

Case C-459/99

Mouvement contre le racisme, l'antisémitisme et la xénophobie
ASBL (MRAX)

v

État belge

(Reference for a preliminary ruling
from the Conseil d'État (Belgium))

(Third country nationals who are the spouse of a Member State national — Requirement for a visa — Right of entry for spouses not in possession of identity documents or a visa — Right of residence for spouses who have entered unlawfully — Right of residence for spouses who have entered lawfully but whose visa has expired when they apply for a residence permit — Directives 64/221/EEC, 68/360/EEC and 73/148/EEC and Regulation (EC) No 2317/95)

Opinion of Advocate General Stix-Hackl delivered on 13 September 2001 I-6595
Judgment of the Court, 25 July 2002 I-6630

Summary of the Judgment

1. *Freedom of movement for persons — Right of entry and residence for nationals of Member States — Right of entry for members of their family — Spouse who is a third country national and is not in possession of identity documents or a visa but able to prove his identity and the conjugal ties — No grounds of public policy, public security or public health — Sending back at the border — Not permissible*
(Council Regulation No 2317/95; Council Directives 68/360, Arts 3 and 10, and 73/148, Arts 3 and 8)
 2. *Freedom of movement for persons — Right of entry and residence for nationals of Member States — Right of residence for members of their family — Spouse who is a third country national able to prove his identity and the conjugal ties who has entered the territory of a Member State unlawfully — Refusal of a residence permit and issue of an expulsion order based on that ground alone — Not permissible — Adoption of measures of public policy or public security referred to in Directive 64/221 — Not permissible*
(Council Directives 64/221, Art. 3, 68/360, Arts 4 and 10, and 73/148, Arts 4, 6 and 8)
 3. *Freedom of movement for persons — Right of entry and residence for nationals of Member States — Right of entry and residence for members of their family — Spouse who is a third country national and has entered the territory of a Member State lawfully — Refusal of a residence permit and issue of an expulsion order on the sole ground that a visa has expired — Not permissible*
(Council Directives 64/221, Art. 3(3), 68/360, Arts 3 and 4(3), and 73/148, Arts 3 and 6)
 4. *Freedom of movement for persons — Derogations — Decisions concerning the control of aliens — Decision refusing to issue a first residence permit — Decision ordering expulsion before any residence permit has been issued — Examination and opinion procedure before the competent authority — Scope — Decisions adopted against a foreign national married to a national of a Member State and not in possession of identity documents or a visa — Included*
(Council Directive 64/221, Arts 1(2) and 9)
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1. On a proper construction of Article 3 of Directive 68/360, Article 3 of Directive 73/148 and Regulation No 2317/95, read in the light of the principle of proportionality, a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health

within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148.

In view of the importance which the Community legislature has attached to the protection of family life, it is in any event disproportionate and, therefore, prohibited to send back a third country national in such a case.

(see paras 61-62,
operative part 1)

tions are proportionate, refusal of a residence permit, and an expulsion order, based solely on the failure of the person concerned to comply with legal formalities concerning the control of aliens would impair the very substance of the right of residence and would be manifestly disproportionate to the gravity of the infringement. Nor can such failure in itself give rise to application of the measures of public policy and public security referred to in Article 3 of Directive 64/221.

(see paras 77-80,
operative part 2)

2. On a proper construction of Article 4 of Directive 68/360 and Article 6 of Directive 73/148, a Member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully.
3. On a proper construction of Articles 3 and 4(3) of Directive 68/360, Articles 3 and 6 of Directive 73/148 and Article 3(3) of Directive 64/221, a Member State may neither refuse to issue a residence permit to a third country national who is married to a national of a Member State and entered the territory of that Member State lawfully, nor issue an order expelling him from the territory, on the sole ground that his visa expired before he applied for a residence permit.

While Community law does not prevent the Member States from prescribing, for breaches of national provisions concerning the control of aliens, any appropriate sanctions necessary in order to ensure the efficacy of those provisions provided that those sanc-

While Article 4(3) of Directive 68/360 and Article 6 of Directive 73/148 authorise the Member States to demand, for

the purpose of issue of a residence permit, production of the document with which the person concerned entered their territory, they do not lay down that that document must still be valid. Furthermore, an order of expulsion from national territory on the sole ground that a visa has expired would constitute a sanction manifestly disproportionate to the gravity of the breach of the national provisions concerning the control of aliens.

(see paras 89-91,
operative part 3)

4. On a proper construction of Articles 1(2) and 9(2) of Directive 64/221, a foreign national married to a national of a Member State has the right to refer to the competent authority envisaged in Article 9(1) a decision refusing to issue a first residence permit or ordering his expulsion before the issue of the permit, including where he is not in possession of an identity document or where, requiring a visa, he has entered the territory of a

Member State without one or has remained there after its expiry.

The provisions of Article 9 of the directive call for a broad interpretation as regards the persons to whom they apply, since the requirement for judicial review of any decision of a national authority reflects a general principle stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the European Convention for Human Rights.

Moreover, the minimum procedural guarantees laid down in Article 9 of the directive would be rendered largely ineffective if entitlement to them were excluded in the absence of an identity document or visa or where one of those documents has expired.

(see paras 101, 103-104,
operative part 4)