

OPINION OF ADVOCATE GENERAL  
LÉGERdelivered on 7 November 2000<sup>1</sup>

1. The nature of the ties connecting a person to a Member State determines in large measure the rights which that person may enjoy under Community law. This reality is expressed through the term 'national of a Member State', which is a concept central to the Community legal order, since possession of that status determines many of those rights as derived from the general principles of Community law.

2. The Treaty on European Union amended the wording of Article 8 of the EC Treaty (now, following amendment, Article 17 EC),<sup>2</sup> establishing a citizenship of the Union and making such citizenship subject to possession of the 'nationality of a Member State'. The Community legislature thereby expressed once again the importance which it attaches to a prior national connection on the part of those seeking to invoke the benefit of Community law.

<sup>1</sup> — Original language: French.

<sup>2</sup> — The change in numbering of Article 8 and the new amendment to its content (an additional sentence has been inserted in paragraph (1)) (see point 27 of the present Opinion) follow from the Treaty of Amsterdam.

3. Faced with the particular situation of British nationality law, which contains different categories of nationality, one of which allows the holder to be refused any right of entry and stay in British territory, the High Court of Justice of England and Wales, Queens Bench Division (Crown Office), first of all requests the Court to interpret the notion of a 'person holding the nationality of a Member State'. The national court considers that it will then be in a position to rule on attribution of the status of 'citizen of the Union' in the applicant's favour.

The High Court of Justice goes on to question the Court as to the content and scope of the concept of 'citizenship of the Union', as defined in Article 8a(1) of the EC Treaty (now, following amendment, Article 18(1) EC), to enable it to rule on the effects which that status may have, in regard to the right to enter and stay, for a British citizen deprived of that right under national legislation.

I — Legal framework

*Article 8a*

*Community law*

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.’

4. Articles 8 and 8a(1) of the Treaty are worded as follows:

*‘Article 8*

5. At the time of signing the Documents concerning the Accession to the European Communities of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, the United Kingdom Government made the following declaration on the definition of the term ‘nationals’:<sup>3</sup>

1. Citizenship of the Union is hereby established.

Every person holding the nationality of a Member State shall be a citizen of the Union.

‘As to the United Kingdom of Great Britain and Northern Ireland, the terms “nationals”, “nationals of Member States” or “nationals of Member States and overseas countries and territories”, wherever used in the Treaty establishing the European Economic Community, the Treaty establishing the European Atomic Energy Community or the Treaty establishing the European Coal and Steel Community or in any of the

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

<sup>3</sup> — OJ 1972 L 73, p. 196.

Community acts deriving from those Treaties, are to be understood to refer to:

- (a) persons who are citizens of the United Kingdom and Colonies or British subjects not possessing that citizenship or the citizenship of any other Commonwealth country or territory, who, in either case, have the right of abode in the United Kingdom, and are therefore exempt from United Kingdom immigration control;
- (b) persons who are citizens of the United Kingdom and Colonies by birth or by registration or naturalisation in Gibraltar, or whose father was so born, registered or naturalised.'

6. In 1982 the United Kingdom Government lodged with the Italian Government, as guardian of the Treaties, a new declaration on the definition of the term 'nationals'<sup>4</sup> which was worded as follows:

'In view of the entry into force of the British Nationality Act 1981, the Government of

the United Kingdom of Great Britain and Northern Ireland makes the following Declaration, which will replace, as from 1 January 1983, that made at the time of signature of the Treaty of Accession by the United Kingdom to the European Communities:

"As to the United Kingdom of Great Britain and Northern Ireland, the terms 'nationals', 'nationals of Member States' or 'nationals of Member States and overseas countries and territories', wherever used in the Treaty establishing the European Economic Community, the Treaty establishing the European Atomic Energy Community or the Treaty establishing the European Coal and Steel Community or in any of the Community acts deriving from those Treaties, are to be understood to refer to:

- (a) British citizens;
- (b) Persons who are British subjects by virtue of Part IV of the British Nationality Act 1981 and who have the right of abode in the United Kingdom and are therefore exempt from United Kingdom immigration control;

<sup>4</sup> — OJ 1983 C 23, p. 1.

- (c) British Dependent Territories citizens who acquire their citizenship from a connection with Gibraltar.” *National law*

...’

7. The Conference of the Representatives of the Governments of the Member States adopting the Treaty on European Union adopted and annexed to the Final Act Declaration No 2 on nationality of a Member State,<sup>5</sup> the wording of which is as follows:

‘The Conference declares that, wherever in the Treaty establishing the European Community reference is made to nationals of the Member States, the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned. Member States may declare, for information, who are to be considered their nationals for Community purposes by way of a declaration lodged with the Presidency and may amend any such declaration when necessary.’

