appeal, holding that, subject to any issue of evasion of national law, the appellant had a right under Community law to reside in the United Kingdom.

The Secretary of State for the Home Department brought proceedings for judicial review of that decision before the High Court of Justice, which in turn referred a question to the Court of Justice to determine whether, in a case where a married woman who is a national of a Member State has exercised Treaty rights in another Member State by

* Original language: English.

working there and enters and remains in the Member State of which she is a national for the purposes of running a business with her husband, Article 52 of the EEC Treaty and Council Directive 73/148 of 21 May 1973 [1] gives her husband, a national of a non-member country, the right to enter and reside in the Member State with his wife.

3. Let me state first that in my view there can be no doubt as to Mr Singh's status as a spouse at the time of the deportation order, for the purposes of the application of the Community provisions relied upon.

As Mr Singh has stated, without being contradicted on that point by the United Kingdom (and as the national court itself appears to accept, at least implicitly), the divorce decree granted in July 1987, because it was a decree nisi, was not such as to affect the respondent's status as a spouse. Furthermore, the Court itself, ruling on Article 10 of Council Regulation No 1612/68 of 15 October 1968, [2] which concerns the right of the spouses of employed persons to establish themselves with them, has held that the marital relationship cannot be regarded as dissolved until it has been terminated by the competent authority; it is not sufficient that the spouses simply live separately, even where they intend to divorce at a later date. [3]

4. Before addressing the merits of the question which has been referred to the Court, I think it is necessary to determine whether the facts of this case are such as to dictate the conclusion that in the light of the Court's case-law this must be regarded as a wholly internal situation in which Community law cannot be relied upon.

The Court has several times had occasion to explain the concept of a wholly internal situation and to define its scope. In *Saunders*, [4] it stated in particular that the application by an authority or court of a Member State to a worker who is a national of that same State of measures which withdraw or restrict the freedom of movement of that worker within the territory of that State as a penal measure provided for by national law by reason of acts committed within the territory of that State is a wholly domestic situation which falls outside the scope of the Treaty rules on freedom of movement for workers.

Subsequently, in *Morson and Jhanjan*, [5] the Court pointed out that the Treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by Community law, and held that Community law does not prohibit a Member State from refusing to allow a relative, as referred to in Article 10 of Regulation 1612/68, of a worker employed within the territory of that State who has never exer-

1 — OJ 1973 L 172, p. 14.

2 — OJ, English Special Edition 1968 (II), p. 475.

3 — Judgment in Case 267/83 *Diatta* v *Land Berlin* [1985] ECR 567, at paragraph 20.

4 — Judgment in Case 175/78 *Saunders* [1979] ECR 1129, at paragraph 12.

5 — Judgment in Joined Cases 35 and 36/82 *Morson and Jhanjan* v *State of the Netherlands* [1982] ECR 3723, at paragraphs 16 and 18.

cised the right to freedom of movement within the Community to enter or reside within its territory if that worker has the nationality of that State and the relative the nationality of a non-member country.

Similarly, in *Moser* [6] it was stated that Article 48 of the EEC Treaty does not apply to situations which are wholly internal to a Member State, such as that of a national of a Member State who has never resided or worked in another Member State. That statement was subsequently confirmed in *Iorio*, [7] and, in relation to other provisions of the Treaty or of secondary Community law, in *Gauchard*, [8] *Zaoui*, [9] *Bekaert*, [10] *Nino* [11] and *Dzodzi*. [12]

5. In the cases referred to, the persons who claimed rights in their own country based on Community legislation had not in fact worked or studied in other Member States, and it was thus obvious that in the absence of any connection with Community law their situation did not fall within the scope of the Treaty.

On the other hand, it is true, as the Commission has correctly pointed out, that the simple exercise of the right of free movement within the Community is not in itself sufficient to bring a particular set of circumstances within the scope of Community law; there must be some connecting factor between the exercise of the right of free movement and the right relied on by the individual.

If, for example, Mr and Mrs Singh had married after their return to the United Kingdom there would clearly be no logical nexus between the exercise of the right to free movement and the right of residence on which the spouse of the Community worker seeks to rely.

