OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 27 February 2003 [1]

I — Introduction

1. In this case the Immigration Appeal Tribunal has raised questions concerning freedom of movement for persons. More specifically, the referring tribunal's questions concern the rights which may be conferred by Community law on a Community national who is married to a national of a non-Member State and leaves her country of origin to settle with her spouse for a limited period in another Member State and work there. On return to the Member State of origin can that Community national claim entitlement to the right conferred by Community law on migrant workers, namely the right enabling her spouse to settle with her in the Member State of origin?

2. This case originates in the juxtaposition of two different areas of competence. The first concerns immigration. As Community law currently stands, immigration legislation is a matter for the Member States. Community law allows the Member States the freedom to shape their legislation as they see fit. As a general rule the Member States admit immigrants only after an assessment of the individual case. In that connection they are entitled to apply strict criteria and also do so. None the less, Article 63 EC affords the Community legislature the possibility of determining considerable parts of immigration legislation at Community level, though it has made only very limited use of this possibility.

3. In practice Member States' competence is primarily of significance in relation to the treatment of nationals of non-Member countries for Member State nationals are to a large extent exempt from national immigration rules owing to the right conferred on them by Community law to remain in a Member State of which they are not nationals. That brings me to the second area of competence, that of freedom of movement for persons within the European Union. In this area the EC Treaty directly confers rights on nationals of the Member States. As a result of secondary Community legislation and the case-law of the Court, their rights to move and to reside have been almost totally harmonised. Thus, that competence is exercised at the level of the European Union. As I shall explain in greater detail further on in my

1 — Original language: Dutch.

Opinion, the Court interprets extensively the rights of citizens of the European Union in the area of freedom of movement for persons. The right to reside in another Member State is regarded as a fundamental right and must therefore be restricted as little as possible. Thus, upon return to one's own Member State certain rights under Community law continue to be applicable.

4. Alongside the nationals of the Member States who settle in another Member State, the family members of those nationals of the Member States also enjoy the right to remain even if they themselves are nationals of a non-Member country. For under Community law a national of a Member State enjoys not only an individual right to remain but also the right to be accompanied by the spouse (and other family members). Secondary Community law conceives the right of accompaniment of the spouse in fact as a right pertaining to that spouse. As a result the spouse of a migrant national of the Union is also to a large extent exempt from the entry requirements under national immigration law. Even if the migrant national returns to his own country, it appears from the judgment in *Singh* [2] that the spouse from a non-Member State may continue to enjoy freedom of movement for persons within the European Union. Under that judgment the national of a Member State who has been employed in another Member State retains the right on his return to be accompanied by a spouse, irrespective of that person's nationality.

5. Such is the background to the present case. Mr Akrich, the applicant in the main proceedings, is the national of a non-Member State and his spouse is a United Kingdom national. In view of his past Mr Akrich was refused entry to the United Kingdom on the basis of national competence in immigration matters. Since Community law makes the obtaining by Mr Akrich of leave to remain subject to less stringent requirements than national United Kingdom legislation, the persons concerned are consequently relying on Community law. What is more, they are not only relying, as is apparent from the facts of the main proceedings, on Community law but are also remaining for a certain period in Ireland in order to ensure that Community law is applicable to them and not United Kingdom immigration law.

6. I use these facts from the main proceedings in order to illustrate the following point. In itself it is logical from the point of view of freedom of movement for persons for the spouse of the migrant citizen of the Union to be exempt from national competence in matters of immigration. His claim under Community law is primarily intended to remove obstacles to the exercise of the right in favour of the EU citizen himself to reside in another Member State.

2 — Case C-370/90 *Singh* [1992] ECR I-4265.

It cannot be the case that the spouse of a national of a Member State is not allowed to move with the national seeking to avail himself of a Treaty freedom and to settle in another Member State.

7. However, this logic applies primarily to non-Member country spouses who have already been admitted to the territory of a Member State and are thus legally within the territory of the European Union. It is less self-evident also to grant a right of residence under Community law to spouses from non-Member States who have not yet been so admitted or who, as in the case of Mr Akrich, are within the territory of the European Union without leave to remain. The spouse's right to remain is quite a different matter from admission to the territory of the European Union. That is well illustrated by the present case in which entry to the European Union was earlier refused by a Member State on the basis of a competence pertaining to that Member State.

8. Thus, in the present case Community law is being invoked in a matter essentially involving national competence in the area of immigration. For the nub of this case is not that a Community worker, exercising a freedom conferred on her by the EC Treaty, wishes to be accompanied by her spouse but that a national of a non-Member State wishes to secure entry to a Member State, in this case the United Kingdom, on the basis of rights conferred on him by Community law as the spouse of an EC national.

9. In this case the persons concerned are availing themselves of the extensive possibilities afforded by EC law in regard to freedom of movement for persons within the European Union in the course of which they are relying, *inter alia*, on the above-mentioned judgment in *Singh*. They are thus seeking to circumvent the immigration legislation which the United Kingdom, on the basis of its national competence, is entitled to establish and to apply.

10. Thus I come to the dilemma to which the Court must find a solution. Must the Court's extensive case-law, as expressed, *inter alia*, in the *Singh* judgment, entail the consequence that national immigration legislation must always remain inapplicable where spouses from outside the European Union who are married to Community nationals, were not, at the time when they were entitled to derive rights from Community law, legally within the territory of the European Union? That dilemma is all the more pressing since in regard to freedom of movement for persons EC law does not verify the nature and duration of the marriage whilst that test is of considerable significance under national immigration law in order to prevent marriages of convenience.

II — Legal framework

A — *European law*

11. So far as relevant, Article 39 EC provides as follows:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

...

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action.'

12. In order to facilitate freedom of movement for workers Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community was enacted. [3] This regulation contains provisions governing the legal position of members of the worker's family. Thus, under Article 10(1) thereof:

'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 years or are dependants;

...'

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

13. I would also refer to an older but still applicable directive which contains further provisions concerning freedom of movement for workers. Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [4] lays down provisions concerning, *inter alia*, the entry and expulsion of persons on grounds of public policy and public security (and also public health). Refusal of entry and expulsion of persons are not always permitted. Article 3 of the Directive provides:

'1. Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.

2. Previous criminal convictions shall not in themselves constitute grounds for the taking of such measures....'

B — *United Kingdom legislation*

14. The immigration law of the United Kingdom is primarily set out in the Immigration Act 1971 and the Immigration Rules [5] (hereinafter the 'Immigration Rules'). A person who is not a British citizen may not in principle enter or stay in the United Kingdom unless he is granted permission to do so. Such permission is known as 'leave to enter' and 'leave to remain' respectively. The Immigration Rules further provide, *inter alia*, that nationals of countries mentioned in Annex I to the Immigration Rules, including Morocco, must obtain an entry clearance prior to arrival in the United Kingdom.

If a person is required to hold entry clearance at the time when he seeks entry to the United Kingdom but is not in possession of one, the Immigration Rules provide that that person is to be refused entry. None the less, in certain defined cases a person who holds an entry clearance may still be refused leave to enter.

15. Under Section 7(1) of the Immigration Act 1988 a person who has an 'enforceable Community right' does not require leave to enter or remain in the United Kingdom. Likewise the Immigration (European Economic Area) Order 1994 contains provisions for nationals of countries of the European Economic Area (other than United Kingdom nationals) who are exercising or seek to exercise Treaty rights in the United Kingdom.

4 — (OJ English Special Edition 1963-1964 (I), p. 117).

5 — House of Commons Paper 395; immigration rules enacted in 1994 by the United Kingdom Parliament.

16. A person seeking leave to enter the United Kingdom may do so on the basis of marriage with a person (including a national of the United Kingdom) who is present and settled in the United Kingdom. The marriage tie must satisfy the conditions laid down in Paragraph 281 of the Immigration Rules. Those rules provide, so far as relevant for present purposes:

'— the applicant is married to a person present and settled in the United Kingdom or who is on the same occasion being admitted for settlement; and

— the parties to the marriage have met; and

— each of the parties intends to live permanently with the other as his or her spouse and the marriage is subsisting; and

— there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and

— the parties will be able to maintain themselves and any dependants adequately without recourse to public funds.'

A person who satisfies these conditions may obtain an entry clearance. Upon grant of the entry clearance he may apply for leave to enter on arrival on the territory. Such persons may be excluded on grounds of public policy, public security and public health (Articles 3 and 15 of the Immigration Rules).

17. The Secretary of State may allow persons to be admitted to the United Kingdom or to remain, even if they do not qualify under the specific requirements of the Immigration Rules.

18. Under section 3(5) and section 3(6) of the Immigration Act 1971 a person who is not a British citizen may be liable to deportation, in particular, if he is convicted of an offence punishable by imprisonment and a criminal court has recommended his deportation. After signature of a deport-

ation order by the Secretary of State the person concerned must leave the United Kingdom, may not return to the United Kingdom and any leave to enter or leave to remain granted to him is invalidated.

19. On their face, deportation orders are of indefinite duration. However, under section 5(2) of the Immigration Act 1971 the Secretary of State may revoke a deportation order at any time. Under the Immigration Rules any application for revocation of a deportation order must be considered in light of all the circumstances, including the grounds on which the deportation order was made, any representations made in support of revocation, the interests of the community including the maintenance of an effective immigration control, and the interests of the applicant including family circumstances. The Immigration Rules further provide that a deportation order will not normally be revoked unless there has been a material change of circumstances or the passage of time so warrants. However, save in the most exceptional cases, a deportation order will not be revoked unless the person concerned has been absent from the United Kingdom for a period of at least three years since the order was made.

20. Under Paragraphs 320(2) and 321(3) of the Immigration Rules a person against whom a deportation order is in force and who seeks entry into the United Kingdom must be refused leave to enter and/or entry clearance, even if he might otherwise satisfy the requirements for entry. Such a person must secure revocation of his deportation order before he can be granted entry clearance or leave to enter the United Kingdom. That is not altered by the fact that such person may possess another capacity on the basis of which he may be eligible to be admitted to the United Kingdom.

21. United Kingdom legislation contains no specific provision for a person who wishes to enter the United Kingdom as the spouse of a United Kingdom national returning or wishing to return to the United Kingdom after exercising Treaty rights as a worker in another Member State. Following the judgment in *Singh* [6] such a person enjoys an 'enforceable Community right' within the meaning of section 7(1) of the Immigration Act 1988 and section 2 of the European Communities Act 1972. As such he is not required to obtain leave to enter the United Kingdom. However, if he possesses a nationality mentioned in Annex I to the Immigration Rules he must have prior entry clearance for entry into the United Kingdom. Entry clearance is normally granted but can be refused on grounds of public policy, public security or public health.

6 — Cited at footnote 2 above.

III — Facts and circumstances

22. In this part of my Opinion I will reproduce the facts which have been established in the main proceedings and have not been disputed before the Court.

23. Hacene Akrich is a Moroccan citizen born on 27 March 1967. His wife Halina Jazdzewska is a British citizen born on 9 June 1963.

24. On 14 June 1988 Mr Akrich was refused entry to the United Kingdom. On 12 February 1989 he entered the United Kingdom as a tourist on a one month's tourist visa. On 20 July 1989 his application for leave to remain as a student was refused and his subsequent appeal was dismissed on 10 August 1990.

25. On 22 June 1990 he was found guilty of attempted theft and possession of a stolen identity document. He was sentenced to a fine of GBP 250 or one day's prison for each offence, the sentences to run concurrently. The sentencing court recommended that he be deported. He did not appeal against his conviction. On 1 October 1990 a deportation order signed by the Secretary of State was issued. On 2 January 1991 Mr Akrich was deported to Algiers. In 1992 he was arrested in the United Kingdom and on 30 June 1992 was again deported to Algiers.