8. Under the British Nationality Act 1948,<sup>6</sup> the concept of a British subject covered, in addition to citizens of the independent Commonwealth countries, ‘Citizens of the United Kingdom and Colonies’ and ‘British subjects without citizenship’, the latter being persons liable to become citizens of an emerging independent Commonwealth country on the coming into force of that country’s citizenship law. If that did not occur, such persons would then acquire citizenship of the United Kingdom and Colonies.

9. The Immigration Act 1971<sup>7</sup> introduced the concept of ‘patriality’. Only persons with patriality were exempted from immigration control when entering the United Kingdom.

10. The new British Nationality Act 1981<sup>8</sup> abolished the status of citizenship of the United Kingdom and Colonies and divided those who held that status into three categories:

- (a) British Citizens, including citizens of the United Kingdom and Colonies with

5 — OJ 1992 C 191, p. 98.

6 — Hereinafter referred to as ‘the 1948 Act’.

7 — Not applicable to the English text.

8 — Hereinafter referred to as ‘the 1981 Act’.

the right of abode in the United Kingdom;

that of a British Overseas Citizen. As such, she has no right under national law to enter or remain in the United Kingdom.

(b) 'British Dependent Territories Citizens', comprising citizens of the United Kingdom and Colonies who did not have the right of abode but satisfied certain conditions concerning connection with a British Dependent Territory deemed to confer on them immigration rights to that territory;

12. Following several temporary periods of residence in British territory, and while once again in the United Kingdom, Mrs Kaur re-applied for leave to remain on 4 September 1996, as she had done on several occasions since 1990, the year in which she first entered the United Kingdom.

(c) 'British Overseas Citizens', comprising all citizens of the United Kingdom and Colonies who did not become British Citizens or British Dependent Territories Citizens. Lacking any connection with any British Dependent Territory, they might lack any immigration rights anywhere.

13. On 20 March 1997 Mrs Kaur applied to the High Court of Justice for judicial review of the decision of 22 January 1997 by the Secretary of State for the Home Department refusing her leave to remain in the United Kingdom.

## II — Facts of the main proceedings

11. Mrs Kaur<sup>9</sup> was born in Kenya in 1949, thereby becoming a Citizen of the United Kingdom and Colonies under the terms of the 1948 Act. Following the entry into force of the 1981 Act, her status became

14. On that occasion she stated that she wished to remain and obtain gainful employment in the United Kingdom and periodically to travel to other Member States in order to make purchases of goods and services and, if necessary, to work there.

15. Since it formed the view that resolution of the dispute before it depended on the interpretation of Community law, the High Court of Justice decided to stay proceedings

<sup>9</sup> — Also referred to as 'the applicant'.

and to refer the following questions to the Court for a preliminary ruling:

1. When determining whether the Applicant, as a British Overseas Citizen not entitled (under United Kingdom law) to enter or remain in the United Kingdom, is a “person holding the nationality of a Member State” and therefore is “a citizen of the Union” for the purpose of Article 8 of the EC Treaty:
  - (1) What is the effect (if any) as a matter of Community law of
    - (a) the United Kingdom’s 1972 Declaration “on the definition of the term ‘nationals’” which was made at the time of Accession to the European Communities and annexed to the Final Act of the Accession Conference, and
    - (b) the United Kingdom’s 1982 Declaration “on the meaning of a UK national”, and
  - (2) If and to the extent that the United Kingdom is not entitled, as a matter of Community law, to rely on the Declarations referred to in (1) above, what are the relevant criteria for identifying whether a person has nationality of a Member State for the purposes of Article 8 where domestic law identifies various categories of nationality only some of which confer a right to enter and remain in that Member State?
  - (3) In this context, what is the effect of the principle of respect for fundamental human rights under Community law claimed by the Applicant, in particular where the Applicant relies on Article 3(2) of the Fourth Protocol to the European Convention on Human Rights that no one shall be deprived of the right to enter the territory of the State of which he is a national,
- (c) Declaration No 2 to the Treaty on European Union signed on 7 February 1992 that nationality is to be decided solely by reference to the national law of the Member State concerned and Member States may declare, for information, who are to be considered to be their nationals for Community purposes?

which has not been ratified by the United Kingdom?