Where, however, as in fact happened in this case, the right of free movement was exercised after the marriage and the persons concerned availed themselves of rights under the Community legislation on freedom of movement, it is difficult to say that the question whether a person may continue to enjoy such rights in his own country is something which lies outside the scope of Community law and constitutes a wholly internal situation. That is particularly true inasmuch as such an assertion would have the result that a Community worker's right of establishment in other Member States would be facilitated under the Community legislation but his right of re-establishment in his own country would not.

6. If, therefore, as I think, this case cannot simply be dealt with as a wholly internal situation, it is necessary to consider the provisions of Community law which may be relied upon by Mr Singh, that is to say, having regard to the fact that his spouse moved to the United Kingdom to work as a self-employed person, Article 52 of the Treaty

6 — Judgment in Case 180/83 *Moser* v *Land Baden-Württemberg* [1984] ECR 2539, at paragraph 20.

7 — Judgment in Case 298/84 *Iorio* v *Azienda Autonoma delle Ferrovie dello Stato* [1986] ECR 247, at paragraph 17.

8 — Judgment in Case 20/87 *Gauchard* [1987] ECR 4879, at paragraph 13.

9 — Judgment in Case 147/87 *Zaoui* v *Cramif* [1987] ECR 5511, at paragraph 16.

10 — Judgment in Case 204/87 *Bekaert* [1988] ECR 2029, at paragraph 13.

11 — Judgment in Joined Cases C-54/88, C-91/88 and C-14/89 *Nino* [1990] ECR I-3537, at paragraphs 10 and 11.

12 — Judgment in Joined Cases C-297/88 and C-197/89 *Dzodzi* v *Belgian State* [1990] ECR I-3763, at paragraphs 23 and 24.

and Article 1 of Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services.

Article 52 provides, first, that within the framework of the provisions which follow it, restrictions on the freedom of movement of nationals of a Member State in the territory of another Member State were to be abolished by progressive stages in the course of the transitional period and, secondly, that freedom of establishment includes the right to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the country where such establishment is effected.

The Court has held on several occasions that, at least in certain circumstances, Article 52 may be relied upon by the nationals of a Member State in their own country of origin; the Court has held that although it is true that the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State, the position nevertheless remains that the reference in Article 52 to 'nationals of a Member State' who wish to establish themselves 'in the territory of another Member State' cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals when the latter, owing to the fact that they have lawfully resided on the territory of another Member State and have there acquired a trade qualification which is recognized by the provisions of Community law, are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty. [13]

Furthermore, in the *Stanton* [14] and *Daily Mail* [15] cases, the Court held that Article 52 of the Treaty precludes legislation which has the effect of placing at a disadvantage the pursuit of occupational activities in another Member State.

7. It follows from those judgments that in the Court's view Article 52 covers both the situation of workers from a Member State who have acquired rights recognized by Community legislation in another Member State and wish to avail themselves of those rights in their own country of origin and the situation in which national legislation in itself penalizes the exercise of the right of free movement.

In this case, it might be objected that Mr Singh, on the basis of Community legislation, acquired in Germany only the right to reside in that country as the spouse of a Community worker and that the application of the British immigration legislation did not have any detrimental effect on the pursuit by Mrs Singh of occupational activities in another Member State. In other words, Mr and

13 — Judgment in Case 115/78 *Knoors* v *Secretary of State for Economic Affairs* [1979] ECR 399, at paragraph 24. See also the judgment in Case 246/80 *Broekmeulen* v *Huisarts Registratie Commissie* [1981] ECR 2311, at paragraph 20; judgment in Case 292/86 *Gullung* v *Conseils de l'ordre des avocats du barreau de Colmar et de Saverne* [1988] ECR 111, at paragraph 12; judgment in Case C-61/89 *Bouchoucha* [1990] ECR I-3551, at paragraph 13.

14 — Judgment in Case 143/87 *Stanton* v *INASTI* [1988] ECR 3877, at paragraph 14.

15 — Judgment in Case 81/87 *The Queen* v *HM Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust Plc* [1988] ECR 5483, at paragraph 16.