26. On 8 June 1996 he married Halina Jazdzewska. I will subsequently refer to her in this Opinion as Mrs Akrich. Shortly thereafter, on 29 August 1996, he applied for leave to remain as the spouse of a British citizen. On 14 April 1997 Mr Akrich also lodged a request for asylum.

27. On 1 June 1997 Mrs Akrich moved to Ireland with the intention that her husband should join her there. A short time later, at the end of August 1997, Mr Akrich in fact arrived in Dublin. At his own request he was removed there by the United Kingdom authorities.

28. Later Mrs Akrich gave the following reasons for staying in Ireland. She stated that her spouse was in a reception centre in the United Kingdom. If she was resident in Ireland he would not be deported to Algeria. In that case he was able to come to Ireland. At the same time she declared that it was not her intention to remain in

Ireland because she knew that a period of residence of six months in Ireland would give both of them the right under Community law to return to the United Kingdom. It is apparent from the interviews conducted with both Mrs Akrich and her husband that they regarded the *Singh* judgment as forming the basis for their entry into the United Kingdom.

29. During her stay in Ireland Mrs Akrich was employed by a bank. It appears from the order for reference that the employment relationship was of more than six months' duration.

30. It was likewise established and not contested that Mr Akrich was also employed during his stay in Ireland. As to circumstances on any return to the United Kingdom, the married couple could count on accommodation (made available by the brother of Mrs Akrich), Mrs Akrich had an actual prospect of employment (which was offered to her in the United Kingdom as from August 1998) and the couple could show that they had more than IEP 4 000 in cash.

IV — Procedure

31. On 23 January 1998 Mr Akrich sought revocation of the still current deportation order of 1990 and on 12 February 1998 he applied at the British Embassy in Dublin for entry clearance in order to enter the United Kingdom as the spouse of a person settled in that country.

32. On 21 September 1998 the Secretary of State refused to revoke the deportation order. He also instructed the Entry Clearance Officer to refuse the entry clearance applied for. On 29 September 1998 the Entry Clearance Officer refused entry clearance in accordance with the Secretary of State's instruction. The Secretary of State took the view that the move to Ireland by Mr and Mrs Akrich was no more than a temporary absence deliberately designed to secure for Mr Akrich a right of residence on his return to the United Kingdom and thus to circumvent United Kingdom legislation. Accordingly, Mrs Akrich could not be regarded as a worker who had been exercising Treaty rights in another Member State.

33. On 20 October 1998 Mr Akrich appealed against those decisions to an Adjudicator. On 2 November 1999 the Adjudicator found as a fact that there had been an effective exercise by Mrs Akrich of Community rights which had not been tainted by the intentions of Mr Akrich and his wife. He found as a matter of law

that they had therefore not relied on Community law to evade United Kingdom legislation. He also found that Mr Akrich did not constitute such a genuine and sufficiently serious threat to public policy as to justify continuation of the deportation order.

34. On 16 November 1999 the Secretary of State sought leave to appeal to the Immigration Appeal Tribunal from the Adjudicator's determination. On 23 November 1999 the Immigration Appeal Tribunal granted the leave sought. At a hearing on 12 April 2000 the Tribunal indicated to the parties that it was minded to refer certain questions to the Court of Justice for a preliminary ruling under Article 234 EC. The Tribunal requested the parties to submit observations in that connection.

35. Subsequently, by an order dated 3 October 2000 in the case of Secretary of State for the Home Department and Hacene Akrich, which was received at the Court Registry on 7 March 2001, the Immigration Appeal Tribunal (United Kingdom) referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

'Where a national of a Member State is married to a third country national who does not qualify under national legislation to enter or reside in that Member State, and moves to another Member State with the non-national spouse, intending to exercise Community law rights by working there for only a limited period of time in order thereafter to claim the benefit of Community law rights when returning to the Member State of nationality together with the non-national spouse:

(1) is the Member State of nationality entitled to regard the intention of the couple, when moving to the other Member State, to claim the benefit of Community law rights when returning to the Member State of nationality, notwithstanding the non-national spouse's lack of qualification under national legislation, as a reliance on Community law in order to evade the application of national legislation; and

(2) if so, is the Member State of nationality entitled to refuse:

(a) to revoke any preliminary obstacle to the entry of the non-national spouse into that Member State (on the facts of this case an outstanding deportation order); and

(b) to accord the non-national spouse a right of entry into its territory?'

36. In these proceedings written observations were submitted to the Court by the applicant in the main proceedings, the United Kingdom and Greek Governments and by the Commission. The oral hearing took place on 5 November 2002.

V — Context of this case

A — *Preliminary comment*

37. As I already stated in the introductory part to this Opinion, this case originates in the conjunction, on the one hand, of immigration legislation concerning primarily the entry into the Member States of persons from non-Member States and, on the other, freedom of movement for persons within the European Union itself which is secured at the level of the European Union. In this section of my Opinion I shall further elaborate on the features of both areas of competence after which I shall provide a summary. The subsequent section of my Opinion provides an analysis of the Court's case-law in regard to freedom of movement for persons. Those two sections together delimit the area within which the dilemma outlined in the introduction must be resolved.

B — *Migration law*

1. Competence

38. As Community law currently stands, immigration law comes, as I have said, almost completely within the competence of the Member States. It is a very essential competence which must be capable of being exercised effectively. None the less, Article 63(3) provides for the enactment of specific EC measures in the field of immigration but that provision has been acted upon only to a very limited extent in Community legislation. [7] In the near future further harmonisation is provided for. [8] At various meetings of the European Council the need for a Community immigration

7 — Article 63(3) EC constitutes, inter alia, the legal basis of Council Regulation No 1091/2001 of 28 May 2001 on freedom of movement with a long-stay visa (OJ 2001 L 150, p. 4) 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).

8 — Amended proposal for a Council Directive on the right to family reunification (OJ 2002 C 203 E, p. 136) and proposal for a Council Directive on conditions of entry and residence of third country nationals (OJ 2002 C 332 E, p. 248).

policy has been underlined and the Commission has already outlined its possible features in a communication to the Council and the Parliament.[9] Full harmonisation will not occur. Article 63 provides for harmonisation only in certain areas, including '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 purpose of family reunion' (Article 63(3)(a) EC).

39. In the Commission's view harmonised rules are necessary because the pressure from immigration will persist and because a more open and transparent migration policy will benefit not only immigrants and the countries of origin but also the EU itself. However, in the Commission's view and in accordance with Article 63 EC, the management of migratory flows remains within the competence of national governments.

40. The manner in which the United Kingdom has used its competence has prompted the reference for a preliminary ruling in the present case. Yet what is at issue in this case? The United Kingdom on the basis of its own competence lays down requirements concerning entry by nationals from non-Member States in the context of a marriage to a United Kingdom national.[10] The marriage must have a 'serious' character. Entry may also be refused — I am disregarding the exceptions — if there is a current deportation order against that person.

41. In itself the United Kingdom may lay down such requirements provided of course that Article 8 ECHR, which protects family and private life, is observed. Exercise of that competence may conflict with Community law in regard to freedom of movement for persons only in a situation where the person concerned may rely on EC law.

2. Substantive aspects and trends

42. Article 63 EC is directed to nationals of non-Member States. The immigration legislation is in principle applicable to all foreigners but, in view of the many rights enjoyed by EU nationals under Community law, the target group of national legislation is in practice, at least in general terms, likewise restricted to nationals of non-Member States. I have already adverted to that matter. The key element of the Member State's immigration legislation is that an immigrant is cleared for entry only

9 — See, in particular, conclusions of the European Council of 15 and 16 October 1999 in Tampere and Commission Communication of 22 November 2000 to the Council and the European Parliament concerning a Community immigration policy (COM/2000/0757 fin.).

10 — See paragraph 16 hereof.

after a prior individual assessment of his case. The requirements laid down by the Member States in that regard are becoming ever more stringent. Marriage is now one of the few bases on which a national of a non-Member State may obtain entry to a Member State. The requirements laid down in connection with the marriage are also becoming more and more stringent. [11]

43. At the time when a national of a non-Member State applies for entry into a Member State a Member State may under its legislation make entry subject to certain criteria. A partner from outside the European Union is admitted only after a review of the nature and duration of the marriage. That review is to counter the phenomenon of marriages of convenience between EU nationals and nationals of non-Member States already staying in a Member State. Where the competent authorities of the Member States establish the existence of a marriage of convenience leave to settle or to remain in connection with the marriage of the national of the non-Member State may as a general rule be withdrawn, revoked or not extended. Those measures may be adopted irrespective of the existence of a risk to public order.

44. In certain Member States (Germany, Belgium, Spain, France, Portugal and the United Kingdom) there is a prior test. In those Member States the official of the registry of civil status can or must refuse to celebrate the marriage where there are serious indications that the couple seeking marriage do not intend to live together. Thereafter, there is in all the Member States provision for subsequent review. The competent immigration authorities are to investigate, where there are justified suspicions, whether the marriage is a sham. The Council Resolution of 4 December 1997 lays down a number of criteria on which the competent authorities may base themselves. [12]

45. In addition to review of the marriage the Member States further apply a number

11 — To a limited degree nationals of non-Member States may legally enter the EU for the purposes of study or as economically active persons or in the capacity of asylum seekers. Family reunification may also give a right of entry or a right to remain. However, for the purposes of this Opinion, I will deal only with marriage as a ground for entry and residence.

12 — Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience (OJ 1997 C 382, p. 1). So far as is relevant, Paragraph 2 of the resolution provides as follows: Factors which may provide grounds for believing that a marriage is one of convenience are in particular:
— the fact that matrimonial cohabitation is not maintained,
— the lack of an appropriate contribution to the responsibilities arising from the marriage,
— the spouses have never met before their marriage,
— the spouses are inconsistent about their respective personal details (name, address, nationality and job), about the circumstances of their first meeting, or about other important personal information concerning them,
— the spouses do not speak a language understood by both,
— a sum of money has been handed over in order for the marriage to be contracted (with the exception of money given in the form of a dowry in the case of nationals of countries where the provision of a dowry is common practice),
— the past history of one or both of the spouses contains evidence of previous marriages of convenience or residence anomalies.

of criteria. In that connection it makes no difference whether the persons concerned are married or unmarried. In most Member States interruption of residence in a Member State, [13] fraud together with a risk to public policy and security constitute grounds for withdrawing or refusing to extend leave to remain or for removing a person from the territory of a Member State. In certain Member States a measure removing a person from national territory may be ordered by way of penalty or as a penalty in addition to deprivation of liberty. If a national of a non-Member State has provided false or misleading information, has used false or forged documents or has otherwise engaged in fraud or had recourse to unlawful means in all Member States his leave to remain may be withdrawn or extension of leave refused. All the Member States make legislative provision for the removal or deportation of nationals of non-Member States where there is a risk to public policy or security. In Austria, Denmark and Germany deportation on those grounds is mandatory. Various countries also make provision allowing a deportation order to be issued on commission of a certain kind of offence (drugs offence, Denmark) or on imposition of a penalty of a certain degree of gravity (a sentence of imprisonment of more than one year, Finland).

46. In the case of a decision to remove a person from national territory, Member States must none the less take account of the specific circumstances surrounding the person concerned. That is connected with the fact that an exclusion order can have very serious consequences for the persons concerned, especially if the person concerned has very close ties with his family and other close persons. The limits are determined by reference to the ECHR and in particular Article 8 thereof. In the assessment of the refusal to issue or to extend leave to remain or removal from the territory the competent national authority must weigh the interests of the State against the interests of the person concerned and his dependants. A number of criteria have been laid down in the case-law of the European Court of Human Rights, such as: [14]

— The degree of social and cultural integration in the host country.

