the right of a migrant worker's spouse to install herself with him, the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date.

# OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 7 November 1984 [1]

*Mr President,*
*Members of the Court,*

1. The Bundesverwaltungsgericht [Federal Administrative Court of the Federal Republic of Germany] has referred two questions to the Court for a preliminary ruling on the interpretation of Articles 10 and 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [2].

2. The questions arise in connection with the following facts:

Mrs Aissatou Diatta, a Senegalese national, is married to a French national who resides and works lawfully in West Berlin. Shortly after her marriage she joined her husband and moved into the appartment which he occupies. She found employment as a domestic help and on 13 March 1978 obtained a residence permit which was valid until 16 July 1980. In August 1978 she separated from her husband, whom she intends to divorce, and moved into accommodation which she rented herself. On the expiry of her residence permit she requested its extension. That request was refused on the ground that the couple did not live together. It is that refusal which is the subject of the proceedings before the Bundesverwaltungsgericht.

3. By an order of 18 October 1983, in pursuance of Article 177 of the EEC Treaty, the Bundesverwaltungsgericht stayed the proceedings in the action brought by Mrs Diatta and requested the Court to give a preliminary ruling on the following two questions:

'(1) Is Article 10 (1) of Regulation (EEC) No 1612/68 to be interpreted as meaning that the spouse of a worker who is a national of a Member State and who is employed in the territory of another Member State may be said to live "with the worker" if she has in fact separated from her spouse permanently but none the less lives in her own accommodation in the same place as the worker?

(2) Does Article 11 of Regulation (EEC) No 1612/68 establish for a spouse who, though not a national of a Member State, is married to a national of a Member State who works and lives in the territory of another Member State, a right of residence which does not depend on the conditions set out in Article 10 of that regulation, if the spouse wishes to pursue an activity as an employed person in the territory of that Member State?'

1 — Translated from the French.
2 — Official Journal, English Special Edition 1968 (II), p. 475.

4. The two articles in question are worded as follows:

*Article 10*

'(1) The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 or are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse;

(2) Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

(3) For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however, must not give rise to discrimination between national workers and workers from other Member States.'

*Article 11*

'Where a national of a Member State is pursuing an activity as an employed or self-employed person in the territory of another Member State, his spouse and those of the children who are under the age of 21 years or dependent on him shall have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State.'

5. The plaintiff in the main proceedings claims that those provisions confer on her an independent right to a residence permit.

Mrs Diatta takes the view that Article 10 does not impose an express obligation to cohabit. It merely requires a worker who is a national of a Member State to make available to his family housing 'considered as normal . . . in the region where he is employed . . .'. That requirement is based on considerations of public security and public policy; it owes nothing to the view that married couples should live together. The continuation of normal married life cannot be the decisive criterion. Indeed, under German law a married couple may separate legally and continue to live under the same roof. Moreover, a worker who is a national of a Member State cannot be allowed to cause the expulsion of a spouse in whom he has lost interest merely by refusing to continue to share his accommodation with her. Finally, whilst the marriage continues to exist, it is possible that the spouses may be reconciled. When a spouse whose residence permit has been refused is compelled to leave, that possibility is removed once and for all. Article 10 is based not on cohabitation but on the preservation of marital and family ties.

Article 11 allows the spouse of a national of a Member State to take up any activity as an employed or self-employed person in the territory of the host State. Under that provision the spouse therefore has a right of residence which is more extensive than that provided for under Article 10 and which is incompatible with the requirement of a shared dwelling. It follows that Article 11

must be interpreted and applied without reference to Article 10.

6. The Land Berlin, the defendant in the main proceedings, the Governments of the Federal Republic of Germany and the Kingdom of the Netherlands, and the United Kingdom, which have intervened in these proceedings, consider that the two questions submitted by the Bundesverwaltungsgericht should be answered in the negative.

I do not intend to repeat in detail their observations, which have been comprehensively summarized in the Report for the Hearing. However, it should be noted that, in the view of the Land Berlin and the intervening Member States, in the first place, it is clear from both the spirit and the letter of Article 10 that that provision is based on the assumption that the persons coming within its scope live with a worker who is a national of a Member State. The provision is intended to facilitate the implementation of the principle of free movement laid down in Article 48 of the Treaty by allowing workers who are nationals of a Member State and who move within the Community to live with their family. Even a broad interpretation of Article 10 must take into account the spirit and the purpose of that provision. It cannot therefore cover the case of spouses who are separated on a permanent basis.

Secondly, Article 11 merely confers on all the relevant persons the right of access to the labour market and not an independent right of residence, distinct from that provided for in Article 10. Article 11 supplements Article 10 with regard to the persons covered by Article 10, again with a view to removing the obstacles to the mobility of Community workers. Moreover, that interpretation is supported by reference to the history of Articles 10 and 11 of Regulation No 1612/68 inasmuch as they are based on Articles 17 and 18 of Regulation No 38/64 [3] and Article 18 refers expressly to Article 17. The complementary relationship between Articles 10 and 11 makes sense only if Article 11 is interpreted subject to the conditions laid down in Article 10.

7. From the outset the Commission adopted a very liberal position. In the course of the proceedings it moved towards an even broader interpretation of the provisions in question.

In its written observations the Commission stated that it was 'clear that the rights to free movement of the members of migrant workers' families are not rights which pertain to those members but *consequential rights*'. At the same time the Commission noted that 'the severance of special family links with the migrant worker also deprives the members of the family of the right to free movement established under Community law'. It explained its view as follows:

'If a migrant worker divorces, his spouse loses her status as a member of the family of a migrant worker and may no longer rely on the rights provided for in favour of those persons'.