Mrs Singh are not, by virtue of the fact that they have exercised their right of free movement, in a less favourable position than a similar couple who have never worked in another Member State.

8. Even those initial objections, however, are subject to reservations, since it is in theory necessary to take into account the possibility that Mr Singh might have obtained an unlimited right of residence or become naturalized under United Kingdom legislation if his wife had not exercised her right of free movement.

That is to say, if, after examining the relevant provisions of United Kingdom legislation, the national court were to hold, as the respondent in the main proceedings argued at the hearing, that the fact that he resided in Germany deprived Mrs Singh's spouse of the possibility of obtaining, by a period of residence, a residence permit of unlimited duration in the United Kingdom, a permit which he would have obtained if the couple had remained in the United Kingdom, it is clear that the question would arise of the compatibility with Community law of national legislation which in substance penalizes the exercise of the right of free movement.

9. That is not all. Even leaving aside such a hypothesis, it seems to me that on the basis of the judgments of the Court to which I have referred it is possible to argue that the Community legislation on freedom of movement is applicable whenever a national of a Member State is in a situation in relation to his own country of origin similar to that of all other persons who avail themselves of the rights and liberties guaranteed by the Treaty and by secondary Community law.

I think it is necessary, therefore, to ascertain in specific terms what rights are granted by Community legislation to nationals of Member States who seek to exercise their right of establishment and what the purpose and scope of those rights are.

10. As appears from the first recital in its preamble, Directive 73/148/EEC is intended to eliminate 'restrictions on movement and residence within the Community *for nationals of Member States wishing to establish themselves or to provide services within the territory of another Member State*' (my emphasis).

In order to achieve that objective the directive *inter alia* requires Member States to allow Community nationals who wish to establish themselves in order to pursue activities as self-employed persons to enter their territory merely on production of a valid identity card or passport (Article 3) and to grant them a right of permanent residence (Article 4), and also requires them to allow their own nationals to leave their territory simply on production of a valid identity card or passport (Article 2).

Under Article 1 the Member States must in particular, subject to the conditions laid down in the directive itself, abolish restrictions on the movement and residence of nationals of a Member State who are established or who wish to establish them-

selves in another Member State in order to pursue activities as self-employed persons *and the spouses of such nationals, irrespective of their nationality* (my emphasis).

Such a right granted to relatives may be said to be ancillary to the right of establishment provided for in favour of the Community worker, and is clearly intended to eliminate the obstacles to freedom of movement for workers which would result from the impossibility or difficulty of moving the entire family unit.

11. It is true that the right of residence is expressed by the Community legislature as the right of nationals of one Member State to establish themselves in another Member State. However, the wording used may be explained by the fact that it is obvious that the individual Member States will not deny their own nationals the right of entry to and residence in their territory.

The literal wording of the provision thus does not justify the conclusion that members of the family of a worker established in a Member State are precluded from relying on the rights which the directive grants them when the spouse returns to his or her own country.

Such an interpretation would, moreover, be far from consistent with the requirements flowing from the freedom of movement for persons, the freedom of establishment and the freedom to provide services guaranteed in Articles 3(c), 48, 52 and 59 of the Treaty, since the practical result would be that a Community national who was established in another Member State would be assisted in moving for occupational purposes to any Member State other than his own.

12. It is clear, furthermore, that in practical terms this is a very marginal case, since it is undisputed that in general States do not seek to prevent family members of their own nationals from residing in their territory, unless of course there are legitimate suspicions of evasion of immigration legislation.

Nevertheless, the question of principle remains, and in my view it would be illogical to uphold an interpretation of the rule which, by denying the right of residence to members of the family of a citizen who returns to his own country after working in another Member State, would result in an unjustified obstacle to freedom of movement for workers within Community territory and a difference in the treatment of two workers in the same circumstances solely by reason of their different nationalities.

13. Before concluding I should like to reply to a number of remarks and understandable concerns raised by the United Kingdom, which intervened in these proceedings.