III — Question 2(d) in the order for reference, concerning the applicability of Article 8a(1) of the Treaty

2. In the circumstances of the present case, does Article 8a(1) of the EC Treaty:

(a) Confer rights on a citizen of the Union to enter and remain in the Member State of which he is a national even where those rights are otherwise denied by national law.

(b) Confer rights additional to those which existed under the EC Treaty prior to its amendment by the Treaty on European Union.

(c) Give rise to directly effective rights which citizens of the Union may invoke before national courts and tribunals.

(d) Apply to situations which are wholly internal to a single Member State?

16. It is appropriate first of all to address this question, since the answer which may be given to it will determine whether it is necessary to examine the other questions.

17. The national court asks whether Article 8a(1) of the Treaty applies to a situation such as that in the main proceedings, in which a person who, under national law, holds the nationality of a Member State but does not have any right to enter and reside in the territory of that State invokes Article 8a for the purpose of securing the right to reside there.

18. Should the answer be in the negative, the first question submitted in the order for reference, concerning the issue of whether the applicant is or is not a 'person holding the nationality of a Member State' for the purpose of Article 8 of the Treaty, would no longer serve any purpose.

If Article 8a(1) of the Treaty and the rights attached to the concept of 'citizenship of the Union' featuring therein were to be held to have no bearing on a situation such as that in the main proceedings here, there

would be little point in ruling on Mrs Kaur's nationality, on which precisely the status of 'citizen of the Union' depends. The same reasoning applies in regard to the other questions grouped under Question 2, since these will serve a purpose only if the dispute does in fact come within the scope of Community law.

the rights derived from her status as a citizen of the Union.

19. The Italian, Danish and United Kingdom Governments, together with the Commission, argue that the question posed falls outside the scope of Community law, and cite to this effect the case-law of the Court, in particular the judgment in *Uecker and Jacquet*.<sup>10</sup>

21. The judgment in *Uecker and Jacquet* is one of the most recent judgments delivered by the Court in line with its established case-law to the effect that certain provisions of Community law cannot be applied to cases which have no factor linking them with any of the situations governed by Community law and all elements of which are purely internal to a single Member State.<sup>11</sup>

20. Mrs Kaur, in contrast, submits that her situation is not covered by that case-law and must be subject to Community law. She argues that the right to reside within the territory of the European Union, of which she has been deprived, is a right inherent to the concept of citizenship of the Union. She contends that a Member State cannot, without infringing Community law, adopt measures which have the effect of preventing one of its nationals from exercising rights conferred on that person by the Community legal order. She must be allowed to enter the territory of the Union in order there to be able to exercise all of

22. That case-law developed in the course of disputes involving the principle of non-discrimination on grounds of nationality set out in the first paragraph of Article 6 of the EC Treaty (now, after amendment, first paragraph of Article 12 EC), together with the articles guaranteeing its application in specific areas, such as free movement of persons or services.<sup>12</sup>

10 — Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171.

11 — *Uecker and Jacquet*, paragraph 16. See also Case 175/78 *R v Saunders* [1979] ECR 1129; Joined Cases 35/82 and 36/82 *Morson and Jhanjan v State of the Netherlands* [1982] ECR 3723; Case 44/84 *Hurd v Jones* [1986] ECR 29; Case 180/83 *Moser v Land Baden-Württemberg* [1984] ECR 2539; Case 147/87 *Zaoui v CRAMIF* [1987] ECR 5511; Case C-41/90 *Höfner and Elser v Macrotron* [1991] ECR I-1979; Joined Cases C-330/90 and C-331/90 *López Brea and Hidalgo Palacios* [1992] ECR I-323; Case C-332/90 *Steen v Deutsche Bundespost* [1992] ECR I-341; Case C-60/91 *Batista Morais* [1992] ECR I-2085; Case C-153/91 *Petit v Office National des Pensions* [1992] ECR I-4973; Case C-206/91 *Koua Poirrez v CAF* [1992] ECR I-6685; Joined Cases C-29/94, C-30/94, C-31/94, C-32/94, C-33/94, C-34/94 and C-35/94 *Aubertin and Others* [1995] ECR I-301; Case C-134/95 *USSL No 47 di Biella v INAIL* [1997] ECR I-195; Case C-108/98 *R.I.SAN.* [1999] ECR I-5219; and Case C-97/98 *Jägersköld* [1999] ECR I-7319.

12 — See the judgments cited in footnote 11 above.

23. The principles of Community law connected to the free movement of persons and services seek to ensure that a Member State cannot use the nationality of a national of another Member State or the fact that one of its nationals has received training in another Member State as a pretext for obstructing that person's right of movement within its own territory. Citizenship of the Union, which encapsulates those principles, is designed to guarantee free movement of persons in an area without internal frontiers, as envisaged by the second paragraph of Article 7a of the EC Treaty (now, after amendment, Article 14(2) EC).

