OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 8 September 2005 [1]

I — Introduction

1. By this application, the European Parliament asks the Court to annul the final subparagraph of Article 4(1), Article 4(6) and Article 8 of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2] ('the Directive'). The Directive — despite its title — does not deal with family reunification in general, but solely with the rights of families none of whose members is a Union citizen.

2. The Directive establishes the principle that any third country national residing lawfully in the Community is entitled to have the host State approve the subsequent entry and residence of his or her children by way of family reunification. The contested provisions permit Member States, however, to restrict family reunification in certain situations where the children in question are over 12 years of age, or, in certain cases, over 15, and to impose certain waiting periods. The Parliament considers these provisions to be incompatible with protection of the family as a human right, and with the principle of equal treatment.

3. Although the Parliament clearly does not set great store by the contribution that the Advocates General make to the judicial process, [3] the present case raises a number of new points of law, concerning notably whether the application is admissible at all and how the relevant fundamental and human rights may be exercised, and accordingly requires an Opinion.

1 — Original language: German.

2 — OJ 2003 L 251, p. 12.

3 — In the European Parliament resolution containing the comments which form part of the decision on the discharge for implementing the general budget of the European Union for the financial year 2003, Section IV — Court of Justice (C6-0017/2005 — 2004/2043 (DEC) of 12 April 2005, Document P6_TA-PROV(2005)0095, Report A6-0066/2005, not yet published in the Official Journal), the Parliament welcomes as an improvement the fact that fewer Opinions were presented by the Advocates General.

II — Legal context

A — *Community law*

4. The Council based the Directive on point 3 of the first paragraph of Article 63 EC, which provides that the Council is to decide unanimously on 'measures on immigration policy within the following areas:

(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purposes of family reunion,

(b) ...'

5. The second paragraph of Article 63 is also relevant:

'Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.'

6. The second recital in the preamble to the Directive refers expressly to the obligation to protect the family resulting from international agreements and specifically from fundamental rights:

'Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union.'

7. In that regard it is appropriate to recall Article 7 of the Charter of Fundamental Rights (Article II-67 of the Treaty establishing a Constitution for Europe) which provides that everyone has the right to respect for his or her private and family life, home and communications.

8. The fifth recital in the preamble to the Directive states:

'Member States should give effect to the provisions of this Directive without discrimination on the basis of sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.'

9. By these words, the Community legislature evokes the specific prohibitions of discrimination set out in Article 21 of the Charter of Fundamental Rights (Article II-81 of the Treaty establishing a Constitution for Europe).

10. Article 3(4)(b) of the Directive provides that the Directive is without prejudice to more favourable provisions of the European Social Charter of 18 October 1961,[4] the amended European Social Charter of 3 May 1996[5] and the European Convention on the legal status of migrant workers of 24 November 1977.[6]

11. Article 4(1) provides that, in principle, Member States are to authorise the entry and residence of the sponsor's spouse and children. However, the final subparagraph permits Member States to lay down additional conditions in regard to children over 12 years of age:

'By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the Member State may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.'

12. The 12th recital deals with this point:

'The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school.'

4 — ETS No 35.

5 — ETS No 163 — the Directive wrongly gives the year as 1987.

6 — ETS No 93.

13. Under Article 4(6), the right to family reunification does not apply at all where an application is made in respect of a child which has reached the age of 15:

'By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorise the entry and residence of such children on grounds other than family reunification.'

14. Article 8 permits Member States to establish waiting periods:

'Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members.'

15. The Directive contains various provisions relating to the consideration of the circumstances of individual cases.

16. Article 5(5) requires the Member States to have regard to the best interests of children:

'When examining an application, the Member States shall have due regard to the best interests of minor children.'

The Commission proposal [7] referred here explicitly to the Convention on the Rights of the Child. [8]

7 — COM(2002) 225, p. 19.

8 — Opened for signature on 20 November 1989 (UN Treaty Series, Volume 1577, p. 43). All Member States have ratified it. In addition, the Treaty establishing a Constitution for Europe provides expressly in the second subparagraph of Article I-3(3) that the Union is to promote protection of the rights of the child; these rights are recognised as fundamental rights through their inclusion in the Charter of Fundamental Rights of the Union (Article 24 of the Charter; Article II-84 of the Treaty establishing a Constitution for Europe).

17. Article 17 concerns all persons liable to be affected:

'Member States shall take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his/her country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family.'

B — *International law*

1. European Agreements

18. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), is the pre-eminent source establishing the right to protection for family life as a human right:

'1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

19. The prohibition of discrimination is enshrined in Article 14 of the ECHR:

'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

20. The European Social Charter [9] likewise contains provisions on family reunification. Part 1, point 19, states that migrant workers who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other

9 — Cited in footnote 4.

Contracting Party. Applying this principle to family reunification, Article 19 provides specifically:

'With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake:

...

6. to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;

...' [10]

21. The appendix — pursuant to Article 38, an integral part of the Charter — states that, for the purposes of Article 19(6), the term 'family of a foreign worker' is understood to mean at least his wife and dependent children under the age of 21 years. In the revised version of the Charter of 3 May 1996, [11] in which Article 19(6) remains unchanged, the appendix was recast so as to provide that, for the purpose of applying the provision, the term 'family of a foreign worker' is understood to mean at least the worker's spouse and unmarried children, as long as the latter are considered to be minors by the receiving State and are dependent on the migrant worker.

22. The Council of Europe has also opened for signature the European Convention on the legal status of migrant workers. [12] Article 12 of that Convention deals with family reunion. Article 12(1) states:

'The spouse of a migrant worker who is lawfully employed in the territory of a Contracting Party and the unmarried children thereof, as long as they are considered to be minors by the relevant law of the

10 — Consultation of the Treaty Office website (http://conventions.coe.int) on 14 April 2005 revealed this provision to be recognised by Austria, Belgium, Portugal, Estonia, France, Ireland, Italy, Luxembourg, Slovenia, Spain, Germany, Greece, Finland, the Netherlands, Poland, Sweden, the United Kingdom and Cyprus, but not by Latvia, Malta, Slovakia, the Czech Republic and Hungary. Denmark appears to have accepted Article 19(6) when ratifying the revised Charter in 1996. When Lithuania ratified the revised Charter, it declined to be bound by Article 19(6).

11 — Cited in footnote 5.

12 — Cited in footnote 6. To date, this has been ratified by eight States, including Spain, France, Italy, the Netherlands, Portugal and Sweden.

receiving State, who are dependent on the migrant worker, are authorised on conditions analogous to those which this Convention applies to the admission of migrant workers and according to the admission procedure prescribed by such law or by international agreements to join the migrant worker in the territory of a Contracting Party, provided that the latter has available for the family housing considered as normal for national workers in the region where the migrant worker is employed. Each Contracting Party may make the giving of authorisation conditional upon a waiting period which shall not exceed 12 months.'

23. Article 1 defines the term 'migrant worker' for the purpose of the Convention, restricting its application to nationals of a Contracting Party.

2. Worldwide Agreements

24. The International Covenant on Civil and Political Rights of 16 December 1966 [13] contains, in Article 17, a guarantee comparable to Article 8 of the ECHR:

'1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.'

25. Article 23(1) of the Covenant provides:

'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

26. Article 24(1) is also relevant:

'Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.'

13 — UN Treaty Series, Volume 999, p. 171.

27. The Convention on the Rights of the Child [14] similarly contains provisions on family reunification. Article 9(1) establishes the basic principle that a child is not to be separated from his or her parents against the latter's will. The first sentence of Article 10(1) develops this:

'In accordance with the obligation of States Parties under Article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.'