— Ties with relatives living in the host country.

— Ties with the host country, regard also being had to whether a national of a

13 — In 10 Member States interruption of the stay in the Member State concerned may constitute a ground for withdrawing or refusing to extend leave to remain. That criterion is not relevant to the present case.

14 — *Moestaquim* v. *Belgium*, judgment of 18 February 1991, Series A no. 193; *Nasri* v. *France*, judgment of 13 July 1995, Series A no. 320-B; *Boughanemi* v. *France*, judgment of 24 April 1996, *Reports of Judgments and Decisions* 1996-II; C v. *Belgium*, judgment of 7 August 1996, *Reports of Judgments and Decisions* 1996-III; *Bouchelkia* v. *France*, judgment of 29 January 1997, *Reports of Judgments and Decisions* 1997-I.

non-Member State emigrated to the host country in his youth.

— Duration of period of stay by the person concerned in the relevant host country.

— The health, age and family and economic situation of the person concerned.

— The extent to which the person concerned has ties with the country of origin.

— Whether there is a risk that the person concerned may be ill-treated if he returns to his country of origin.

47. As I have said, for nationals of non-Member States there are only limited opportunities for entering the territory of the European Union. Conversely, the grounds for removing a person from the territory of a Member State under the legislation of the Member States are at this moment extensive. Moreover, the national laws of the various Member States are steadily becoming more restrictive and are swift to align themselves with one another. After one Member State has tightened its immigration laws, the surrounding Member States frequently follow suit a short time later. The requirements to which the Member States make entry of nationals of non-Member States subject are tightened in line with the increasing difficulties which they experience in controlling migratory flows.

48. I would also refer to proposals for a series of new directives concerning immigration and freedom of movement. [15] For the purposes of the reply to be given to the questions of the referring court these proposals for EC legislation, in respect of which the further question arises as to the extent to which they will be accepted by the Council, are of no significance.

C — *Freedom of movement for persons*

1. Competence

49. The European Community's competences in regard to the internal freedom of movement for persons are practically total.

15 — Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ 2001 C 270 E, p. 150). See also the amended proposal for a Council Directive on the right to family reunification (cited at footnote 8 above). These proposals follow on from the European Council held in Tampere on 15 and 16 October 1999.

They relate to the movement and residence of nationals of Member States of the European Union in the Member States of which they are not nationals. Articles 18, 39, 43 and 49 EC are addressed in so many words to the nationals of the Member States. [16] Under these articles the latter have a direct right to move and reside. In this area the Member States have only very limited competence. Thus they may refuse entry and leave to remain to nationals of other Member States only on grounds of public policy, public security or public health. Directive 64/221 determines more specifically the manner in which those criteria are to be interpreted by the Member States. In the case of economically inactive citizens of other Member States they may also lay down the requirement that they do not place an unreasonable burden on public funds.

50. This competence was assigned to the European Community in order to ensure that European integration might in fact assume concrete form, in the first place by means of the creation of an internal market without internal borders. In that regard I would quote Article 14(2) EC according to which: 'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty.'

16 — The fact that Article 18 EC refers to citizens of the Union and Article 39 EC to workers of the Member States is immaterial in that connection.

2. Substantive aspects and trends

51. As I explained more fully in my Opinion in *Baumbast and R* [17] there are two sets of EC legislation, namely the pre-existing rules concerning migration in connection with the pursuit of an economic activity and the subsequent rules providing for an albeit not unrestricted right to remain in favour of citizens of the European Union even where they are not economically active.

52. The rules applicable to economically active persons — in the context of the present case I shall confine myself to freedom of movement for workers — are laid down, *inter alia*, in Article 39 et seq. EC, Regulation No 1612/68 and Directives 64/221 and 68/360. [18] Article 39 EC affords to the national of a Member State of the European Union the right to move within the European Union and to reside freely on the territory of another Member State, in both cases with a view to the pursuit of employment. Secondary legislation adds to both these rights, which are guaranteed by the Treaty itself, ancillary rights including the right mentioned previously to be accompanied when residing in the other Member State by family

17 — Opinion in Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 28 et seq.

18 — Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ English Special Edition 1968 (II), p. 485.

members. Regulation No 1612/68 formulates that ancillary right as an individual right in favour of the members of the worker's family. Directive 68/360 seeks to ensure that this right is not impeded by formal impediments on actual entry. Family members — and naturally also the worker himself — are admitted to the national territory on presentation of a valid identity card or passport and in an appropriate case a visa. This therefore precludes a prior individual assessment. [19]

53. For non-active persons a right to remain applies under Directive 90/364. [20] That right is conferred on nationals of the Member States who do not possess that right under other provisions of Community law together with members of their families provided they have sickness insurance cover for themselves and their families covering all risks in the host country and that they have adequate resources in order to prevent them from becoming a burden to the social security scheme of the host country during their stay there.

54. European legislation in regard to freedom of movement for workers is complemented by the right to move and to reside freely within the territory of the Member States conferred on citizens of the Union by Article 18 EC. In the judgment in *Baumbast and R* [21] the Court expressly held that Article 18 EC has direct effect, albeit that that right is subject to limitations which have their basis in Community law. In that connection the Court did not have to consider the question whether the rights conferred on citizens of the Union by Article 18 also include the right to be accompanied by family members.

55. That brings me more specifically to the rights of family members who are not themselves nationals of an EC State. Article 10 of Regulation No 1612/68 confers rights on nationals of non-Member States who can rely on their status as the spouse or children of a Community worker. The fact that they are not citizens of the Union is not relevant to their right to remain: the only material factor is the tie with the worker. The regulation says nothing further concerning the spouse.

56. I now come to the development of that right. The freedom secured in the Treaty to reside in another Member State is becoming more and more comprehensive. The exercise of that right by citizens of the Union may not be impeded by barriers

19 — The Court itself went a step further in the *MRAX* judgment: see paragraph 74 below.

20 — Council Directive 90/364/EEC of 28 June 1990 on the right to remain (OJ 1999 L 180, p. 26).

21 — Cited in footnote 17.

placed in the way of family members. That is true in particular of freedom of movement for workers. To begin with, the worker has the right under Regulation No 1612/68 to establish himself with his spouse in that other Member State. According to the recitals in the preamble to that regulation, that right must be regarded as a fundamental right, for both the worker and his family. Neither the nature nor the duration of the marriage are reviewed. The only exception concerns refusal of entry on grounds of public policy or public security (under Directive 64/221). And then it must be a serious threat: a criminal conviction cannot automatically be regarded as a threat. Also the rights of the family members are more far-reaching than mere entry. They must be allowed to work and receive education. Even after the worker's return to the Member State of origin they retain certain rights. [22]

57. The question, none the less, is whether the Community legislature in enacting Regulation No 1612/68 took into account all possible variants. The primary concern of Regulation No 1612/68 is, it seems to me, that when the worker migrates to another Member State he must be able to take his spouse to another Member State under conditions favourable to them. That is in the interests of freedom of movement and is also in conformity with Article 8 ECHR. Yet other situations are also conceivable which come within the broad terms of Article 10 of Regulation No 1612/68. To begin with, I am thinking of the situation where at the time of migration there was as yet no family tie. Only after a citizen of the Union has installed himself as a worker in the host country does he marry someone from outside the European Union. The situation is also conceivable where the tie with the worker existed but the tie comes to an end at a certain moment. That occurred in the *Baumbast and R* case. [23] That case concerned two different situations, namely the ending of the tie with the worker as a result of divorce and the situation in which the Community national to whom the person concerned was married (and remained married) was no longer entitled to claim the status of Community worker.

58. Then there is the variant occurring in the present case. Mr Akrich, the spouse of a Community national, is not lawfully within the territory of the European Union. More importantly, not only has he not been granted entry but there is also a deportation order in force against him in the United Kingdom. None the less, he is relying on Community law in order to gain entry to the European Union in another Member State, in this case Ireland. That right is granted to him and he consequently

22 — See *Echternach & Moritz*, which I discuss below at paragraph 79.

23 — See paragraph 73.

invokes that right in order, notwithstanding the still current deportation order, to gain entry to the Member State which earlier refused him entry.

D — *Summary*

59. Immigration legislation makes entry into the Member States of the European Union subject to rules. Those rules are becoming more and more stringent. EC legislation in regard to freedom of movement for persons seeks to liberalise movement to and residence in other countries. The right to remain in another Member State is becoming increasingly more complete.

60. In themselves these are not necessarily opposing developments. It is even unavoidable that development of the substantive law in both areas of competence should become more and more divergent. For since the European Union is more and more becoming an area within which persons may move with unrestricted freedom, it is necessary to exercise control at the point of entry to that area. Freedom of movement for persons then applies to those persons who have been allowed entry to that area.

61. However, legislation in regard to freedom of movement for persons also confers on spouses of EU citizens rights even if they have not or not yet been granted entry to the European Union. That is all the more striking since, as stated, the rules are diverging more and more. Moreover, the area of application *ratione personae* appears at the same time to be more and more uniform. On the one hand, nationals of non-Member States who avail themselves of the rules of freedom of movement for persons form an increasingly large group owing to the fact that a growing number of rights are conferred on citizens of the European Union, and thus derivatively on family members, in connection with the right enjoyed by those citizens to reside within the European Union. On the other hand, against the background of increasingly stringent immigration law, the founding of families and family reunification constitute in relative terms a growing basis for legal immigration into the European Union. It is precisely the members of families of migrant Community citizens on whom rights are conferred by the rules on freedom of movement for persons. In light of the concern which the Court attaches to the protection of the family life of citizens of the European Union,[24] those rights are assuming greater prominence.

62. These matters give rise to a legal anomaly. A citizen of the Union who

24 — See, for example, recent judgments in Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraphs 38-42 and Case C-459/99 *MRAX* [2002] ECR I-6591, paragraphs 63 and 61. See also at paragraph 106 below.

wishes to marry and thereafter live together with a national of a non-Member State has no automatic right to entry by his spouse into the Member State concerned. The spouse is granted entry only after an individual assessment by the national immigration authorities on the basis of strict rules. The assessment includes amongst other matters the nature and duration of the relationship and the spouse's past. However, if the citizen of the Union installs himself in any other Member State of the European Union those rules do not apply. The spouse is then exempt from national immigration law and under Community law gains automatic entry. It is only otherwise if that spouse constitutes a serious threat to public policy. [25]

63. I would further point out that the host Member State may inquire whether the citizen of the Union (not the spouse from outside the Union) is correctly relying on Community law, as a worker (or a provider of services) or a non-working person pursuant to Directive 90/364.

25 — Or public security or public health.

VI — The current state of the Court's case-law

A — *Introduction*

64. Of direct relevance in this matter is the case-law on the extent of the right enjoyed by the migrant worker and his family members under Article 39 EC and the concomitant secondary Community legislation. I will deal with the case-law as follows. First, I shall discuss establishment of the right under Article 39, then the extent to which that right is retained where the worker returns to his country of origin; in that connection I shall consider the principle of non-discrimination. I will then discuss the restrictions of the right of residence which are possible under Community law on grounds of public policy or public security. Subsequently I will examine the case-law from another perspective: what entitlement under Community law do citizens have where they use rights in that connection purely and simply to circumvent (national) legislation which is unfavourable to them? Finally, I will come to the citizen of the Union and his right to family life. In various sections the question will also arise as to the extent to which the spouse of the migrant worker may derive the same rights from Community law as the migrant worker himself.