In the first place, the United Kingdom states that when she returned Mrs Singh exercised

her rights under the Immigration Act 1971 as a British national, and not the rights granted to her by Community legislation, as is shown by the fact that the British authorities could not have denied her the right of entry and residence even on grounds of public policy, public security or public health, as is possible under the directive.

That observation, correct though it may be, does not seem to me to be decisive, since there is nothing to prevent the rights granted under national legislation to nationals of the Member State in question from being added to and extended by those granted under Community law.

It is true that as a general rule the rights of entry and residence which a State grants to its own nationals are more extensive than those granted under Community legislation, but it is nevertheless true that in certain circumstances — this case is an example — Community legislation grants persons who exercise their right of free movement and their spouses rights which are more extensive than those under national law.

14. Secondly, the United Kingdom states that every Member State has a legitimate interest in preventing its own nationals and their spouses from relying on Community law in order to evade the conditions laid down in national legislation.

Those concerns certainly reflect a real need and merit the greatest attention. The Court itself, referring in particular to legislation concerning occupational training, has acknowledged that it is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals, by means of facilities created under the Treaty, from attempting to evade the application of national legislation. [16]

However, I should point out again in that regard that Directive 73/148/EEC allows Member States, under Article 8, to derogate from its provisions on grounds of public policy, public security or public health.

Moreover, the Court's case-law to the effect that in order to be regarded as such an occupational activity must be effective and genuine, and not purely marginal and ancillary, [17] may provide a useful point of reference for the national authorities in seeking to prevent abuses.

Indeed, the Court has recently held that a national court may, in assessing the genuine and effective nature of an activity, take into account the irregular nature and *limited duration of work done* under a contract for occasional work [18] (my emphasis).

16 — Judgment in Case 115/78 *Knoors*, cited above, paragraph 25.

17 — Judgment in Case 53/81 *Levin* v *Staatssecretaris van Justitie* [1982] ECR 1035, paragraph 17; judgment in Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741, paragraph 14; judgment in Case 197/86 *Brown* v *Secretary of State for Scotland* [1988] ECR 3205, paragraphs 21 and 23; judgment in Case 334/87 *Bettray* v *Staatssecretaris van Justitie* [1989] ECR 1621, paragraph 20.

18 — Judgment in Case 357/89 *Raulin* v *Minister van Onderwijs en Wetenschappen* [1992] ECR , paragraph 14.

Furthermore, the continued ability of the national authorities to take measures to prevent abuses is attested by the fact that even in this case the Immigration Appeal Tribunal, in upholding the appeal, expressly reserved the possibility of examining any factual issue of evasion of national law.

15. Finally, the United Kingdom states that to apply Directive 73/148/EEC in this case would have paradoxical consequences, since Mr Singh's right to remain in the United Kingdom would depend not so much on his matrimonial relationship as on the continued exercise by his wife of an occupational activity.

Even that consideration does not seem to me to be such as to undermine the reasoning set out above. As a matter of principle the spouse of a national established in his own country will undoubtedly be able to take advantage of national legislation, which will normally, by sole virtue of the existence of a matrimonial relationship, grant him more extensive and enduring rights than those granted under Community legislation. As I have said, however, it is hard to see why, in the rare cases in which Community law gives rise to more extensive rights than those envisaged in national legislation, the spouse of a Community worker who returns to his or her own country and exercises the right of free establishment in Community territory should be deprived of such rights.

It is clear that where the preconditions for the application of the Community legislation cease to be met the person in question, if he is not entitled in any other way under national legislation to remain in the territory of that country, will be required to leave. But that is the natural consequence of the fact that in this particular hypothesis the rights relied on draw their validity solely from Community law; I therefore see nothing illogical or paradoxical in such a situation.

16. In view of the foregoing considerations I therefore propose that the Court reply as follows to the question referred by the High Court of Justice:

Where a married woman who is a national of a Member State has exercised Treaty rights in another Member State by working there and her husband enjoyed a right of residence under Community law in that other Member State, and where she then establishes herself in order to work as a self-employed person in the Member State of which she is a national, Community law, in particular Directive 73/148/EEC, entitles her husband to enter and remain in that Member State under the conditions laid down in that directive.