28. The general requirement set out in Article 3(1) should also be borne in mind:

'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

14 — Cited in footnote 8.

29. Like the Council of Europe, the United Nations has opened for signature an International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. [15] Article 44(2) thereof provides that States Parties are to take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses and minor children. No Member State has yet ratified the Convention.

30. Finally, Article 13 of Convention No 143 of the International Labour Organisation (ILO) concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers of 24 June 1975 [16] provides:

'1. A Member may take all necessary measures which fall within its competence and collaborate with other Members to facilitate the reunification of the families of all migrant workers legally residing in its territory.

15 — New York, 18 December 1990, UN Treaty Series, Volume 2220, I-39481.

16 — Ratified by 18 States, including Cyprus, Italy, Portugal, Slovenia and Sweden.

2. The members of the family of the migrant worker to which this Article applies are the spouse and dependent children, father and mother.'

III — Forms of order sought

31. The European Parliament claims that the Court should:

— annul, pursuant to Article 230 EC, the final subparagraph of Article 4(1), Article 4(6) and Article 8 of Directive 2003/86;

— order the defendant to pay all the costs.

32. The Council claims that the Court should:

— dismiss the application;

— order the European Parliament to pay the costs.

33. The Federal Republic of Germany and the Commission intervene in support of the form of order sought by the Council.

IV — Assessment

A — *Admissibility*

1. Existence of a challengeable legal act

34. An action for annulment pursuant to Article 230 EC will lie only against legal acts, and not against measures which do not produce binding legal effects. [17] The second paragraph of Article 63 EC casts doubt on the binding force of the Directive: 'Measures adopted by the Council pursuant to points 3 and 4 [as was the Directive] shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.'

17 — See my Opinion in Joined Cases C-138/03, C-324/03 and C-431/03 *Italy* v *Commission*, point 45, with further citations.

35. Some read that provision as authorising Member States to adopt enhanced protective measures, like Articles 95(5) EC, 137(5) EC, 153(3) EC and 176 EC. [18] I am not persuaded that this is the case, since, unlike the provisions on enhanced protection, the second paragraph of Article 63 EC does not specify the objective of such enhanced protection. However, if Member States are indeed free to determine the objectives of any alternative measures, the Community rules can in no way be said to constitute a minimum standard binding on Member States — whereas it is the existence of such a minimum standard (as opposed to the complete absence of any binding force) which is the characteristic feature of those situations in which Member States are permitted to adopt enhanced protection. [19]

36. On a strictly literal construction of the second paragraph of Article 63 EC, secondary legislation adopted pursuant to points 3 and 4 of that article — including, therefore, Directive 2003/86 — produces no effects, and enjoys no primacy, within a Member State whose national legislation lays down other rules. [20] Thus the German Government, in reply to a question by the Court, expressed the view that the second paragraph of Article 63 authorised Member States to act unilaterally. Applying rigorous logic to that view, it would even be permissible for there to be no rules at all, that is to say non-transposition, since that too would involve 'other' rules, and the legal effect of measures adopted pursuant to points 3 and 4 of the first paragraph of Article 63 EC would consequently be reduced to that of a recommendation. [21] The German Government was not, however, prepared to go that far.

18 — Fungueiriño-Lorenzo, *Visa-, Asyl- und Einwanderungspolitik vor und nach dem Amsterdamer Vertrag*, p. 81 et seq. Röben, too, writing on Article 63 EC in Grabitz/Hilf, *Das Recht der Europäischen Union*, as at May 1999, paragraph 43, proceeds, I think, along similar lines.

19 — See, on Article 176 EC, Case C-318/98 *Fornasar and Others* [2000] ECR I-4785, paragraph 46, and Case C-6/03 *Deponiezweckverband Eiterköpfe* [2005] ECR I-2753, paragraph 27 et seq.

20 — See, for example, Weiß in: Streinz, *EUV/EGV*, 2003, Article 63 EC, paragraph 68, and Brechmann in: Callies and Ruffert, *Kommentar zum EU-Vertrag und EG-Vertrag*, 2nd edition 2002, Article 63 EC, paragraph 42.

21 — Such a swingeing abridgement of the binding legal force of measures would not be confined to the present Directive, but would extend at least to the following measures, which were similarly based exclusively on points 3 and 4 of the first paragraph of Article 63 EC: Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service (OJ 2004 L 375, p. 12); Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third country nationals who are subjects of individual removal orders (OJ 2004 L 261, p. 28); Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ 2004 L 261, p. 19); Council Decision 2004/191/EC of 23 February 2004 setting out the criteria and practical arrangements for the compensation of the financial imbalances resulting from the application of Directive 2001/40/EC on the mutual recognition of decisions on the expulsion of third country nationals (OJ 2004 L 60, p. 55); Council Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air (OJ 2003 L 321, p. 26); Council Directive 2003/109/EC of 25 November 2003 concerning the status of third country nationals who are long-term residents (OJ 2004 L 16, p. 44); Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality (OJ 2003 L 124, p. 1); Council Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third country nationals (OJ 2002 L 157, p. 1); and Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals (OJ 2001 L 149, p. 34).

37. Such an interpretation would probably reflect the reasons of some Member States for adoption of the provision — initially, not all Member States were in favour of the transfer to the EC Treaty of powers relating to immigration policy. [22]

38. However, construing the second paragraph of Article 63 EC in this way (as a saving clause for the benefit of Member States) would necessarily render absurd, and ineffective, the incorporation into the EC Treaty (*simultaneously* with that paragraph) of the powers conferred by points 3 and 4 of the first paragraph of Article 63. These are not new powers to issue recommendations. That would not have required a legal basis in the EC Treaty, since Articles K.1 and K.3 of the Treaty on European Union, as it applied previously in the version of the Maastricht Treaty, conferred the authority to do as much, and indeed, potentially, more. [23] Rather, the powers set out in points 3 and 4 of the first paragraph of Article 63 EC were provided in order to make the full panoply of Community law available to tackle — inter alia — problems of immigration policy.

39. Article 63 EC thus contains a number of contradictory provisions. [24] It is only if one seeks a proper balance when interpreting them — a 'praktische Konkordanz' or 'practical concordance', to borrow a term from the Bundesverfassungsgericht (German Federal Constitutional Court) [25] — that one can ensure that each is duly effective. Accordingly — as the Parliament, the Council and the Commission all stated in response to the Court's question — one cannot read the second paragraph as negating the legally binding force of measures adopted on the basis of points 3 and 4. The reference to compatibility with the Treaty should be understood rather as it is understood elsewhere in Community law — as a requirement that national measures be compatible with secondary Community legislation, including measures enacted on the basis of points 3 and 4. [26]

22 — See the Irish Presidency Document 'The European Union Today and Tomorrow', CONF/2500/96 of 5 December 1996, Part A, Section I, Chapter 2. Although the Treaty amendments proposed at that time included the power to legislate, no provision comparable to the second paragraph was as yet included.

23 — The Treaty on European Union, as it applied at the time, empowered Member States to draw up not only common positions and common measures, but also legally binding agreements.

24 — The fact that these problems of interpretation have arisen is itself an argument in favour of following Article III-267 of the Treaty establishing a Constitution for Europe and dispensing with a rule comparable to that contained in the second paragraph of Article 63 EC.

25 — See the judgment of the Bundesverfassungsgericht of 16 May 1995 in Case 1 BvR 1087/91 *Kruzifix* BVerfGE 93, 1, 21, with further references.