65. None the less, I will begin with a preliminary observation: Essentially, the

interpretation by the Court of the provisions concerning freedom of movement for workers may be described by use of the term extensive. In addition to the wording of the rules the Court also attaches much importance to the underlying intention: restrictions on freedom of movement for workers must as far as possible be removed. The other side of the coin is that the scope for national measures which (may) impinge on that freedom is limited.

B — *Establishment of the right*

66. To begin with, I would point to the settled case-law of the Court under which rights under Article 39 EC may arise only in situations coming within the scope of Community law. Those rights do not arise in situations which bear no relationship to those governed by Community law or where all the elements of such situations are purely internal to the individual Member State. [26] Thus, Article 39 cannot be applied to persons who have never made use of that freedom. The same applies, *mutatis mutandis*, to claims by a citizen under Article 43 EC or Article 49 EC in regard to establishment or provision of services respectively. [27]

67. In order, then, to establish a right under Article 39 EC the presence of a cross-border element is required. In a given situation there must be factors connecting the person seeking to establish the right with at least two Member States. The classic situation contemplated in Article 39 EC concerns the national of a Member State who moves to another Member State in order to work there. That person derives entitlement under Community law to remain in that other Member State. That is the principal rule contained in Article 39 EC.

68. In accordance with the judgment in *Levin* [28] a worker may claim entitlement to freedom of movement for workers only if he is genuinely and actually working in a Member State of which he is not a national, or at least has a serious intention of doing so. The work may not be of such small extent that it is merely marginal and incidental. It may be part-time work and the income earned may also be lower than the guaranteed minimum wage in the sector concerned. Thus the Court does not rule out that part-time employment normally comprising no more than 10 hours per week may be entirely serious. The same applies to a training period forming part of professional education. [29]

69. In that regard I would point out that the concept of worker is a Community

26 — See for example judgment in Case C-206/91 *Koua Poirrez* [1992] ECR I-6685, paragraphs 10 and 11).

27 — See *MRAX*, cited above in footnote 24, paragraph 39.

28 — Judgment in Case 53/81 *Levin* [1982] ECR 1035, paragraph 21.

29 — In my Opinion of today's date in Case C-413/01 *Ninni-Orasche* I have given a more extensive account of that case-law.

concept. [30] The operation of that concept may not be curtailed by reference to criteria laid down in national legislation, for example by requirements concerning the extent of the work or concerning the minimum period during which occupational activities are performed. [31]

70. In order in actual fact to secure freedom of movement for workers various supplementary rights are recognised in the case-law and under secondary Community legislation. Thus, the Court has given effect to the notion that these are fundamental freedoms secured by the Treaty which on that ground may not be construed restrictively. [32] That supplementation occurs in two ways: the Court interprets broadly the right of the worker himself but in addition comparable rights are conferred on the members of the worker's family.

71. I shall first examine the extent of entitlement in the case of the worker himself. In the first place the requirements to be satisfied by the employment relationship are not all that stringent. Thus, in the *Levin* judgment of 1982 the Court was already prepared to accept part-time employment. That is worthy of note inasmuch as part-time employment in 1982 was considerably less common than now. Secondly, it is not a requirement *per se* that a national of a Member State physically installs himself in another Member State. In the *Carpenter* judgment, which concerned the freedom to provide services the Court deemed Community law to be applicable to a situation in which a provider of services principally provides services from his own Member State to recipients of services established in other Member States. The Court, it seems to me, went further in the *Deliège* judgment. [33] In that case the Court has opened up the possibility that a person may rely on Community law on the basis of the fact that he is participating as a practitioner of sport in a competition taking place in a Member State other than that in which he is resident. Naturally it is a requirement in that connection that the participation in international competitions constitutes an economic activity within the meaning of Article 2 EC. Thirdly, the worker may under certain circumstances continue to rely on Community law if after residence in another Member State he returns to his own country. In view of its importance to the present case that point will be discussed separately below.

72. The rights of the members of the family of the migrant worker are principally based on Regulation No 1612/68. [34] Their right to remain stems from Article 10 of that

30 — The requirements laid down concerning the relationship between employer and employee are dealt with more extensively in the judgment in Case 344/87 *Bettray* [1989] ECR 1621.

31 — See in addition to *Levin* Case 39/86 *Lair* [1988] ECR 3161, paragraphs 41 and 42.

32 — See, *inter alia*, *Levin*, cited at footnote 28, paragraph 13.

33 — Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549, paragraphs 58 and 59.

34 — That regulation is supplemented in Directive 68/360/EEC, cited in footnote 18, which lays down certain obligations on the Member States to create travel and residence documents.

regulation. Thus, family members obtain their own enforceable rights but those rights are dependent on a tie with a migrant worker. That derivative nature of those rights means that the spouse does not need to be a citizen of the Union and also that there does not need to be a factor connecting the spouse with more than one Member State. What is important is whether there is a connecting factor in the case of the worker himself, as was held, *inter alia*, in *Morson and Jhanjan*.[35] In accordance with that judgment there was no connecting factor in a case where workers who had never worked in another Member State wished to bring over family members from a non-Member State.

73. Nor, in accordance with the extensive interpretation of the worker's entitlement, does the Court lay down requirements which are too stringent concerning the nature of the tie with the migrant worker. Thus, spouses do not have to live together permanently.[36] Nor does the end of the tie with a migrant worker automatically mean that the right in favour of a family member to remain in a Member State also comes to an end. *Baumbast and R*[37] concerned both the case where the family tie was broken by divorce and the case where the status of worker of the person entitled under Article 39 EC had lapsed. In both cases the Court held that under Article 12 of Regulation No 1612/68 the right to remain in favour of the children of the (former) worker was maintained, as was the right to remain of the parent carer, which in its turn was derived from the rights in favour of the children.

74. Finally, and this is true of both the worker and the member of his family, they may not, prior to entry into a Member State, be made subject to formalities. Sending back at the border is possible only if a person cannot prove his identity.[38] In that connection the Court itself has already held in *MRAX* that failure to possess a valid visa cannot in itself give rise to refusal of entry.[39] Nor, under that judgment, can non-compliance with formalities provide a ground of refusal.

C — *Does the right lapse on return?*

75. In principle the status of Community worker is lost where the conditions for the acquisition of that status are no longer satisfied.[40] In other words when the employment relationship is terminated the person concerned in principle loses his status as a worker within the meaning of

35 — Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723.

36 — Case 267/83 *Diatta* [1985] ECR 567.

37 — Cited in footnote 17 above.

38 — In both cases except where there is a risk to public policy, public security and public health which I will discuss below at paragraphs 91 et seq.

39 — Cited at footnote 24, paragraph 61.

40 — In my Opinion in *Baumbast and R*, cited above at footnote 17, paragraph 45 et seq. I went into this matter in greater detail referring again to the Opinion of Advocate General La Pergola in Case C-85/96 *Martínez Sala* [1998] ECR I-2691.

Article 39 EC. However, that does not preclude that status from having certain effects after the end of the employment relationship.[41] Those effects continue to subsist after the worker's return to his own Member State.

76. In the *Singh*[42] judgment the Court held that: 'A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.' In short the Court is proceeding on the basis that after returning to his own Member State a migrant worker continues to derive rights from the EC Treaty. In that judgment the Court also stated that those rights are equivalent to the rights conferred directly by the EC Treaty on a migrant worker or self-employed person.

77. I would emphasise that return to one's own country does not give rise to the creation of any new right under Community law but that entitlement continues to subsist under a previously established right. In similar terms are the judgments in *Angonese*, *Kraus* and *D'Hoop*[43] which all concerned the treatment of citizens of the European Union in their own countries after they had previously pursued training in another Member State. Without going into details I would point out that they had made use of the right to free movement which brought them within the scope of Community law. After their return they were entitled to continue to exercise rights under Community law. In particular it could not be held against them that they had not pursued their (whole) training in their own countries. There must therefore be a connecting factor between the exercise of the right of free movement and the right on which the person concerned is relying.[44]

78. More specifically, the Court in *Singh* goes on to discuss the right of the spouse from a non-Member State. That person may accompany the worker or self-employed person under the conditions laid down in Regulation No 1612/68, Directive 68/360 or Directive 73/148. That person's

41 — *Martinez Sala*, cited in footnote 40, paragraph 32.

42 — Cited at footnote 2, paragraph 19.

43 — Cases C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32, C-281/98 *Angonese* [2000] ECR I-4139, in particular paragraphs 38 to 41, and Case C-224/98 *D'Hoop* [2002] ECR I-6191.

44 — See Opinion of Advocate General Tesauro in the *Singh* case, cited at footnote 2, paragraph 5.

rights are no different than if the worker had installed himself in another Member State.

79. In the case of the worker's children that right goes even further. In *Echternach & Moritz*[45] the Court held that where a worker has worked in another Member State, the worker's child retains the status of a member of the worker's family within the meaning of Regulation No 1612/68 where the child's family returns to the country of origin and the child — perhaps after a certain interruption — remains in the host country in order to continue his education which he was unable to do in his country of origin. In that connection the Court considered that the advantages accruing to the members of a worker's family contribute to their integration in the social life of the host country in accordance with the objectives of freedom of movement for workers. For such integration to come about, the Court continued, a child of a Community worker must have the possibility of attending school and pursuing further education in the host country, as is expressly provided in Article 12 of Regulation No 1612/68, in order to be able to complete that education successfully.[46]

80. The advantages in favour of the children are not, however, unlimited. *Echternach & Moritz* concerned a specific situation. For in general non-discriminatory access to the social benefits of the host Member State cannot — save in special circumstances[47] — be extended to workers who have ceased to pursue their occupation in the host Member State and have decided to return to their Member State of origin. Thus, study finance need not be awarded in a case where the worker returns with the child in whose favour entitlement to study finance had subsisted.[48]

D — *Significance of the prohibition on discrimination*

81. According to the Court's settled case-law, the principle of equal treatment laid down in both Article 39 EC and Article 7 of Regulation No 1612/68 prohibits not only overt discrimination on the basis of nationality but also all covert forms of discrimination which in fact lead to the same result by means of the application of other distinguishing criteria. Persons concerned may rely on that prohibition which is interpreted broadly. A condition thereof is that they are not outside the substantive scope of Community law, as the Court ruled in *Morson and Jhanjan*.[49]

45 — Joined Cases 389/87 and 390/87 *Echternach & Moritz* [1989] ECR 723.

46 — Paragraphs 20 and 21 of the judgment.

47 — For special circumstances see Case C-57/96 *Meints* [1997] ECR I-6689 which concerned a benefit whose grant was dependent on an employment relationship which had come to an end shortly before and which was inextricably linked with the recipient's objective status as a worker.

48 — Case C-33/99 *Fahmi and Esmoris Cerdeiro-Pinedo Amado* [2001] ECR I-2415, paragraph 47.

49 — Cited in footnote 35 above, paragraphs 15 to 17.

82. The prohibition of discrimination plays a considerable role in the Court's case-law in regard to freedom of movement for workers. Many of the rights under Community law stem from the prohibition on according to citizens of the Union and members of their families less favourable treatment than that accorded to a comparable person.