24. The Court's position in regard to internal situations is justified by the need to confine application of the Treaty provisions or the rules of secondary law resulting therefrom to situations involving certain extraneous factors, in particular situations characterised by the existence of cross-border elements.

25. Where such elements are not present, Community law can no longer be applicable to situations which, in that case, fall within the competence of the Member States alone. The case in the main proceedings here requires to be examined in the light of that case-law.

26. Mrs Kaur claims the status of a 'person holding the nationality of a Member State' within the meaning of Article 8 of the Treaty, and that of a 'citizen of the Union'

for the purposes of Article 8a(1) of the Treaty in support of her claim to be entitled to reside within British territory. She proposes that the concept of a 'person holding the nationality of a Member State' should be construed in such a way as to limit the right of Member States to fix the criteria for attribution and the content of that nationality.<sup>13</sup>

27. The notion of 'citizenship of the Union', which is a recent concept in Community law, is far from having been fully examined by the Court and remains the subject of divergent views regarding certain of its aspects.<sup>14</sup> The fact remains that Article 8a(1) of the Treaty sets out unambiguously, for the purpose of the case in the main proceedings, the right of every citizen of the Union to move and reside freely within the territory of the Member States,<sup>15</sup> which expresses the idea that nationals of the Member States may move freely from one Member State to another.

In regard to the free movement of workers and the right of establishment, the Court

13 — The applicant submits that 'Community law has a role in deciding who is or who is not to be regarded as a "national" for the purposes of the Treaty provisions. Although the matter is one where domestic law has a large role to play, Community law will prevent e.g. a Member State denationalising an individual or refusing to recognise an individual as a national where that denationalisation or refusal to recognise would infringe basic rules of Community law' (point 2.14 of her written observations).

14 — See, for example, the Opinion of Advocate General La Pergola in Case C-85/96 *Martinez Sala v Freistaat Bayern* [1998] ECR I-2691, and that of Advocate General Cosmas in Case C-378/97 *Wijzenbeek* [1999] ECR I-6207. See also A. Mattered, 'La liberté de circulation et de séjour des citoyens européens et l'applicabilité directe de l'article 8 A du traité CE', *Mélanges en hommage à Fernand Schockweiler*, Nomos Verlagsgesellschaft Baden-Baden, 1999, p. 413.

15 — Case C-193/94 *Skanaei and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22.

had already drawn a distinction between, on the one hand, the entry and residence of a national of a Member State within the territory of another Member State, which are matters coming within the scope of Community law, and, on the other, that national's entry and residence in his own territory, which are based on the rights attendant upon his nationality.<sup>16</sup> This distinction has, in my view, been maintained by the wording added to Article 8(1) of the Treaty by the Treaty of Amsterdam. By specifying that 'Citizenship of the Union shall complement and not replace national citizenship', the Community legislature has reaffirmed the idea of an allocation of areas of competence between the Member States and the Community in matters affecting the rights and duties which an individual may acquire by reason of his or her nationality. The relationship which a national has with his or her State of origin in regard to rights of entry and residence must therefore, in principle, remain within that State's sphere of competence. It follows that 'citizenship of the Union' is relevant in the present case only within the context of free movement between Member States.<sup>17</sup>

28. The Court has consistently held that the rules governing the free movement of persons 'apply only to a national of a Member State of the Community who seeks to establish himself in the territory of another Member State or to a national of the Member State in question who finds himself in a situation which is connected with any of the situations contemplated by Community law'.<sup>18</sup>

29. It should be noted that, from the strictly legal point of view, Mrs Kaur's application does not seek recognition of a right to move freely within Community territory but seeks rather to secure the right to reside within the territory of the Member State of which, according to that Member State's domestic law, she possesses a form of nationality.

30. The applicant thus does not come within any of the hypothetical categories envisaged by the Court's case-law since, first, the main proceedings are not designed to secure for her benefit the right of establishment in the territory of another Member State and, second, she does not find herself in a situation which is connected with any of the situations contemplated by Community law.

16 — Case C-370/90 *Singh* [1992] ECR I-4265, paragraph 22.