26 — Thus, for example, Hailbronner, 'European Immigration and Asylum Law under the Treaty', *Common Market Law Review*, 1998, 1047 (1051). The Commission appears to agree: it has already brought four Treaty infringement actions before the Court for failure to transpose Directive 2001/40, against Luxembourg (Case C-448/04, OJ 2004 C 314, p. 6), France (Case C-450/04, OJ 2004 C 314, p. 7), Italy (Case C-462/04, OJ 2005 C 6, p. 30) and Greece (Case C-474/04, OJ 2004 C 314, p. 10). The defendant Member States are similarly not seeking to rely on the second paragraph of Article 63 EC; they state that transposition of the directive is under preparation.

40. There is a further factor telling in favour of this interpretation: since the power to adopt measures pursuant to points 3 and 4 of the first paragraph of Article 63 EC may only be exercised unanimously, [27] Member States have sufficient opportunity to safeguard their own interests in the course of the legislative process. Moreover, if a Member State which had initially agreed to a measure adopted on that legal basis were subsequently to maintain in force or introduce inimical national provisions, it would be guilty of acting in bad faith — an instance of *venire contra factum proprium*. [28]

41. The second paragraph is therefore not to be read as limiting the legal effect of legislation, but rather — as the Council in particular has emphasised — as enjoining the Community legislature, when it adopts measures on the basis of points 3 and 4, to leave Member States an appropriate degree of latitude. That is duly achieved by the wide range of options which the present Directive allows Member States. Moreover, given such an injunction as to legislative policy, secondary legislation adopted on the basis of points 3 and 4 is not (should any doubts arise) to be construed as definitive harmonisation.

27 — When the Council took the — unanimous — decision on 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Article 251 of that Treaty, it introduced qualified-majority voting only for point 3(b) (OJ 2004 L 396, p. 45).

28 — See my Opinion in Case C-117/03 *Dragaggi* [2005] ECR I-167, point 24 et seq.

42. It follows that the Directive is in principle a legal act capable of being challenged, the second paragraph of Article 63 EC notwithstanding.

2. The legal nature of the contested provisions

43. The Council none the less still doubts whether the present application is in fact directed against a legal act capable of being challenged. The Parliament's application, it says, is directed not against Community legislation, but against provisions of national law, and is therefore inadmissible. The final subparagraph of Article 4(1), Article 4(6) and Article 8 of the Directive do not require Member States to enact any particular rules. Rather, the provisions in question refer to existing national law, allowing it to remain in force. The Council points out that the Court has no power to review national legislation in order to determine whether or not it is compatible with Community fundamental rights.

44. In contrast, the Parliament and the Commission both assert that the contested provisions form part of Community law and are subject to review by the Court — not least in regard to their compatibility with Community fundamental rights. Any Community provisions purporting to authorise Member States to adopt measures contrary

to fundamental rights are, they say, incompatible with those rights.

45. On this point I agree with the Parliament and the Commission. The Council's objection is, I think, unconvincing: the Council has failed to recognise that endorsement by Community law of specific options for maintaining in force or introducing provisions of national law constitutes a measure which may itself, in certain circumstances, infringe Community law. First, the options potentially restrict the scope of the entitlement to family reunification conferred by the Directive. Secondly, they formally establish that the provisions in question are compatible with Community law. If provisions establishing such a fact are not challenged in time by means of an action for annulment, the Community will be precluded from taking action itself against national measures which simply take full advantage of the various options contemplated. [29] It follows that such an action for annulment must in principle be allowed to proceed.

3. Challenge to part of the Directive

46. The German Government has submitted a report by Professor Langenfeld which raises — indirectly — a further question: is it possible, as the applicant seeks, to annul certain provisions in the Directive? The Court has consistently held that no application for partial annulment will lie in circumstances where the contested provisions of an act are inseverably linked with other provisions thereof which are not challenged and to annul the entire act would be to go beyond the form of order sought (*ultra petita*). [30] Annulling only the non-severable elements would alter the substance of the act in question; [31] only the Community legislature may do that. [32]

47. The above criteria — as the Council and the German Government submitted in response to a question from the Court — also render the present action inadmissible. Contrary to the view taken by the Parliament, and propounded at the hearing by the Commission, it is objectively impossible to sever the provisions contested by the Parliament from the remainder of the Directive. That the remaining provisions of the Directive are capable of being applied on their own is immaterial. What is material is that the contested provisions contain a potential limitation on the duty imposed on Member States by the Directive to make family

29 — See, to that effect, Case C-475/01 *Commission* v *Greece* (the Ouzo case) [2004] ECR I-8923, paragraph 15 et seq.

30 — Case 37/71 *Jamet* v *Commission* [1972] ECR 483, paragraphs 10 to 12; Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 21; Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* (the Potash and Salt case) [1998] ECR I-1375, paragraph 256; Case C-29/99 *Commission* v *Council* (the Nuclear Safety Convention case) [2002] ECR I-11221, paragraph 45; and Case C-244/03 *France* v *Parliament and Council* (the Testing on Animals case) [2005] ECR I-4021, paragraphs 12 and 21.

31 — See the 'Testing on Animals' judgment, cited in footnote 30, paragraph 15.

32 — See Case C-376/98 *Germany* v *Parliament and Council* (the Tobacco case) [2000] ECR I-8419, paragraph 117.

reunification possible. If the Court were to annul those provisions, there would be a right to family reunification without any special limitation also in respect of minor children of more than 12, or 15, years of age, and the right would not be subject to a waiting period. Annulment of the contested provisions would therefore alter the substance of the Directive: the Court would be trespassing on the preserves of the Community legislature.

48. Nor is it possible here to annul the remaining — non-severable — provisions (i.e., to annul the Directive *in toto*). That would exceed the form of order sought by the Parliament, and would be at odds with the interest pursued by the applicant, since there would then be no right at all to family reunification under Community law. [33]

49. The application is thus inadmissible.

33 — We need not ponder whether, in a preliminary ruling, the Court could annul only the impugned provisions if it found these to be unlawful. However, there are strong reasons for concluding that here it would be the Directive as a whole, and not only a part of it, which would fall to be annulled.

50. It is therefore merely in the alternative that I now turn to consider the merits.

B — *Merits*

51. In its application, the Parliament alleges that the duty to protect the family, as a matter of human rights, and the principle of equal treatment have both been infringed. Before I consider these points, however, there is a possible defect in the legislative process to examine.

1. The legislative process in regard to Article 4(6) of the Directive

52. It is necessary to examine the legislative process in regard to Article 4(6) of the Directive. The Parliament observes that the relevant amendment was not submitted to it by the Council for its opinion.

53. Since the Parliament does not base its case on the fact that it was not consulted, the question arises whether the Court must consider of its own motion whether the legislative procedure was thus defective. In

actions for annulment pursuant to Article 33 of the ECSC Treaty, the Court has already considered procedural defects of its own motion. [34] Advocate General Ruiz-Jarabo Colomer infers from this case-law that, in proceedings under Article 230 EC too, the Court may of its own motion raise at least lack of competence and the breach of an essential procedural requirement. [35] As far as an institution's competence to act is concerned, that view also matches the Court's case-law. [36] The principles of procedural economy and legal certainty tell in favour of procedural defects being similarly treated, at least when the Court has been made aware of such defects in the course of an action for annulment. In the present case, therefore, the Court should examine whether the Parliament was adequately consulted in regard to Article 4(6) of the Directive.