83. In connection with freedom of movement for persons the prohibition is qualified in two respects. On the one hand, the Court sometimes concedes that a Member State's own national may be treated better than the national of another Member State. That difference results from the fact that, as Community law currently stands, there is no unconditional right in favour of nationals of one Member State to remain on the territory of another Member State. [50] The difference in treatment may also manifest itself in a difference in treatment as between the spouse of a Member State's own national and the spouse of the national of another Member State. More specifically, as the Court has held, a Member State is entitled, in the case of the spouse of a person who himself is not eligible to claim unlimited leave to remain, to require a longer period of residence in its territory than in the case of the spouse of a person who already has unlimited leave to remain. [51]

84. Conversely, reverse discrimination plays a considerable role. A Member State may make its own nationals subject to rules which it may not impose on nationals of other Member States where those rules would impede the exercise by the latter nationals of a freedom guaranteed by the Treaty. However, that power in favour of the Member State is not limitless. In situations which are within the substantive scope of Community law, a national of a Member State is legally entitled to receive equal treatment, [52] irrespective of his nationality and without prejudice to the exceptions expressly provided for. Within that scope it is then true of a Member State's own national that he is being impeded in the exercise of a freedom guaranteed by Community law. This means that discrimination of a Member State's own national is possible only where all relevant aspects of a case are confined to a single Member State. The Court regards such a case as a matter purely internal to a Member State owing to the absence of any connecting factor with situations coming

50 — Nor is that achieved by conferral of direct effect on Article 18 EC in the *Baumbast and R* judgment.

51 — Case C-356/98 *Kaba* [2000] ECR I-2623, paragraphs 30 to 32.

52 — *D'Hoop* (cited above in footnote 43, paragraphs 28 and 29). In that connection the Court expressly refers to citizenship of the Union, as mentioned in *Grzelczyk* (paragraph 106 below).

under Community law.[53] But it is as well also on this point to emphasise that the Court interprets the substantive scope of Community law widely.

85. As far as is relevant to this case, I have thus given an adequate outline of the prohibition on discrimination. That brings me to the substance of discrimination: equal treatment in regard to whom? The classic case of discrimination concerns the Community migrant who installs himself in another Member State. He must be accorded the same treatment as the national of that Member State. A classic illustration of this is to be found in the *Reed*[54] judgment where a Member State which, in the case of its own nationals, treats married and unmarried partners on the same footing for the purposes of the grant of certain benefits, may not in the case of Community migrants limit those benefits to spouses of migrant workers.

86. However, the present case does not concern that classic situation but rather a form of reverse discrimination: the citizen who returns to his own country after making use of a freedom guaranteed by Community law. In the case-law I find comparisons:

— with the person who remains established in the Member State in which he has exercised his freedom (*Fahmi and Esmoris Cerdeiro-Pinedo Amado* judgment).

— with the Member State's own national who has not made use of Community law (*D'Hoop* judgment).

— with the person who moves to another Member State (a third Member State) (*Singh* judgment).

87. The judgment in *Fahmi and Esmoris Cerdeiro-Pinedo Amado*[55] consolidates earlier case-law relating to the retention by a migrant worker after his return to his own country of social advantages to which the migrant worker was entitled under Regulation No 1612/68. That case involved, *inter alia*, the retention of the right to study finance in favour of the worker's children.[56] Article 7(2) of Regulation No 1612/68 cannot be interpreted as

53 — See in more detail my Opinion in Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 77 et seq. The starting point of my reasoning in that case was the admissibility of the questions submitted for a preliminary ruling by the referring court in regard to the possible absence of a connecting factor with Community law.

54 — Case 59/85 *Reed* [1986] ECR 1283, paragraph 25 et seq.

55 — Cited above in footnote 48.

56 — See also paragraph 80 above. Case 32/75 *Cristini* [1975] ECR 1085 concerning reduced train tickets granted to workers is also comparable.

guaranteeing retention of a social advantage in favour of migrant workers who have ceased their occupational activity in the host Member State and have returned to their Member State of origin. [57] I would interpret this case-law more broadly. After a person returns to his own Member State there is no longer any ground for comparison with persons who have remained in a host country. That applies in regard to rights inherent in local residence such as entitlement to study finance, but also in regard to other rights. A person is back in the legal sphere of his own Member State and rights therefore arise in regard to that person's own Member State.

88. The second parallel concerning the prohibition of discrimination is to be found in the *D'Hoop* [58] judgment. It would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement. At issue here therefore is unequal treatment in regard to fellow citizens who have not availed themselves of the right to freedom of movement. A person may not be penalised for making use of a freedom guaranteed in the EC Treaty.

89. However, that judgment does not examine the question whether application of the prohibition on discrimination may also mean that the fact that a person has made use of Community law can place him in a more favourable position. It is precisely that interpretation which would be of benefit to Mr and Mrs Akrich in the present case.

90. This interpretation is to be found in the *Singh* judgment. From this comparison the Court also draws consequences for the legal position of the spouse of a Community national who has made use of Community law where the latter returns to his country of origin. The spouse has at least the same rights to enter and to remain as those which Community law would confer on her if her spouse decided to move to and remain in another Member State, of which he is not a national.

E — *Limitations on the basis of public policy and public security*

91. Under the Court's case-law national measures liable to hinder or make less attractive the exercise of the fundamental freedoms guaranteed by the EC Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified on overriding public-interest grounds; they must be suitable for

57 — *Fahmi and Esmoris Cerdeiro-Pinedo Amado*, cited at footnote 48, paragraph 46.

58 — Cited in footnote 43, paragraph 30. It is noteworthy, moreover, that in earlier comparable cases (e.g. *Angonese*, cited above at footnote 43, paragraph 37 et seq.) the Court reasons on the basis of indirect discrimination of nationals of other Member States.

securing attainment of the objective which they pursue, and they must not go beyond what is necessary in order to attain it. [59] Thus the Court applies a strict interpretation to this restriction of a fundamental Treaty freedom.

92. Article 46 EC recognises public policy and public security as overriding public-interest grounds. Public policy, and public security, may be invoked in regard to nationals of other Member States enabling them to be removed from national territory or enabling refusal of entry thereto. Under the Court's case-law public policy may be invoked only when there is a genuine and sufficiently serious threat affecting a fundamental interest of society. [60] In its case-law the Court bases itself directly on the Treaty and on this point applies a criterion which is stricter than the provisions of Directive 64/221. On occasion the Court refers expressly to that directive. [61] In that connection it held that the existence of a previous criminal conviction can, therefore, be taken into account only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy. Moreover, Directive 68/360 also contains a derogation on grounds of public order and public security. I am assuming that the interpretation of that derogation does not depart from what is stated in this paragraph.

93. The prohibition on discrimination on the ground of nationality does not mean that in the present case the same sanctions are also applied in regard to a Member State's own nationals. More specifically, the Member States may on grounds of public policy adopt measures in regard to nationals of other Member States which they cannot adopt in regard to their own nationals in the sense that they cannot remove the latter from national territory or deny them access to that territory. [62] However, that does not mean that the sanctions applied to a Member State's own nationals and to nationals of other Member States may be entirely different. The *Olazabal* judgment contains a good example of this. [63] In that case the Court made the permissibility of a measure refusing a national of another Member State access on grounds of public policy to a part of national territory dependent on whether in comparable cases punitive measures are also adopted in regard to the Member State's own nationals.

59 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37.

60 — The settled case-law begins with Case 41/74 *Van Duyn* [1974] ECR 1337, paragraphs 22 and 23, includes Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 20 and 21, and, most recently Case C-100/01 *Olazabal* [2002] ECR I-10981, paragraph 39.

61 — See, for example, *Calfa*, cited above in footnote 60, paragraph 24.

62 — See, for example, *Olazabal*, cited in footnote 60, at paragraph 40.

63 — Cited in footnote 60, in particular paragraph 45.

94. In the case-law concerning denial of entry to a national of a non-Member State proportionality also plays a significant role. In that connection I would mention the *MRAX* judgment [64] in which the Court reasoned that it is in any event disproportionate and, therefore, prohibited to send back a third country national married to a national of a Member State 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. The same applies to refusal to issue a residence permit, where that is based solely on a failure to comply with legal formalities concerning the control of aliens, and to expulsion from the territory on the sole ground that a visa has expired.

95. In the *Carpenter* judgment the Court applies as the criterion concerning proportionality a balance between, on the one hand, the right to respect for family life — under Article 8 ECHR — and protection of public policy and security, on the other. The interest in the exercise of a fundamental freedom under the EC Treaty does not therefore form part of the proportionality test.

64 — Cited in footnote 24, in particular paragraphs 61, 78 and 90.

F — *Possible misuse of EC law*

96. Under the Court's settled case-law [65] persons benefiting from the facilities created by the Treaty may not misuse those facilities in order to evade the application of their national legislation. Under the judgment in *Emsland-Stärke* [66] there is a misuse of Community law where two cumulative conditions are satisfied. First, there must be a combination of objective circumstances in which, 'despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved'. The second condition is subjective in nature, consisting in the intention on the part of the person concerned to obtain an advantage from the Community rules by artificially creating the conditions laid down for obtaining it.

97. The Treaty freedoms do not preclude the Member States from taking the measures necessary in order to prevent such abuses. Under the Court's case-law a Member State may adopt provisions seeking to prevent its nationals from taking advantage of the possibilities created by the

65 — The standard judgment in this connection is Case 115/78 *Knoors* [1979] ECR 399, paragraph 25.

66 — Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraphs 52 and 53. That judgment concerned a different area of Community law, namely export refunds in agriculture.

Treaty in order improperly to circumvent their national legislation and invoking Community law for an abusive purpose or with a view to fraud. [67]

98. An example of national legislation to prevent misuse of EC law, which was upheld by the Court, is to be found in the judgment in *Veronica Omroep Organisatie*. [68] In that judgment the Court upheld national legislation prohibiting Netherlands broadcasting organisations from helping to set up commercial radio and television companies abroad for the purpose of providing services there directed towards the Netherlands. That legislation prevented those broadcasting organisations, in exercising the freedoms guaranteed by the Treaty, from improperly evading the obligations deriving from national legislation concerning the pluralistic and non-commercial content of programmes. To the same effect, and in my view taking matters a step further, is the *TV10* judgment. [69] In that case the creation of a broadcasting company in accordance with Luxembourg legislation and established in Luxembourg but with the intention of broadcasting to the Netherlands was considered to be a misuse of rights.

99. Thus, misuse of EC law can be countered by means of national provisions. Yet that says little about the Member States' margin of discretion in that connection. That margin is limited.

100. In the first place prevention of misuse cannot give rise to a limitation of fundamental freedoms guaranteed by the EC Treaty which are widely interpreted by the Court. The application of such a national rule must not prejudice the full effect and uniform application of Community law in the Member States. [70] More specifically, the restriction may not relate to a matter inherent in the exercise of a freedom guaranteed by the EC Treaty, as the Court stated in the *Centros* [71] judgment. That judgment concerned a national of a Member State desirous of setting up a company who subsequently decided to set it up in a Member State in which the rules of company law were less restrictive and to set up branches in other Member States, including his own Member State. There could not then be said to be a misuse of rights. For, as the Court held, the right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

101. It is striking that the Court did not apply analogous reasoning in the *TV10*

67 — Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24. That case-law began with Case 33/74 *Van Binsbergen* [1974] ECR 1299.

68 — Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 13.

69 — Case C-23/93 *TV10* [1994] ECR I-4795, paragraphs 14 and 21.

70 — Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 22.

71 — Cited in footnote 67, at paragraph 27.

judgment. For in that case as well use was made of a right inherent in freedom of establishment, namely the setting up of a company in another Member State. I am of the view that the *TV10* judgment must be viewed in its specific context. The company was set up in another Member State purely and simply in order to circumvent national legislation which sought to attain an objective of general interest upheld by the Court in the field of cultural policy. The consequence of the setting up of the company was that the general-interest objective could no longer be properly attained.