17 — Admittedly, the Court ruled in *Singh*, cited above, that, as provided by Article 3 of the Fourth Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, a State may not expel one of its own nationals or deny him or her entry to its territory (paragraph 22). Should the Court consider that rule to be applicable, both generally and in this particular case, this would have the effect of limiting Member States' rights in the matter. It ought, however, to be borne in mind that while fundamental rights do form an integral part of the general principles of law with which the Court must ensure compliance, this is subject to the condition that the area to which the case before it relates falls within the scope of Community law (see, for example, Case C-260/89 *ERT* [1991] ECR I-2925, paragraphs 41 and 42). I submit precisely that the notion of 'citizenship of the Union' does not cover relations which a Member State may have with its nationals in regard to rights of entry and residence within its territory if there is no issue concerning their freedom to move from one Member State to another.

18 — Case C-230/97 *Awoyemi* [1998] ECR I-6781, paragraph 29.

31. It follows from the facts established by the national court that, while not a 'British citizen' under national law, Mrs Kaur does none the less have the status of a 'British Overseas Citizen'.

32. Two possibilities can thus be envisaged.

33. Let us first of all suppose that it is a matter for Community law to determine whether, in conferring British nationality on Mrs Kaur, the status of a 'British Overseas Citizen' thereby confers on her the 'nationality of a Member State' for the purposes of Article 8 of the Treaty. An interpretation of those words leading to the finding that *Mrs Kaur does hold British nationality* would indicate that the cross-border element necessary for the application of Community law is lacking. It would then appear that the applicant is not seeking to establish herself in the territory of another Member State and that she does not at any rate find herself in a situation which is connected with any of the situations contemplated by Community law.

Mrs Kaur does invoke the free movement of persons within the Community — or, as Article 8a(1) of the Treaty puts it, the right to move and reside freely within the territory of the Member States — for the purpose of securing the right to reside in British territory. The applicant, who is presumed to be of British nationality, is physically present within that territory without anything to suggest that she has come from another Member State. The refusal by the British authorities to grant her leave to remain in the territory of the United Kingdom does not therefore in any way adversely affect freedom of movement within Community territory. The only cross-border element lies in the fact that Mrs Kaur comes from a non-member country, such that, with the exception of this extra-Community factor, all elements of the case in the main proceedings are internal to a single Member State.

34. That finding cannot be invalidated by the fact that the applicant claims the right to travel to Ireland and there exercise the rights of a citizen of the Union.<sup>19</sup> The purely hypothetical prospect of a journey

<sup>19</sup> — Point 15 of the order for reference.

within the territory of the European Community does not establish a sufficient connection with Community law to justify application of Article 8a(1) of the Treaty.<sup>20</sup> It should be added that the subject-matter of the main proceedings is confined to the challenge brought against a decision refusing leave to remain in the United Kingdom, a fact which confirms that the principal question facing the national court is, in the absence of other evidence involving the free movement of persons, confined to a purely national issue.<sup>21</sup>

35. Second, if, as the United Kingdom Government contends, *Mrs Kaur does not hold British nationality* for the purposes of application of the Treaty, it is common ground that she also does not hold the nationality of any other Member State. That being so, she must be regarded, under Community law, as being a national of a non-member country.

20 — For examples of situations purely internal to a Member State in which the prospects of the situation developing externally were not considered to be sufficiently credible to warrant the Court declaring Community law to be applicable, see *Moser*, cited above, paragraphs 17 and 18, and *Höfner and Elser*, cited above, paragraph 39.

21 — Point 3 of the order for reference.

36. The principle of the free movement of persons does not apply in the situation where a person who does not hold the nationality of a Member State claims such nationality and seeks to enter or remain in the territory of one of the Member States of the Community.

37. The Court has clearly stated in this regard that a national of a non-member country ‘may not effectively rely on the rules governing the free movement of persons ...’.<sup>22</sup>

38. Consequently, whether or not Mrs Kaur holds British nationality, Community law — and in particular the free movement of persons linked to citizenship of the Union — appears to be manifestly inapplicable to a case such as that in the main proceedings.

39. Regard being had to that conclusion, it is, as we have seen, unnecessary to reply to the other questions.

22 — *Awoyemi*, cited above, paragraph 29.

## Conclusion

40. In light of those considerations, I propose that the Court reply as follows to the questions submitted by the High Court of Justice of England and Wales, Queens Bench Division (Crown Office):

Article 8a(1) of the EC Treaty (now, after amendment, Article 18(1) EC) is not applicable in a situation where:

- a person who holds the nationality of one Member State and who is not present in the territory of another Member State challenges the refusal by the first Member State to grant her leave to remain within its territory;
  
- a person who holds the nationality of a non-member country challenges the refusal by a Member State to grant her leave to remain within its territory.