54. Pursuant to Article 63 EC read in conjunction with Article 67(1) EC, the Council is to decide having consulted the Parliament. A further consultation of the Parliament is always necessary if the text that is eventually adopted, taken as a whole, differs in essence from the text on which the Parliament has already been consulted, except when the amendments substantially correspond to the wishes of the Parliament itself. [37]

55. It is not possible to establish that the Parliament was consulted in regard to Article 4(6) of the Directive. The Council consulted the Parliament for the last time by letter of 23 May 2002. The information available indicates that Article 4(6) first appeared in a Council document of 25 February 2003, in which the Presidency suggested an amendment to that effect in response to certain reservations expressed by the Austrian delegation. [38] Although the last occasion on which the Parliament expressed a view on the Directive was 9 April 2003, [39] there is no indication that the Council had informed the Parliament of the change in the draft directive and had consulted the Parliament on it. As the Council has not contradicted the Parliament's statements on this point it must be presumed that the Parliament had no opportunity to express a view on Article 4 (6).

34 — Case 1/54 *France* v *High Authority* [1954–56] ECR 1, at 15, and Case 19/58 *Germany* v *High Authority* [1960] ECR 225, at 233.

35 — Opinions in Joined Cases C-346/03 and C-529/03 *Atzeni and Others*, case pending before the Court, point 70, and Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, point 29.

36 — Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 56, a judgment in which the Court found in favour of the Commission.

37 — Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593, concerning road haulage, paragraph 16; Joined Cases C-13/92 to C-16/92 *Driessen and Others* [1993] ECR I-4751, paragraph 23; and Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, concerning the common organisation of the market in bananas, paragraph 38.

38 — Note from the Presidency, Council Document 6585/03, p. 9, footnote 3.

39 — European Parliament legislative resolution on the amended proposal for a Council directive on the right to family reunification of 9 April 2003 (OJ 2004 C 64E, pp. 283 and 373). The statement of reasons stems from the report by Mrs Cerdeira Morterero MEP of 24 March 2003, document A5-0086/2003.

56. Article 4(6) allows Member States to apply rules relating to the subsequent arrival of minor children more restrictive than those contemplated in the system on which the Parliament was consulted. Without Article 4(6), even children of the age of 15 and above would be entitled to be reunited with their family. The introduction of Article 4(6) therefore changed the essence of the Directive.

57. The restriction of the right to family reunification contained in Article 4(6) goes against the Parliament's explicit request that the family reunification rules be made more generous than those in the draft on which it was consulted, [40] and its particular wish that all minor children, without distinction, be permitted to join their families. [41]

58. The Parliament should consequently have been consulted again before the Directive was adopted. It follows that the Directive, and in particular Article 4(6) thereof, came into being without the correct procedure being used.

2. Protection of the family as a human right

(a) The standard of protection required as a matter of human rights

59. The Court has consistently held, in case-law reaffirmed by the preamble to the Single European Act and by Article 6(2) EU, that the Community protects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Among these rights is the right to protection of the family enshrined in particular in Article 8 of the ECHR. [42]

60. In so far as it is relevant here, Article 7 of the Charter of Fundamental Rights of the European Union, cited in the second recital in the preamble to the Directive, is identical to Article 8 of the ECHR. Moreover, the first sentence of Article 52(3) of the Charter (Article II-112 of the Treaty establishing a Constitution for Europe) provides that its meaning and scope are to be the same.

61. In addition, when considering protection of the family in regard to the right of

40 — See in particular Amendments 22 to 25 contained in the legislative resolution cited in footnote 39.

41 — See Amendment 26 contained in the legislative resolution cited in footnote 39.

42 — Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 41, and Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 58.

residence, the Court has been guided by the interpretation of Article 8 of the ECHR by the European Court of Human Rights. On that basis the Court of Justice has held that Article 8 of the ECHR does not as such guarantee the right of a foreign national to enter or to reside in a particular country, but that to refuse to allow a person to enter or reside in a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the ECHR. Such an interference will infringe the ECHR if it does not meet the requirements of Article 8(2), that is unless it is 'in accordance with the law', motivated by one or more of the legitimate aims under that paragraph and 'necessary in a democratic society', that is to say 'justified by a pressing social need' and, in particular, proportionate to the legitimate aim pursued. [43]

62. The Court of Justice has developed this case-law through cases involving the right to residence of family members of Union citizens who exercised their right to free movement and settled in other Member States. In those cases the Union citizen's right to residence founded on Community law, and protection of the family as specifically enunciated in particular by Community law, together result in a right to residence which may be restricted only in exceptional cases and subject to stringent conditions. [44] Further special rules may result from particular Association Agreements. [45]

63. There is, however, under Community law, no similar right to residence that would permit the reunification of families all of whose members are third country nationals. Hence the Court's pronouncements that I have just cited cannot be transposed directly to such a situation: one must instead draw on the case-law of the European Court of Human Rights. The decisive aspect here is the protection of the family *as a human right*, which — particularly in regard to questions of immigration and residence — is something distinct from the fundamental rights of citizens of the Union, that is to say it is typically less extensive than citizens' rights.

64. The European Court of Human Rights has held that the mutual enjoyment by family members of each other's company constitutes a fundamental element of family life within the meaning of Article 8 of the ECHR. State measures which prevent life together, for example, the removal of a child from parental care, [46] a prohibition on

43 — See *Carpenter*, paragraph 42, and *Akrich*, paragraph 59 (both cited in footnote 42).

44 — See my Opinion in Case C-503/03 *Commission* v *Spain*, case pending before the Court, point 37, with further references.

45 — Here EEA law is particularly relevant.

46 — Eur. Court H.R., *Eriksson* v. *Sweden*, judgment of 22 June 1989, Series A No 156, § 58.

contact [47] or the expulsion of members of a person's family, [48] constitute interference with the exercise of that human right. Such interference is only permissible if it is justified under Article 8(2) of the ECHR.

65. However, the European Court of Human Rights has held that the denial of an application for family reunification does not in principle constitute an interference with rights under Article 8 of the ECHR which a State would be required to justify. With regard to family reunification, it views Article 8 not as conferring a negative right against the State, but as something which might found an entitlement to positive action.

66. In particular, that court has stated in terms that Article 8 of the ECHR does not connote a *general* obligation to permit families to be reunited simply in order to enable them to live in the country of their choice. It has held that family reunification concerns not only family life but also immigration, and that the extent of a State's obligation to allow settled immigrants to be joined by their relatives will vary according to the particular circumstances of the persons involved and the general interest. As a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory. In that regard it enjoys wide margin of appreciation. [49]

67. On that basis, in three of the four cases in which it has ruled on the substance the European Court of Human Rights has rejected an application for family reunification in the host State, inter alia because it was possible for the family in question to live together in the country of origin. [50] The case-law has been reaffirmed subsequently in decisions dismissing applications as inadmissible. [51]

68. However, the *Sen* judgment demonstrates that when the interests in a particular case are weighed as required, a right to unification may arise for children too. In *Sen*, the European Court of Human Rights saw a number of obstacles preventing return to the country of origin. It based its decision on the fact that Mr and Mrs Sen had, in addition to the child seeking to join them, other children

47 — *Elsholz v. Germany*, No 25735/94, § 44, ECHR 2000-VIII.

48 — Eur. Court HR, *Mehemi* v. *France*, judgment of 26 September 1997, *Reports of Judgments and Decisions* 1997-VI, § 27.