102. In the second place the intentions of the person making use of the EC right may not be inquired into. In *Levin* [72] the Court held in so many words that the possible intentions of a worker are irrelevant and may not be taken into account. The decisive factor is whether the freedom is used in accordance with the Treaty. As Advocate General Slynn also stated in his Opinion in that case, it is not proper to establish what the intention of a worker is who goes to work in another Member State. It may actually be for the sake of the job but it may, for example, also be to live close to his family or it may be for the climate. Moreover, in the judgment the Court expressly attaches significance to the fact that the right to remain under Article 39(3) is conferred only on a person residing in another Member State *for the purpose of* working there. According to the Court, the worker's actual intention in residing in the other Member State is not relevant. What is relevant, on my reading of the judgment, is a genuine intention of pursuing employment at the time of residence there.

103. Notwithstanding these clear statements in *Levin* the intention of the person concerned has indeed played a role in the Court's subsequent case-law. In *Lair* [73] the Court found there to be a misuse of EC law where it may be established on the basis of objective evidence that a worker has entered a Member State for the sole purpose of enjoying, after a very short period of occupational activity, a certain benefit.

104. In the *Knoors* judgment the Court relativises in a striking manner the competence of the Member States to combat abuse. It pointed out that Directive 64/427 [74] lays down rules concerning the minimum period of residence in another Member State by certain self-employed

72 — Cited in footnote 28, paragraph 22.

73 — Cited in footnote 31, paragraph 43.

74 — Council Directive 64/427/EEC of 7 July 1964 laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Groups 23-40 (Industry and Small Craft Industries) (OJ, English Special Edition, 1963-1964, p. 148).

persons and also that it is open to the Community to adopt fresh measures at European level in order to combat circumvention of the law.

105. Finally, I would point out that the Court, where it accepts that abuses may be combated, applies the following reasoning in that regard. National legislation which is justified on overriding public-interest grounds may be applied to the Member State's own nationals who are using Community law purely and simply in order to evade that legislation.

G — *The citizen and his family*

106. At the outset I would mention citizenship of the Union which in itself is not in issue in the present case but none the less provides an indication of the extensive protection afforded by Community law to migrants within the European Union. In *Baumbast and R*, the Court, as I have stated, conferred direct effect on Article 18 EC which grants the citizen of the Union the right to move and reside.[75] *Baumbast and R* completes a development in the Court's case-law in which increasing value is being accorded to citizenship. A significant step in that connection was taken in the *Grzelczyk* judgment. Union citizenship is destined to be the fundamental status of nationals of the Member States.[76] And frequently the citizen will, as the Court of course acknowledges, have a family.

107. In its case-law the Court expressly states that it is apparent in particular from the Council regulations and directives on freedom of movement for employed and self-employed persons within the Community that the Community legislature has recognised the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty.[77] Thus, Regulation No 1612/68 must be interpreted in light of the right for respect for family life in Article 8 ECHR. It is apparent from the overall structure and purpose of that Regulation that, in order to facilitate the free movement of members' families, the Council took into account the importance for the worker, from a human point of view, of living together with his family.[78]

108. Not only does Article 8 ECHR play a role in the interpretation of the Community

75 — See paragraph 54 of this Opinion.

76 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31.

77 — See, for example, *MRAX*, cited above in footnote 24, paragraph 53, and *Carpenter*, cited in footnote 24, paragraph 38.

78 — Case 249/86 *Commission* v *Germany* [1989] ECR 1263, paragraphs 10 and 11).

legislature's objectives but is also assuming increasing significance in other areas as a point of reference for review by the Court. Accordingly, I am assuming that Article 8 ECHR determines the interpretation and application of the EC Treaty itself and, with specific reference to the present case, Article 39 EC. I would also refer to the judgment in *Carpenter*.[79] In that case the Court reviewed a decision directly in the light of Article 8 ECHR. The Court stated as follows: 'Even though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from 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 Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, 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"...'

H — *Summary*

109. In paragraph 65 above I made the preliminary observation that the Court in its case-law in regard to freedom of movement for workers applies an extensive interpretation. The extensive nature of that interpretation may be clarified by the exposition of that case-law.

110. I shall begin with the case-law concerning the scope of freedom of movement for workers. In order for a right to be established the activity of an EU citizen must come within the area of application of Community law and that citizen must be a worker. Community law applies as soon as there is a cross-border element; to that end a worker does not have to establish himself in another Member State. In order to be deemed to be a worker it is sufficient for there to be an employment relationship of limited duration and extent.

111. The substance of the Community worker's right is also extensively interpreted by the Court. First, it is an objective right: in principle the worker's intentions play no role. Secondly, the right to move to and reside in another Member State must be capable of being fully exercised. The right is then supplemented by a series of broadly interpreted ancillary rights, including the right to be accompanied by one's spouse. That is far-reaching to the extent that the spouse has self-standing rights under Community law. Thirdly, even if a person loses the status of Community worker, on returning to his own country he retains certain rights acquired on the

79 — Cited at footnote 24, paragraph 41 et seq. Citation paragraph 42.

basis of his previous status. Fourthly, the possibilities for the worker to rely on the prohibition of discrimination are very extensive. On occasion the Community worker returning to his own country may have more rights than fellow nationals who have never left the country. Fifthly, the extensive interpretation of the Community worker's right is reinforced by the significance attached by the Court to Article 8 ECHR.

112. Conversely, possible restrictions on the worker's right are strictly construed. That is true of the interpretation of the concept of public policy as a ground for restricting the right and of a presumption of misuse of Community law.

VII — Assessment

A — *Preliminary observations*

113. I begin with an observation concerning the approach to be adopted. The United Kingdom Government is asking the Court for a clear answer that enables the national court to determine whether reliance on Community law is correct in law or whether the element of abuse or fraudulent conduct constitutes a decisive factor. I shall bear in mind this request by the United Kingdom in replying to the questions raised by the referring court. I support the United Kingdom Government to the extent to which it is stating that a reply couched in general terms is not conducive to securing legal certainty. However, I do not share the view asserted by the Greek Government that the national court is best able to make the determination. [80]

114. Fundamentally, the United Kingdom Government is stating that the measures which a Member State may adopt under Directive 64/221 produce inadequate effects. It expresses the fear that were the Court to decide that Mr Akrich has a right under Community law to remain in the United Kingdom, it would be possible for all spouses from non-Member States to evade national law with impunity and to obtain a right to remain if they are married to a national of a Member State. Consequently, the Member States' right to adopt measures to combat abuse would become marginalised.

115. Conversely, the Commission points out that application of national immigration law would mean that national law has priority although a person is protected by Community law. In this case national law does not apply to the person con-

80 — See paragraph 172 below.

cerned. In that connection the Commission refers to the *Centros*[81] judgment. In the Commission's view, there is no pressing national interest justifying the application of national law.

116. The submissions on behalf of Mr Akrich are to the same effect. In his view there is complete harmonisation in regard to freedom of movement of persons with the consequence that a Member State no longer has the right to adopt unilateral measures in that area. If a Member State precludes a certain category of persons from rights in connection with freedom of movement for persons by adding an extra requirement to the concept of worker, that is itself restrictive of the free movement of persons. He also states that the United Kingdom Government may not adopt measures which are more far reaching than the measures which may be adopted under Directive 64/221. Any more restrictive measure is by definition disproportionate.

117. The curious feature of this case, in the submission of Mr Akrich, is that the Secretary of State accepts that it is not possible as a matter of Community law for another Member State to refuse Mr Akrich entry to and residence in its territory but that the United Kingdom is none the less doing so. That is the anomaly which I outlined in paragraph 62 hereof.

81 — Cited in footnote 67; see in greater detail at paragraph 100 hereof.

B — *The dilemma*

118. I closed the introduction to this Opinion by stating the following dilemma: must the Court's extensive case-law, as expressed, *inter alia*, in the *Singh* judgment, entail the consequence that national immigration legislation must always remain inapplicable where spouses from outside the European Union are involved who are married to Community nationals but are not lawfully on the territory of the European Union? The resolution of that dilemma is central to the assessment of this case.

119. On the one hand is the immigration law governing entry to the European Union by nationals of non-Member States. A major feature of immigration law which is still to a large extent determined at national level is that it imposes a barrier to entry to the European Union by nationals of non-Member States. That barrier is twofold: first, entry is allowed only after a prior individual assessment by the authorities. Secondly, the grounds for entry are exhaustive. In addition, the bar has steadily been raised as the immigration pressure on (the Member States) of the European Union has increased.

120. On the other hand is the movement of persons within the European Union itself. The main feature of that internal move-

ment of persons which is almost entirely determined at European level is that within the European Union the barrier to access to another Member State is as far as possible removed. Removal of that barrier is significant in the following respects: first, a person has access to another Member State without a prior individual assessment. Secondly, the grounds for entry are in principle unrestricted. Community law contains only certain limitatively circumscribed restrictions on the exercise of the right to move and to reside. In addition, the bar on entry to another Member State has over the years been continually lowered by the Community legislature and the Court.

121. Viable and enforceable immigration legislation, as described above, is a necessary precondition of the completion of the internal market in which internal border controls may be lifted and persons may circulate freely within the whole Union. The latter concern, namely the creation of the internal market with free movement of persons, is precisely one of the reasons why the Community legislature and the Community judicature opted in favour of a broad sphere of application for Article 39 EC. The link between the regulation of immigration to the European Union and free movement within it is apparent, *inter alia*, from Article 61(a) EC. Therein the Treaty mentions external border controls as a flanking measure in regard to the internal freedom of movement of persons. Also the Schengen Agreement of 14 June 1985 proceeded on the assumption that abolition of internal border controls would be possible only in the event of tighter external border controls.

122. Hitherto the system has worked. Citizens of the European Union, who as such have the right to move to and reside in other Member States, and nationals of non-Member States who after a prior individual assessment under the immigration legislation are allowed entry to the European Union may exercise the rights conferred on them under freedom of movement for persons.

123. However, there is a substantial anomaly in the system. Persons who have not yet been allowed entry to the European Union may sometimes have a right to remain under the rules concerning the internal movement of persons. That is applicable, *inter alia,* under Article 10 of Regulation No 1612/68 to the spouse of a migrant worker. It is this status of spouse on which Mr Akrich is relying. Such spouses may enter the European Union without a prior individual assessment by the immigration authorities. In the case of Mr Akrich it appears that a person who

previously was deported from the European Union on the basis of the immigration law of a Member State can be allowed entry. Such a person may by invoking Community law acquire a right to remain in a Member State other than that which deported him.

124. The Court cannot in this case remove the anomaly adverted to. For the entry by Mr Akrich into Ireland without prior individual assessment is not at issue in the present case.

125. The questions before the Court do not concern the anomaly itself. It is rather a question of determining the extent of the consequences of that anomaly. More specifically, if Mrs Akrich may be regarded as a migrant worker in Ireland, then under the case-law concerning freedom of movement for persons, in particular the *Singh* judgment, she retains on her return to the United Kingdom a number of rights conferred on her as a migrant worker, including the right to be accompanied by her spouse.

126. The Court is now called upon to examine the question whether the general rule in *Singh* is also applicable in a case where the spouse accompanying the worker in her own country was admitted to the territory of the European Union in a manner not in conformity with the normal immigration rules, that is to say without a prior individual assessment. Is a Member State required none the less to accept that such a spouse of its own national is exempt from application of immigration law? Normally speaking, a Member State's competence to subject the third country spouse of its own national to an assessment under national immigration law remains unaffected. EC law in regard to freedom of movement for persons, as may be inferred from the judgment in *Morson and Jhanjhan*, does not apply in that connection. Furthermore, prior assessment of spouses who are nationals of non-Member States constitutes an essential element of immigration policy, not least in connection with the risk of marriages of convenience.