The Commission points out that the Diattas are in fact still married and that there is nothing to suggest that under Article 10, in addition to being married, the spouses must live together in a common dwelling. The Community legislature could not have

3 — Regulation No 38/64 of the Council of 25 March 1964 on freedom of movement for workers within the Community (Journal Officiel 1964 No 62, p. 965).

intended to make the exercise of the right to free movement subject to a requirement which is derived from family law and which varies according to the Member States.

It adds that such a restrictive interpretation of Article 10 conflicts with Article 11 since a migrant worker's spouse cannot exercise her right to seek employment throughout the territory unless she also has the possibility of living in a place other than that where the worker resides.

In order that his family may qualify for the right of residence under Article 10, the worker must have available normal accommodation. There is no provision which states that in addition that accommodation must be shared. The existence of that accommodation is a condition which represents 'a compromise between, on the one hand, the authorities' concern . . . and, on the other hand the fundamental right to freedom of movement.'

The Commission proposed at that stage of the procedure that the Court should reply as follows:

'(1) Article 10 (1) and (3) of Regulation No 1612/68 must be interpreted as meaning that the spouse of a migrant worker is entitled to reside in the Member State in which the migrant worker is employed only if she occupies normal housing within the meaning of Article 10 (3) of that regulation. On the other hand, it is not necessary for the migrant worker's spouse to live under the same roof as the worker.

(2) Article 11 of Regulation No 1612/68 establishes for spouses of nationals of Member States who work and live in the territory of another Member State the right to exercise an activity as an employed person throughout the territory of that Member State, subject to the sole condition that the spouses have the right of residence under Article 10 of Regulation No 1612/68.'

At the sitting, the Commission went further. In its view the family relationship and the existence of accommodation, though not necessarily shared, are clearly the two conditions laid down for entry, but the severance of the family relationship — in this instance the marital relationship — should not have the effect of automatically withdrawing 'the protection of Community law' from the members of the family who benefited from it.

The reply proposed by the Commission, in its final version, is therefore as follows:

Article 10 must be interpreted as meaning that the spouse of a migrant worker may reside in the Member State where the worker is employed only if adequate accommodation is made available to her.

The spouse's right of residence and the right to work which she has under Article 11 is not extinguished merely because the spouse separates indefinitely from the migrant worker and takes separate accommodation.

8. In reply to a question posed by a Member of the Court, the Commission's representative candidly admitted that that view was, or at least, might appear somewhat bold.

Indeed it is so. When the Community legislature wishes to transform a right which is initially consequential into a personal right, it makes express provision to that effect. Thus, for example, Article 3 of Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 [4] provides that in certain circumstances the members of a worker's family, as defined in Article 10 of Regulation No 1612/68, are entitled to remain permanently in the Member State in which they resided with the migrant worker. That is an exceptional provision, which as such may not be implied.

Similarly, the view that Article 11 is autonomous cannot be accepted. In order to take up an activity as an employed person in the territory of a Member State, the person in question must be admitted for the purpose of residing there. The conditions for the right of residence are set out in Article 10.

Articles 10 and 11 essentially reiterate the provisions of Articles 17 and 18 of Regulation No 38/64/EEC of the Council of 25 March 1964 which was repealed by Article 48 of Regulation No 1612/68. Article 18 provided expressly that:

'The spouse and the children of a worker who is a national of a Member State lawfully employed in the territory of another Member State, *who have been admitted to that Member State in pursuance of Article 17 (1)*, have the right, irrespective of their nationality, to work as employed persons in the territory of the other Member State'.

The words which I have stressed do not appear in Article 11. That omission cannot have the effect of creating, for a national of a non-member country, a right of residence independent of that expressly provided for in Article 10.

9. The same concern to provide a strict interpretation leads me to give those provisions their full effect and thus to avoid making their beneficiaries subject to conditions which are not expressly laid down.

Let us suppose that Mrs Diatta has a very good relationship with her husband and that the family's economic requirements lead her to take up employment in another place in the Federal Republic of Germany or, again, in the same town employment which requires her to reside at her place of employment. Would it be possible, without depriving her of the benefit of Article 11, to make the extension or renewal of her residence permit subject to the requirement that she must continue to live with her husband?

That example shows that the expression 'install themselves with a worker' used in Article 10 cannot be interpreted restrictively as 'live under the same roof as the worker'. Moreover, the requirement under Article 10 (3) that a worker must have 'available for his family housing . . .', is merely a precaution taken prior to allowing the worker's family to enter the host State; it does not necessarily imply a common dwelling.

When the Bundesverwaltungsgericht referred the matter to the Court of Justice, Mrs Diatta was indeed separated from her husband. However, while the marital relationship has not been dissolved by a judicial decision which has become final the person concerned must, 'subject to any limitations justified on grounds of public

4 — Official Journal, English Special Edition 1970 (II), p. 402.

policy, public security or public health' [5], be able to rely on Article 10 of Regulation No 1612/68 for the purpose of residing in the Member State in which her husband works and Article 11 for the purpose of taking up an activity as an employed person herself.

10. I therefore propose that the Court should rule as follows:

(1) Article 10 (1) and (3) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 must be interpreted as meaning that the spouse of a worker who is a national of a Member State and who is employed in the territory of another Member State has a right to reside in that Member State only where the worker has available normal housing within the meaning of Article 10 (3), although it is not necessary for her to live under the same roof as her spouse.

(2) Article 11 of the same regulation grants to the spouse of a worker who is a national of a Member State and who pursues an activity as an employed or self-employed person in the territory of another Member State, irrespective of her nationality, the right to pursue an activity as an employed person throughout the territory of that Member State subject to the sole condition that the spouse has a right of residence under Article 10 of that regulation.

5 — The first recital in the preamble to Regulation No 1612/68.