49 — Eur. Court H.R., *Abdulaziz, Cabales and Balkandali* v. *the United Kingdom*, judgment of 28 May 1985, Series A no. 94, § 67 et seq.; *Gül* v. *Switzerland*, judgment of 19 February 1996, *Reports of Judgment and Decisions* 1996-I, § 38; *Ahmut* v. *the Netherlands*, judgment of 28 November 1996, *Reports of Judgment and Decisions* 1996-VI, § 63 and 67; and *Sen* v. *the Netherlands*, no. 31465/96, § 31 and 36, 21 December 2001.

50 — The judgments in *Abdulaziz* (§ 68), *Gül* (§ 39) and *Ahmut* (§ 70), all cited in footnote 49. *Abdulaziz* was unanimous; *Gül* (7 votes to 2) and *Ahmut* (5 votes to 4) were majority decisions.

51 — See, for example, the decisions of the European Court of Human Rights of 23 March 2003 in *I.M.* v. the *Netherlands*; of 13 May 2003 in *Chandra v. the Netherlands*; of 6 July 2004 in *Ramos Andrade* v. *the Netherlands*; and of 5 April 2005 in *Benamar v. the Netherlands*.

who had been born, had grown up and were integrated in the host State.[52] Further decisions on the admissibility of applications have left open the possibility of other circumstances founding a claim to be joined by family members.[53] Conceivable justifications include persecution on political grounds,[54] for example, or the fact that certain family members have special medical needs which cannot be met in their State of origin.

69. *Sen* shows above all that the interests of the children concerned are pre-eminently capable of founding a claim to family reunification in the host State. That thinking likewise informs the Human Rights Committee's views in *Winata* on the application of Articles 17, 23 and 24 of the International Covenant on Civil and Political Rights.[55] Similar conclusions may be drawn from Articles 3, 9 and 10 of the Convention on the Rights of the Child.

70. There was no separate consideration in *Sen* of the issue of justification for a refusal to permit family reunification: the court's premiss appears to be that any factors falling to be assessed in regard to justification necessarily form part of the basis for a claim to reunification as a positive right.[56]

71. I consider that Community law should take the same approach. Admittedly, the Court of Justice has stated expressly in *Akrich* and *Carpenter* that any refusal of family reunification needs to be justified — but that is the necessary consequence of the more extensive rights which Union citizens enjoy under Community law.[57] If, on the other hand, the conditions for a claim to succeed are formulated as narrowly as they are in the case-law of the European Court of Human Rights, no scope generally remains for the justification of interference in the form of a rejection, since the relevant considerations have already been addressed in considering whether any claim lies at all.[58] Thus — *pace* the Parliament — the denial of an application for family reunification entailing the arrival of minor children does not require the justification contemplated in Article 8(2) of the ECHR.

52 — *Sen*, cited in footnote 49, § 40.

53 — See the decisions of the European Court of Human Rights on admissibility of 19 October 2004 in *Tuquabo-Tekle* v. the *Netherlands* and of 14 September 2004 in *Rodrigues da Silva and Hoogkamer* v. *the Netherlands*.

54 — It is therefore logical that Article 10(1) of the Directive should also exclude the application of the final subparagraph of Article 4(1) to refugees.

55 — Communication No 930/2000: Australia, of 16 August 2001, CCPR/C/72/D/930/2000, paragraphs 7.1 to 7.3 (Jurisprudence), http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/488b0273fa4febfbc1256ab7002e5395?Opendocument.

56 — But see the dissenting opinion of Judge Martens, approved by Judge Russo, in *Gül* (cited in footnote 49, §6 et seq.), which does not cast doubt on the classification as a positive right, but none the less applies the classical justification test. See also the separate concurring opinions of Judges Thór Vilhjálmsson und Bernhardt in *Abdulaziz* (cited in footnote 49), based on justification under Article 8(2) of the ECHR.

57 — See above, point 61.

58 — It is here that the real difference of opinion is to be found between the minority view of Judge Martens and the view of the European Court of Human Rights (cited in footnote 56): Judge Martens is considerably more generous than the majority of the European Court of Human Rights in discerning a claim to family reunification.

72. The *interim conclusion* may be drawn that, when all relevant interests of the individual and the public have been duly weighed, the protection of the family pursuant to Article 8 of the ECHR may exceptionally found an entitlement to family reunification in the host State.

73. Nor do Article 19(6) of the European Social Charter and other international arrangements make it possible to establish *more extensive* rights to family reunification in the host State by way of protection of the family as a matter of human rights. [59]

74. There is much to be said for the view that Article 19(6) of the Social Charter is more generous than the ECHR in setting criteria for the family reunification of migrant workers. Simply demonstrating that it would be possible for a family to live together in the country of origin would scarcely suffice to tip the scales against reunification: rather, it would be necessary to prove that objective obstacles precluded reunification in the host State. What also appears of interest in the present case is the fact that Article 19(6) of the Social Charter, read in conjunction with the definition of the eligible 'family' contained in the appendix, [60] opposes the application of age-limits to the reuniting of minor children with their family. Moreover, the European Committee of Social Rights, which supervises the implementation of the Social Charter, has to date, in its rulings, only accepted waiting periods of up to one year, and has rejected waiting periods of three years and more. [61] The European Court of Human Rights, in its more recent case-law, has drawn on provisions in the Social Charter and rulings by the Committee in interpreting and applying the European Convention on Human Rights, in particular Article 8. [62]

75. However, the European Court of Human Rights has to date never cited Article 19(6) of the Social Charter in its case-law on family reunification or in any other context. The logic behind that is apparent when one reads

59 — The Bundesverfassungsgericht (Federal Constitutional Court, Germany) ruled to this effect in regard to the Social Charter, BVerfGE 76, 1 (82 et seq.), family reunification. Note the reticence with which *other* provisions of the European Social Charter have been addressed in Case 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 26 to 29, Case 24/86 *Blaizot* [1988] ECR 379, paragraph 17, the Opinion of Advocate General Jacobs in Case C-67/96 Albany [1999] ECR I-5751, point 146, and that of Advocate General Lenz in Case 236/87 *Bergemann* [1988] ECR 5125, point 28.

60 — See above, point 21.

61 — Digest of the Case Law of the ECSR, as at March 2005, p. 84, http://www.coe.int/T/F/Droits_de_l'Homme/Cse/Digest_bil_mars_05.pdf. See also Conclusions 2004 Volume 1, Section 89/174, on Estonia, and Conclusions XVI-1 vol. 2, Section 72/257, on the Netherlands, referring to Conclusions I, p. 216 (probably Section 363/374, on Germany), all accessible via http://hudoc.esc.coe.int/esc/search/default.asp.

62 — *Sidabras and Dziautas* v. *Lithuania*, Nos 55480/00 and 59330/00, § 47, ECHR 2004-VIII (prohibitions on exercising a specific professional activity); *Koua Poirrez* v. *France*, No 40892/98, § 39 and 29, ECHR 2003-X, on claims arising under social legislation; and *Wilson, National Union of Journalists and Others v. United Kingdom*, Nos 30668/96, 30671/96 and 30678/96, § 40, 32 et seq., and 37, ECHR 2002-V, on discrimination against members of trade unions. By contrast, the Court of Justice has to date only pronounced once on the rulings of a non-judicial supervisory body — this was in Case C-249/96 *Grant* [1998] ECR I-621, paragraph 46 et seq., where it declined to follow an observation made by the Human Rights Committee of the International Covenant on Civil and Political Rights.

the provision in question with point 19 of Part 1 of the Social Charter, which provides that the rules on family reunification create rights only for nationals of the Contracting Parties. [63] Accordingly the Committee's rulings on the latter provision cannot be extrapolated so as to found a general legal principle and human right requiring family reunification to be granted when it is sought by third country nationals (the situation in the present case). Consequently, neither Article 19(6) of the Social Charter nor the more extensive guarantees which Union citizens enjoy under Community law can found an entitlement to family reunification based on human rights that goes beyond what is afforded by the case-law of the European Court of Human Rights.