127. If the answer to that question is affirmative Community law may thus be used in order to evade national legislation. That does not merely have implications for the effectiveness of national immigration law — a method of circumventing that legislation is thus upheld — but also prejudices a necessary precondition of internal freedom of movement within the European Union.

128. The consequences of that anomaly, if the *Singh* judgment is applied without

reservation are more far reaching in the specific situation in the main proceedings. A Member State which has decided on the basis of a prior individual assessment under its national immigration law to exclude a national of a non-Member State in light of that law would then be bound to allow entry to that person without any fresh individual assessment having been conducted within the European Union.

129. In addition, it is clear from the statements made by Mr and Mrs Akrich that they arranged their living and working circumstances in such a way as to acquire a right under Community law to remain which cannot be restricted by application of national immigration law. Mr Akrich is thus invoking freedom of movement for persons as a vehicle for entry to the European Union whilst the rules of immigration applicable to him afford him no right of entry.

C — *Resolution of the dilemma*

130. It is thus proper to examine whether the scope of the judgment in *Singh* requires to be further circumscribed. The Commission also expresses concern on this point. It fears that the laying down of criteria to combat misuse of Community law will impinge upon the substantive rule in *Singh*. My concern is of another kind. If the *Singh* judgment were to be interpreted without qualification, the effectiveness of immigration law might, as I have said, be impaired.

131. I am of the view that, in the circumstances of the main proceedings, Community law may not be interpreted in such a way as to render inapplicable the immigration law of a Member State.

132. Following the judgment in *Singh* a national of a Member State who has been employed as a worker in another Member State has the right on returning to his own country to be accompanied by his spouse. In my view it may not be inferred from that judgment that that right subsists under any circumstances. First, the Court was not called upon in that judgment to rule on the question whether that right also subsists where the spouse has no individual leave to reside in the European Union following a prior individual assessment under the immigration law of a Member State. Secondly, the Court appears to have accepted that the right of the national of the Member State does not preclude any individual assessment. It expressly states in *Singh* that it was not argued that the marriage of the

Singh couple was a marriage of convenience. [82] Thirdly, the Court formed its view on the basis of the argument that an obstacle occurring on a person's return to his own country could deter a national of a Member State from making use of the right to go and work in another Member State. That argument cannot prevail in a case where the spouse has not been allowed entry to the national's own country. Owing to the anomaly in the system described above, that is precisely the reason for the Community national to go and work in another Member State.

133. *Singh* creates both a right for the Community national to be accompanied on return to his own country by the spouse and a right for the spouse who is a national of a non-Member State to establish himself in that Member State without being subject to immigration law. Those rights must be viewed in the context of freedom of movement for persons within the European Union. If a citizen of the Union married to a national of a non-Member State makes use of the right conferred on him to reside in another Member State, he must be able to take his spouse with him. Likewise he must be able to assume that when he subsequently returns to his own country the spouse will not be subjected to a prior individual assessment under immigration legislation with the attendant risk that the spouse will not be allowed entry. In both cases the situation is no different if the marriage takes place during residence in another Member State.

134. However, *Singh* does not create a right in favour of the national of a non-Member State to enter the territory of the European Union. For that the immigration law of the Member States is applicable under which a prior individual assessment is required. The anomaly in the system whereby a spouse of a migrant worker may remain in the territory of a Member State without a prior individual assessment does not mean that that person has an unrestricted right to move and reside in the European Union.

135. A restricted interpretation of that right to move and reside is in keeping with the Court's case-law in regard to freedom of movement for persons. The generally widely drawn nature of that case-law stems from the essential character of freedom of movement for persons. The rights conferred by the EC Treaty on citizens of the Union may only be exercised in full if obstacles are as far as possible removed. In order for freedom of movement of persons within the European Union to function fully, it is likewise important that controls at the external borders of the European Union are effective. Internal freedom of movement of persons cannot function fully if it is made easier for nationals of non-Member States to use Community law in order to gain entry to the European Union

82 — See paragraph 12 of the judgment in *Singh*, cited at footnote 2 above.

without its having been possible to apply controls on entry. Put another way, a restriction on those possibilities in favour of nationals of non-Member States is, in light of the foregoing, a necessary precondition of unimpeded freedom of movement for persons within the European Union. In that connection it is immaterial that entry of nationals of non-Member States is at present regulated at the level of the Member States. Even when Community competence is supplemented under Article 63 EC the abovementioned condition will still have to be satisfied.

136. I thus reach the following determination: the right conferred on the spouse of the migrant worker under Article 10 of Regulation No 1612/68 may be limited in a case involving a spouse who is a national of a non-Member State and has not been granted entry to the European Union in conformity with immigration law. For in essence this case does not concern a right in connection with freedom of movement for persons but leave for nationals of non-Member States to enter the European Union. That is not altered by the fact that the recitals in the preamble to Regulation No 1612/68 describe the right to remain in favour of the spouse as a fundamental right in connection with internal freedom of movement for persons.

137. That means that a Member State in a case such as that described in the preceding paragraph is in principle justified in allowing the national concerned entry to its territory only after a prior individual assessment. A Member State's competence to subject that person to such an assessment is necessary in connection with the viability and enforceability of immigration law.

D — *Effect of that determination*

138. First, viable and enforceable immigration legislation regulating entry to the European Union from non-Member States is a necessary precondition for completion of the internal market and free movement of persons within it. As Community law currently stands, control of immigration from outside is a matter for the Member States. Community law may not be interpreted in such a way that they cannot perform their tasks in that connection.

139. Secondly, prior individual assessment of nationals entering from non-Member States on the basis of criteria laid down in national legislation is at the heart of national competence. If national legislation must give way, the Member State is not authorised to make entry by a national of a non-Member State dependent on an individual assessment, irrespective of whether that assessment would in the end result in entry clearance. For such assessment is

possible only in connection with a risk to public policy, public security or public health. A more wide-ranging assessment would be disproportionate and thus prohibited in light of the requirements laid down by the Court in that regard, for example in the *MRAX* judgment. [83]

140. Thirdly, Community law must not be allowed to be used in order to circumvent the national immigration laws of the Member States, in particular the prior individual assessment. That is all the more so in the situation in the main proceedings in which Community law is used in order to deprive of legal effect an earlier decision to deport a person from a Member State. In the individual case of Mr Akrich it was an offence committed earlier which led to his deportation from the United Kingdom and which thus also precludes his entry as the spouse of a United Kingdom national.

141. Fourth, the extent of the risks to the viability and enforceability of national immigration law should not be underestimated. Thus:

— the personal scope of Community law and national immigration laws are becoming more and more convergent; [84]

— the Court affords extensive protection to freedom of movement of persons as one of the fundamental freedoms of the EC Treaty;

— any extension of the Court's case-law may lead to fresh attempts at circumvention. It is in that sense that Mr and Mrs Akrich are expressly relying on the judgment in *Singh*.

142. In that connection I would point out that the particular case of Mr and Mrs Akrich may not occur that frequently in future. Yet other variants are conceivable whereby persons may seek to evade the immigration laws by availing themselves of Community law. That is not difficult where a justificatory ground is not upheld by the Court. It may also be of benefit to persons concerned in view of the fact that for

83 — See paragraph 74 above.

84 — See paragraph 61 above.

example an individual assessment of the marriage under the criteria laid down in the Council Resolution of 4 December 1997 [85] may be inconvenient to the persons concerned, even where they are acting in good faith, since the outcome is not known in advance. I consider it likely in that case that persons will more frequently seek to circumvent national immigration laws and choose Community law as a vehicle for remaining in the national's own Member State.

143. Yet none of that means that the prior individual assessment is not subject to conditions. The existence of an overriding public-interest ground does not mean that any measure is acceptable. Under the Court's case-law the measure must be suitable for ensuring attainment of the objective pursued and must not exceed what is necessary in that regard.

144. In the present case the rules in question are appropriate since the objective which they pursue is acceptable, namely the prior individual assessment of immigration by nationals of non-Member States. As it currently stands, Community law permits the Member States to shape their national immigration laws in regard to entry by nationals of non-Member States as they see fit. In that connection the United Kingdom legislature has laid down a number of objective criteria in its legislation in order to assist the decision-making process.

145. The proportionality test concerns the individual application of the criteria in the specific case. The Court assesses whether that application observes a proper balance between the interests at stake. In weighing up those interests regard must be had on the one hand to the viability and enforceability of national immigration laws. I have described that interest in sufficient detail above. On the other side of the scales are the individual interests of Mr and Mrs Akrich. The justified individual interests to be weighed in the balance are twofold:

— the entitlement of a person such as Mrs Akrich to the unimpeded exercise of her right to freedom of movement under Community law.

— respect of the right to family life.

146. It is established that Mrs Akrich and her spouse are impeded in the exercise of a right to free movement conferred on them by Community law, as interpreted in the *Singh* judgment. However, I am of the opinion that the rules in question do not go further than is necessary for attainment of

85 — See footnote 12 above.

the objective pursued. The relevant factor for me is that the interest relied on by the United Kingdom, namely the need for an individual assessment, cannot be safeguarded by rules which are less restrictive of freedom of movement. In addition, I consider it acceptable for the right of the spouse under Article 10 of Regulation No 1612/68 to be limited in a case involving a spouse who is a national of a non-Member State and has not been granted entry to the European Union in conformity with immigration law.

147. That brings me to the issue of the right to respect for family life, as laid down in Article 8 ECHR. In my view Article 8 ECHR is primarily of significance in regard to the application by the United Kingdom authorities of national immigration laws. That application is not subject to review by the Court. Only in very special cases is Article 8 of significance in the assessment of proportionality. That was so in the *Carpenter* case. In that connection the Court [86] considered that the refusal to allow Mrs Carpenter to enter the United Kingdom would result in a separation of the parties to the marriage. However, the present case does not concern a forced separation. Mr and Mrs Akrich live in Ireland and can continue to live there. What is being denied them is the right to freedom of movement, that is to say the right to install themselves together in the United Kingdom.

86 — See paragraph 39 of the judgment. Also in the case-law of the European Court of Human Rights the crucial issue is whether the spouses can reasonably live together in another country. See *Boultif* v. *Switzerland*, ECHR 2001-IX, §§ 52 to 55.

148. I conclude that the application of national immigration laws by a Member State to a national of a non-Member State married to a national of that Member State can be justified by an overriding public-interest ground, in this case the viability and enforceability of national immigration laws. The application thereof in the circumstances of the main proceedings is appropriate and proportionate.

E — *Implications of that view as regards approach*

149. In light of the conclusion which I have come to above, I do not consider it appropriate to deal with the questions submitted by the referring tribunal in the sequence indicated by it. For the intentions of Mr and Mrs Akrich, which the referring tribunal primarily addresses, are not the essential element. The competence of a Member State to apply national immigration law is a matter independent of such intentions.

150. That brings me to the following determination: I find that the application of national immigration law is justified by an overriding public-interest ground, in this case the viability and enforceability of national immigration laws. That justificatory ground has not hitherto been expressly

upheld by the Court. As a justificatory ground it is necessary because other such grounds previously upheld by the Court are not appropriate.

151. In these proceedings three possible bases have emerged for the United Kingdom's competence to refuse Mr Akrich entry to its territory in the circumstances of the main proceedings by applying its national immigration laws. Those are as follows:

— Mr and Mrs Akrich are outside the scope of Community law;

— they are within the scope of Community law but the Member State's conduct is warranted by the overriding public interest in the safeguarding of public policy and public security within the meaning of Article 46 EC or Directive 64/221;

— *idem*, but the justification is not to be sought in the areas of public policy and public security but in an overriding ground upheld in the Court's case-law, namely the ability to combat abuse of Community law.