76. The same considerations militate against taking account of the terms of the European Convention on migrant workers, which similarly confers rights only on nationals of the Contracting Parties. In contrast to Article 19(6) of the Social Charter, which had been accepted by all the then Member States at the time when the Directive was adopted, the Convention on migrant workers has to date been ratified by only some Member States.

77. By contrast, the International Convention on the rights of migrant workers, although it has not yet been ratified by a single Member State, seemingly aspires to found a universal right. Convention No 143 of the ILO concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers contains no binding rules on family reunification, merely noting that the Contracting States may facilitate it.

78. Even if regard is had to the European Social Charter and other international agreements, it is not possible to infer a right of third country nationals to reunite their family in the host State. However, the Council and the Commission both concede that such a right may be recognised in exceptional cases following a comprehensive assessment of all the circumstances in individual cases. The Commission rightly concludes that Community law cannot countenance any blanket limitations on children coming to join their families, but

63 — Perhaps that is why Article 3(4)(b) of the Directive makes it clear that those Member States which are parties to the European Social Charter and/or the European Convention on the legal status of migrant workers may have, in regard to family reunification, obligations to migrant workers from other States that are parties which go beyond those arising solely under the Directive (and Article 8 of the ECHR).

must leave sufficient scope for such exceptional cases. [64]

(b) Examination of the contested provisions

79. The contested provisions must accordingly be examined in order to determine whether there is sufficient scope for them to be applied in conformity with human rights where, exceptionally, the protection of family life founds a claim to family reunification in the host State.

80. Contrary to the view taken in part by the Parliament, however, I see no need for that exception to be mentioned expressly in the relevant provisions. As the Parliament has indeed acknowledged elsewhere, and as the other parties to the proceedings have submitted, Community provisions are compatible with fundamental rights if they are capable of being interpreted in a way which produces the outcome which those rights require. [65]

81. Likewise Member States, when they implement a directive, must of course interpret it in conformity with fundamental rights. They must make sure that they do not rely on an interpretation of it which would be in conflict with the fundamental rights protected by the Community legal order or with any other general principles of Community law. [66] The Community legislature explicitly stated as much in the second recital in the preamble to the present Directive, observing there that the Directive was in conformity with the obligation to protect the family as a matter of human rights.

82. Thus in the present case, contrary to the view which I think the Parliament has expressed at certain points, what matters is not what rules Member States might be minded to adopt in order to take full advantage of the latitude which the contested provisions afford, but rather what rules Member States may lawfully adopt if the Community provisions in question are interpreted in conformity with fundamental rights.

The final subparagraph of Article 4(1) of the Directive

83. The final subparagraph of Article 4(1) provides that, in the case of a child aged over

64 — An analogous view was taken by the Verfassungsgerichtshof (Constitutional Court, Austria) with regard to what is required of Austrian law by human rights in its judgment of 8 October 2003 in Case G119, 120/03-13 (http://www.vfgh.gv.at/presse/G119_13_03.pdf, p. 20 et seq.).

65 — Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19.

66 — Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87; see also Case C-376/02 *Stichting 'Goed Wonen'* [2005] ECR I-3445, paragraph 32.

12 years arriving independently from the rest of his/her family, a Member State may, before authorising entry and residence under the Directive, verify whether he or she meets a condition for integration. This provision is compatible with the protection of families provided that the condition permits family reunification wherever it is required following the comprehensive assessment of the specific case which the ECHR demands.

84. The Parliament considers that to be precluded as the term 'condition for integration' precludes any consideration of the interests of the family concerned. [67] I consider this view to be mistaken. Such an integration test measures the extent to which an immigrant is, or is capable of being, integrated in the host State; it translates both the host State's interest in ensuring that immigrants are integrated into society and the individual immigrant's interest in not living in isolation. The family can be a relevant factor in both regards, particularly when a considerable number of well-integrated family members are already living in the host State.

85. A particular feature of an integration condition is that it enables due account to be taken of any exceptional case in which there is entitlement to family reunification, since Member States must give concrete expression to the concept of a condition for integration so as to be able to apply the concept in practice. They cannot give concrete expression to the concept in an arbitrary manner, but must be guided by the meaning and purpose of a condition for integration and also by human rights requirements in regard to family reunification.

86. Moreover, giving sufficiently broad expression to such a condition accords with the scheme of the Directive which seeks to ensure that sufficient account is taken of the interests of the family, and in particular any children, when decisions are taken. Article 17 of the Directive states that Member States are to take due account of the nature and solidity of the person's family relationships and the duration of his residence in the Member State and of the existence of family, cultural and social ties with his country of origin where they reject an application, withdraw or refuse to renew a residence permit or decide to order the removal of the sponsor or members of his family. Moreover, Article 5(5) requires Member States, when examining an application for family reunification, to have due regard to the best interests of minor children. In the event of doubt, therefore, the legal concepts in the Directive are to be interpreted in such a way that their transposition allows a degree of latitude appropriate to the abovementioned provisions.

67 — Similar thinking informed the critical views (cited by the Parliament) expressed by the network of experts on fundamental rights set up by the Commission, in the network's annual report for 2003 — see http://europa.eu.int/comm/justice_home/cfr_cdf/doc/report_eu_2003_en.pdf, p. 55.

87. The purpose of the final subparagraph of Article 4(1) of the Directive does not

preclude such an interpretation. While, as the 12th recital points out, an integration condition is intended to reflect the children's capacity for integration at early ages and help them to acquire education and language skills in school, this in no way prevents the integration condition from being met in special cases on the basis of other factors.

88. The 'condition for integration' is accordingly a concept which enables account to be taken also of exceptional cases where there is entitlement to family reunification, as a matter of human rights, in respect of children over the age of 12. National implementing measures are compatible with Community law only if they also provide for such a contingency.

89. On that interpretation, the final subparagraph of Article 4(1) of the Directive does comply with human-rights requirements for the protection of the family. This plea advanced by the Parliament must therefore fail.

Article 4(6) of the Directive

90. Article 4(6), by way of derogation, permits a Member State to request that applications concerning family reunification of minor children be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of the Directive.[68] If the application is submitted after the age of 15, Member States which decide to apply the derogation are to authorise the entry and residence of such children on grounds other than family reunification.

91. The Council maintains, contrary to the Parliament's view, that this provision, too, is capable of being interpreted in a manner consistent with fundamental rights. As in the case of the final subparagraph of Article 4(1), the purpose of Article 4(6) is, in its submission, to ensure that family reunification involving the admission of children should occur at as early a stage as possible, in order to promote the children's integration in the host State. The age-limit is based on school attendance — itself a factor promoting integration.

92. Moreover, the Council argues, children could also live with their respective families beyond the age of 15, since Member States which apply the derogation in question are required by the second sentence of Article 4(6) to authorise the entry and residence of such children on grounds other than family reunification. The Council considers that the provision is worded in such a way as to leave

68 — The Council has stated that such an age-limit is to be found only in Austrian law.

national authorities no latitude ('*marge de manoeuvre*') whatsoever when deciding on residence on other grounds. All 'other grounds' would have to be considered, so it is to be expected that most such applications would be approved.

93. The Parliament concedes that the 'other grounds' would also embrace humanitarian considerations. As the Commission correctly observes, these would include not only typical instances of refugees fleeing wars, including civil wars, but also claims to family reunification based on human rights. A right to residence may probably be claimed on such grounds in most Member States and perhaps even in all of them. However, such rights are not guaranteed by Community law. Conceivably, one or two Member States might have no such entitlement in their immigration law, with the result that no 'other ground' could be invoked to facilitate family reunification in respect of older children where this was required as a matter of human rights. Perhaps that is why the Council, unlike the Commission, avoids assertions that such a right exists under national law.

94. None the less, it is also possible to interpret Article 4(6) in conformity with human rights: the second sentence can be read as requiring Member States to make family reunification possible where it is required as a matter of human rights.

95. This interpretation of Article 4(6), like the interpretation of the final subparagraph of Article 4(1) which I suggest above, would help to create scope for the application of Article 5(5) and Article 17. [69]

96. Hence Article 4(6) of the Directive too is capable of being interpreted in conformity with human rights. This plea, too, must therefore fail.

Article 8 of the Directive

97. The first paragraph of Article 8 permits Member States to require a sponsor to have stayed lawfully in their territory for a period of two years before being joined by family members. The second paragraph even permits a three-year waiting period after submission of the application for family reuni-

69 — See above, point 86.

fication where the legislation of a Member State relating to family reunification in force on the date of adoption of the Directive takes into account its reception capacity.

98. The Council contends that waiting periods are a commonly used instrument of immigration policy. The Council is right that, in almost all instances of family reunification, a waiting period may be lawfully applied. However, the situations where entitlement to family reunification in the host State exists as a matter of human rights are normally exceptional cases arising from special circumstances — and those circumstances may be such that it would be unreasonable to require any further wait. [70] It must, therefore, be examined whether Article 8 of the Directive has sufficient regard to such situations.

99. The Parliament considers that that cannot be the case. The Commission, amid a wealth of detail, suggests ways in which the provision might be interpreted in conformity with the relevant human rights. It must be stated first of all that the rules on waiting periods — in contrast to the rules on age-limits which I have already considered — contain nothing to indicate that human-rights requirements in relation to family reunification are to be taken into account.

70 — See the judgment of the Austrian Verfassungsgerichtshof of 8 October 2003, cited in footnote 64, at III.2(c).

100. However, the word 'may' used in the first and second paragraphs of Article 8(2) is, in law, so imprecise as to make it possible to contemplate an interpretation of the options allowed by the Directive which is in conformity with human rights.

101. Is it then sufficient for Community law simply to allow national legislatures to take the initiative in order to make possible the examination of individual cases which human rights require — or is the relevant Community act required to contain in its wording at least some indication of such an examination? The answer depends on one's view as to how responsibility for the observance of human rights (and for legal clarity) falls to be apportioned between the Community legislature and national parliaments.

102. If the words 'may require' and 'may provide for' were interpreted in the light of the second paragraph of Article 63 EC (which is one of the enabling provisions on which the Directive is based and contains specific mention of international obligations), of the second recital in the preamble to the Directive (which states that the Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the ECHR and in the Charter of Fundamental Rights) and of the general principles of Community law,

they would mean that Member States may only impose waiting periods if they take account of cases of hardship as required by Article 8 of the ECHR.

103. While it is possible to understand 'may' as I have adumbrated above, this is not the most obvious interpretation. First, in laying down exceptions to the right to family reunification arising under secondary legislation, Article 8 of the Directive delimits the latitude enjoyed by national legislatures in relation to the Community legislature. Hence the meaning of the word 'may' is that Member States are empowered by the Community legislature to provide for waiting periods of up to two or even a further three years. If a Member State were to transpose that provision, as it were, one-dimensionally, with disregard for its human-rights obligations, national rules on waiting periods would also be enacted which failed to allow for the possibility, required by the case-law of the European Court of Human Rights, of having regard to hardship situations — and the national authorities would have to apply them. Nor would there be any scope for applying Article 5(5) and Article 17 the Directive. In cases of hardship, the infringement of fundamental and human rights could be prevented only through the courts, possibly following a reference to the Court of Justice. Hence any attempt to interpret Article 8 of the Directive in a manner consistent with human rights will at best only displace the problems.

104. The reference to human rights in the second recital in the preamble to the Directive even fosters misconceived and one-dimensional transposition of this kind. Instead of reminding Member States of their responsibilities in regard to fundamental and human rights, the recital asserts that the Directive, as drafted, is compatible with them. If Member States rely on that assessment on the part of the Community legislature, they have no reason to consider any issues of fundamental and human rights not addressed in terms in the Directive.

105. Thus Article 8 of the Directive, as drafted, is liable at least to be misunderstood. This ambiguity on account of the failure to take account of hardship situations increases the risk that human rights will be infringed. Should that occur, responsibility would lie not only with the national legislature which implemented the Directive, but also with the Community legislature. Since human rights must be protected effectively, and the law has to be clear, Article 8 of the Directive is contrary to Community law.

3. Equal treatment

106. The Parliament asserts that the distinctions between younger and older children, and between children and spouses, and also the differences permitted by the Directive when it is transposed in the various Member States, all constitute breaches of the principle of equal treatment.

107. The Court has developed a general principle of equality in Community law, independently from Article 14 of the ECHR on which the Parliament relies. It is referred to in the case-law variously as the principle of equality, the principle of equal treatment, and the prohibition of discrimination. It provides that similar situations must not be treated differently, nor different situations treated alike, unless such treatment is objectively justified. [71] Moreover, the differentiation must be proportionate to the objective pursued. [72]

108. Article 21 of the Charter of Fundamental Rights of the European Union expressly prohibits certain forms of discrimination, including that based on age. While the Charter still does not produce binding legal effects comparable to primary law, [73] it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order. [74] For the present Directive there is a further relevant consideration: according to the second recital, the Directive is intended to be compatible with the fundamental rights recognised inter alia in the Charter. Moreover, the fifth recital expressly adjures Member States to give effect to the provisions of the Directive without discrimination on the basis of age. It follows that particular importance should be attached to the prohibition of discrimination based on age when applying the principle of equality to the Directive.

109. Not every distinction according to age constitutes prohibited age-based discrimin-

71 — Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 25; Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 50; Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39; Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 79; Case C-137/00 *Milk Marque and National Farmers' Union* [2003] ECR I-7975, paragraph 126; Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 31; and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 70).

72 — Case T-8/93 *Huet* [1994] ECR II-103, paragraph 45; Case T-14/03 *Di Marzio* v *Commission* [2004] ECR-SC I-A-43 and II-167, paragraph 83; and Case T-256/01 *Pyres* [2005] ECR-SC I-A-23 and II-99, paragraph 61. See also, on 'positive discrimination', Case C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, paragraph 55, and Case C-319/03 *Briheche* [2004] ECR I-8807, paragraph 31.

73 — This was emphasised by the Court of First Instance in Joined Cases T-219/02 and T-337/02 *Lutz Herrera* v *Commission* [2004] ECR-SC I-A-319 and II-1407, paragraph 88, and in *Pyres*, cited in footnote 72, paragraph 66; the Court was considering age-limits, but did not discuss how these were affected by the general principle of non-discrimination.

74 — See, to that effect, the Opinion of Advocate General Tizzano in Case C-173/99 *BECTU* [2001] ECR I-4881, point 28; the Opinion of Advocate General Léger in Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, points 82 and 83; the Opinion of Advocate General Mischo in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, point 126; the Opinion of Advocate General Poiares Maduro in Case C-181/03 P *Nardone* v *Commission* [2005] ECR I-199, point 51; also my own Opinions in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, footnote 83, and in Case C-186/04 *Housieaux* [2005] ECR I-3299, footnote 11.

ation, though. The emphasis on the need to protect children demonstrates that age may be an objective parameter serving to distinguish dissimilar situations requiring different treatment. Age-limits can thus be lawful. [75]

(a) Children over 12 years of age

110. The final paragraph of Article 4(1) of the Directive does not draw a general distinction between younger and older children; rather it allows a supplementary requirement — the 'integration condition' — to be applied to children over 12 years of age *if they arrive independently from the rest of the family*. The distinction is therefore not based solely on age, but on several parameters, including age, which apply cumulatively.

111. If a family wishes to be joined by an *individual* child over the age of 12, it is normally because they have freely opted for this. They are not compelled to expose their children to the application of the integration condition: a child could travel at a younger age, or together with a parent or another child.

112. The fact that children who are over the age of 12 and arrive alone are treated differently from other children can be justified objectively. The 12th recital in the preamble to the Directive explains that the purpose of the final subparagraph of Article 4(1) is to ensure that children join their family in the host State at as early an age as possible in order to enhance their chance of integration. The underlying purpose is the desire — a legitimate one for Member States — to integrate immigrants as fully as possible. The judgment that younger children are easier to integrate lies within the margin of appreciation of the Community legislature.

113. The distinction is, moreover, a proportionate one. The method selected represents an appropriate way of promoting the goal of integration, since it operates to the disadvantage of those families who allow their children to grow up in their country of origin and only seek to bring them to the host country at a late stage. There is no obvious more lenient alternative. Furthermore, the rule is not disproportionate to its objectives — especially if one bears in mind the opportunities which families have of bringing children to join them without the integration condition being applied.

75 — Indeed, the absence of an age-limit (admittedly where the Staff Regulations contemplated that such a limit would normally apply) has led the Court to annul a competition (Case 78/71 *Costacurta* v *Commission* [1972] ECR 163, paragraph 9 et seq.).

114. If, exceptionally, there were special circumstances which militated against the children arriving either earlier, or together with other relatives, such circumstances would fall to be considered when interpreting, shaping and applying the integration condition — otherwise dissimilar situations would be subject to like requirements without any objective justification.

115. On that interpretation, therefore, the final subparagraph of Article 4(1) of the Directive is compatible with the principle of equal treatment.

(b) Children of 15 and above

116. The age-limit in Article 4(6) of the Directive is different in nature from that in the final subparagraph of Article 4(1). It covers *any* arrival of children who have reached the age of 15 without any application for family reunification having been made in respect of them. This rule therefore also affects those families who have not been able to make a conscious decision to have the child join them before the age-limit is reached — families, for example, for whom reunification has become a possibility only at that time.

117. I am less convinced by the Commission's view that here, too, families may avert the threatened disadvantage by applying for reunification in good time. The Directive imposes a considerable range of requirements which an application for family reunification must satisfy. Article 3(1) requires a sponsor to hold a residence permit issued for a period of validity of at least one year and to have reasonable prospects of obtaining the right of permanent residence. Also, Article 7 stipulates that he must have adequate accommodation, sickness insurance for the members of the family, and stable and sufficient resources. Applications which fail to satisfy these conditions may be rejected. Generally, therefore, the subsequent arrival of the children in question is not something which may be freely decided by the families concerned. The rule ultimately constitutes an age-limit which is not qualified by any additional criteria.

118. However, in such cases too the host State's concern for integration can justify the unequal treatment resulting from the age-limit. It is indeed a legitimate assumption on the part of the legislature that integration will very probably be appreciably harder in the case of the adolescents concerned than it is for younger children.

119. A further relevant consideration is that, although the adolescents in question would be living as minors with their parents for only a short time after the family reunification, that period might none the less enable them to acquire a right to residence, without having to meet the requirements imposed on adults. Even children who entered the

country immediately after applying to do so would (assuming 18 to be the age of majority) remain minors only for a further three years. However, the Directive allows a nine-month period for application processing, which can even be extended in exceptional cases. Children coming to be reunited with their family may therefore be almost of age when they enter the country. It is thus not impossible that children, after a minimal period of residence as family members, might acquire their own residence permit — either because the Member State in question does not terminate residence on the achievement of majority as it might pursuant to Article 16(1)(a) of the Directive, or because the case-law of the European Court of Human Rights on the separation of families living together in the host State precludes the termination of residence entitlement. [76]

120. Viewed thus, the age-limit is to be seen as a suitable and necessary distinguishing criterion. Moreover, children who have reached the age of 15 are generally less dependent than younger children on their parents; the criterion is therefore without doubt appropriate to its objectives.

121. However, where the particular circumstances of an individual case are such that family reunification is required, entitlement thereto will arise as a matter of human rights. [77]

122. Thus the distinction contained in Article 4(6), when interpreted in conformity with human rights, is objectively justified.

(c) The distinction between spouse and children

123. The Parliament also objects to the fact that while children over 12 have to meet an integration condition, a spouse does not. A child who is still a minor is normally more in need of protection than an adult spouse. The Council emphasises in response that the

76 — The European Court of Human Rights has consistently held that the removal of a person from a country where close members of his family are living may amount to an infringement of the right of respect for family life. See *Radovanovic* v. *Austria*, no. 42703/98, §30, 16 December 2004; *Boultif* v. *Switzerland*, no 54273/00, § 39, ECHR 2001-IX; and *Moustaquim* v. *Belgium*, judgment of 18 February 1991, Series A No 193, p. 18, § 36.

77 — See above, point 94.

purpose of the rule is to take full advantage of the fact that younger children have better integration prospects.

124. It was, however, permissible for the Community legislature to proceed on the premiss that the respective situations of spouses and children are not comparable. For example, marriage is predicated on lifelong home-sharing. Accordingly, the distinction between spouses and children does not infringe the principle of equality.

(d) Objections to the options as elaborated

125. Finally, the Parliament contends that the options available to the Member States infringe the principle of equality. As a result of the provisions governing the options, and the various deadlines relating to their use, the way in which comparable situations are treated may differ from Member State to Member State.

126. However, the Parliament forgets that the Community is not under a duty to effect a complete harmonisation of the law on family reunification. On the contrary, it is permissible for the Community to leave Member States some latitude for their actions. The second paragraph of Article 63 EC even contains a requirement in this regard as a matter of legislative policy. [78] Where Member States are given such freedom to fashion their own rules, these will necessarily differ. This cannot constitute an infringement of the principle of equality. [79]

C — Summary

127. In summary, the application is inadmissible, since the provisions to which the Parliament objects cannot be challenged in isolation. Were the Court none the less to consider the merits, it should annul Article 4(6) of the Directive because of a failure to consult the Parliament, and Article 8 because it infringes the human right to the protection of family life.

78 — See above, point 41.

79 — See, to that effect, Case C-127/00 *Hässle* [2003] ECR I-14781, paragraph 35 et seq.

V — Costs

128. Article 69(2) of the Rules of Procedure states that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the application must be dismissed as inadmissible, the Parliament must be ordered to bear its own costs and those of the Council.

129. Pursuant to Article 69(4) of the Rules of Procedure, the Commission and the Federal Republic of Germany must bear the costs occasioned by their intervention.

VI — Conclusion

130. I therefore propose that the Court should:

(1) dismiss the application;

(2) order the European Parliament to bear the costs incurred by the Council of the European Union and its own costs;

(3) order the Federal Republic of Germany and the Commission of the European Communities to bear their own costs.