In regard to these three possibilities I will show why none of them can constitute in the present case an appropriate basis for application of the United Kingdom's national immigration laws. I thus demonstrate that no other basis recognised by Community law exists for such application.

F — *Scope of Community law*

152. The United Kingdom takes the view that in the present case Community law is not applicable. In the United Kingdom Government's assertion, where a person seeks to use Community law in order to circumvent national law, that person cannot rely on the advantages stemming from Community law. Such a person falls outside the scope of Community law. Accordingly it is not necessary to determine whether that Member State is entitled under Community law to prohibit entry to its territory on the basis of public policy. Thus, in the United Kingdom Government's view, there is no need to examine whether Mrs Akrich is a Community worker.

153. Conversely, the Commission is of the view that nationals of the European Union have the right under Article 39 EC to move to another Member State in order to work there and to return to the Member State of origin together with their spouse and enjoy the same rights there as they enjoyed in that

other Member State. Return to the Member State of origin is thus governed by Community law and not by national law. Mrs Akrich is a Community worker. There was no disproportionate exercise of the rights pertaining to that status in view of the nature and scope of those rights.

154. Mr Akrich also considers that his spouse must be regarded as a Community worker since she moved to Ireland with the intention of genuinely and actually pursuing an occupational activity there and of returning to the United Kingdom after a certain time. The United Kingdom Government cannot maintain that Mrs Akrich is a worker in Ireland and ceases to be a worker on her return to the United Kingdom.

155. First, I will deal with establishment of a right as a Community worker. Subsequently, I will turn to the circumstances under which a citizen of the Union returning to his own country after working for a period in another Member State continues to come within the substantive scope of Community law. In that connection the question of the significance of the prohibition on discrimination also arises. Finally, I address the entitlement of the spouse of that citizen under Community law and the significance of the fact that his entitlement is derived from the rights of his spouse.

156. Under the Court's case-law the requirements in connection with establishment by a migrant worker of a right to reside are not strict. For this is a fundamental freedom of the Treaty which must be safeguarded as far as possible. First, the Court interprets widely in regard to duration, extent, level and place of salaried employment. Secondly, the intentions of the worker are in principle not relevant. As the Commission has submitted in these proceedings, it matters what someone does and not why they do it. Nor can that be otherwise since persons may have very different reasons for establishing themselves as workers in another Member State. These grounds may be work-related but may also be of a personal nature. Nor can a person be required to have the intention of settling for a long period or even permanently in another country. It goes without saying that to require persons to commit themselves to residence for a long period would have the effect of deterring workers from moving.

157. Thirdly, the right of a national of a Member State of the European Union to settle in another Member State has increasingly become more complete. That development has culminated in the direct effect of Article 18 EC which was for the first time expressly recognised by the Court in its judgment in *Baumbast and R.* As a result the intention underlying residence in another Member State is no longer material

at all to the question whether a right of installation in another Member State subsists.

158. None the less, intention is relevant in connection with the legal basis of that residence. That legal basis may be material in connection with the rights of family members derived from the right to reside and with the rights which continue to subsist after a person's return to his own Member State.

159. In light of these considerations I now turn to the case at issue in the main proceedings. In those proceedings it is established that during her period of residence in Ireland Mrs Akrich worked for more than six months for a bank. Accordingly, there is no doubt that in that connection she had a right under Community law to reside in Ireland and that during her period of residence in Ireland she had the status of a Community worker. It has also been established that the Irish authorities also treated her as such. Since the intentions of persons concerned are immaterial, I can discern no factor of relevance to the viewpoint of the United Kingdom that Mr and Mrs Akrich are outside the substantive scope of Community law.

160. The broad view taken by the Court in regard to establishment of the right is also apparent in the extent of a former Community worker's rights after that person's return to his own Member State.[87] The *Singh* judgment which is crucial to the present case formulates those rights, it is true, in absolute terms. Those rights are founded on the prohibition of discrimination and are akin to the rights which may be conferred on persons installing themselves in another Member State. In a substantive sense those persons retain the rights of a migrant worker. Amongst those rights is the right to be accompanied in one's own country by one's spouse who is a national of a non-Member State under the conditions laid down for workers in Regulation No 1612/68 and Directive 68/360.[88]

161. Thus, the prohibition of discrimination entails the consequence that the national of a Member State of the European Union who has resided in another Member State and has made use of Community law in that way acquires a more favourable legal position than his fellow countryman who has not made use of Community law. The same is true of the spouse of the national of a Member State who has resided in another Member State. In *Singh* the Court does not contrast that national with a fellow countryman but with a person installing himself in another Member State. On that view Mrs Akrich has the right to take her spouse with her to the United Kingdom. Mr Akrich retains his own right to remain conferred on him by Regulation No 1612/68. Thus both retain the rights conferred on them by Community law in Ireland.

87 — See paragraphs 75 et seq.

88 — See in more detail paragraphs 89 and 90 above.

162. In that connection it has been submitted in these proceedings that the right in favour of Mr Akrich to remain in the United Kingdom on the basis of Community law is a right derived from the right in favour of his spouse. Moreover, his right is not derived merely from her entitlement but is founded not on the Treaty itself but in secondary Community legislation, namely Regulation 1612/68. In addition, the right in favour of Mr Akrich cannot be derived from the wording of Regulation No 1612/68 itself but from the interpretation of that regulation in *Singh*.

163. In other words the right in favour of Mr Akrich is said to be a lesser right. I do not share that view. The right enjoyed by Mr Akrich under Community law is a right fully based on Community law. It is derivative in nature only inasmuch as it is derived from the tie existing between him and a Community worker. That tie must satisfy two conditions: there must be a tie between Mr and Mrs Akrich and Mrs Akrich must have rights under Community law owing to her status as a Community worker. In the present case there is no doubt that the tie satisfies both conditions.

164. Nor do I attach significance to the fact that the right in favour of Mr Akrich primarily stems from secondary Community law rather than from primary law. First, Regulation No 1612/68 was enacted as one of the measures necessary in order to bring about freedom of movement for workers. This and comparable EC legislation is thus a precondition of the realisation of freedom of movement for workers and cannot be dismissed as being of less value. In that regard the recitals in the preamble to Regulation No 1612/68 use the term 'fundamental right' in connection with both the worker and his family. Secondly, Community law has no hierarchy of norms under which the strength of a claim is dependent on the level at which the right is established. Nor, for those reasons, is it material that the right stems from the interpretation by the Court and not from the text of the regulation.

165. In light of the foregoing I conclude that a national of a Member State who has worked as a Community worker in another Member State may continue even after his return to his own country to derive rights from Community law and more particularly from Article 39 EC. Amongst those rights is the right for the spouse to install himself in the national's own country. The application by the United Kingdom authorities of national immigration laws conflicts with that right. Thus, it must subsequently be examined whether application of national rules is justified by an overriding national interest. I established earlier that such justification subsists in the present case.

166. Finally, I would make the following observation. It is contended on behalf of Mr Akrich that as a result of full harmonisation in the area of freedom of movement for workers the Member States are no longer competent to adopt unilateral measures. That view of the matter is unfounded. Regulation No 1612/68 on which the right to remain in favour of Mr Akrich would have to be based cannot be regarded as a harmonising measure. The regulation does not seek to approximate the legislation of the Member States but gives effect to Article 39 EC in particular by way of certain provisions intended to abolish any discrimination on the ground of nationality as between workers of the Member States. Directive 64/221 is also relevant. That directive approximates the legislation of the Member States but concerns only the internal movement of persons within the European Union in regard to a specific aspect: refusal of entry of persons to the territory of a Member State on grounds of public policy, public security or public health. The directive makes no provision in regard to the entry of persons into the European Union.

G — *Public policy within the meaning of Article 46 EC and Directive 64/221*

167. Where the concept of public policy is used as a ground for justifying an exception to freedom of movement for persons within the European Community it is strictly interpreted. In the interpretation of Article 46 EC the Court requires the existence of a serious threat affecting an essential interest of society. Review under Directive 64/221 is conducted on the basis of personal conduct constituting an actual threat to public policy.

168. On this point it is useful once again to highlight the specific case of the refusal to grant Mr Akrich entry clearance to the United Kingdom. The refusal by the United Kingdom authorities to revoke the deportation order against Mr Akrich is connected with an earlier punishable offence committed by him. Neither has it been stated nor may it be inferred that his presence in the United Kingdom constitutes a threat to public policy such as to warrant reliance on this justificatory ground. The United Kingdom authorities are in fact of the opinion that in a case such as this Community law cannot be invoked. Nor is it apparent from the facts and circumstances of the case that the existence of a threat to public policy may be presumed. In the absence of a more thorough investigation of the facts — to the extent to which that is a matter for the Court — I have formed the view that in a case such as this public policy cannot constitute an overriding ground of justification.

H — *Misuse of Community law*

169. In the proceedings before the Court much attention was paid to the question of a misuse of Community law. That is apparent from the observations submitted and is also logical in view of the questions referred to the Court for a preliminary ruling. In that connection the Commission is of the view that the motives or intentions of those concerned are not material. That the spouses made use of facilities afforded by the case-law, thus obtaining an advantage from Community law, does not result in a misuse of Community law. It is also asserted on behalf of Mr Akrich that under the case-law regard may not be had to the motives of those concerned. The fact that his wife moved to Ireland with the intention of pursuing occupational activities there and of returning after a certain period to the United Kingdom and that she did not wish to remain permanently in Ireland cannot in itself be deemed to constitute a misuse.

170. The United Kingdom's view of the matter is that a misuse of Community law is constituted in this case by the fact that Mrs Akrich moved to Dublin merely to benefit from Community law and thus to evade national legislation. In the assessment of whether a misuse of Community law is constituted regard may be had, in the United Kingdom Government's view, to the reasons for the move to Ireland by Mrs Akrich.

171. The Greek Government observes that persons are in principle entitled to arrange their circumstances in such a way as to come within a given set of rules, in this case Community law, and to benefit therefrom. But in regard to misuse of Community law the national courts are best placed to determine whether the person concerned loses the advantages of Community law. Accordingly, that government states that regard may be had to the intention of the spouses. In that regard the declared intention of the persons concerned must be inquired into. The inner will and motives are immaterial.

172. I begin with a preliminary observation. The present case affords a good opportunity to subject the concept of misuse of Community law to closer analysis. Mr and Mrs Akrich have expressly stated that they installed themselves in Ireland only with a view to escaping the application of United Kingdom immigration laws. They thus created a loophole such as to suggest a misuse of Community law. But those statements at the same time demonstrate the weakness of the doctrine of misuse. Were the aim of installation in Ireland a decisive factor then in subsequent cases those concerned would no longer have regard to the honesty of Mr and Mrs Akrich but would seek another aim.

173. It is apparent in my view from the case-law outlined (see paragraph 96 et seq.) and the observations submitted in these proceedings how difficult it is to apply the doctrine of misuse of Community law in a specific case. The following matters are relevant in that connection:

— subjective criteria serve no purpose;

— objective criteria — where identifiable — may be circumvented;

— the dividing line between abuse and use for a purpose not contemplated by the legislature is hard to define.

174. First, in regard to subjective criteria, considerable reluctance to attach weight to such criteria is discernible in the case-law. In principle, as is apparent from the judgment in *Levin*, the worker's intentions are irrelevant. It follows from my preliminary observation that that reluctance on the part of the Court is inevitable since subjective criteria and thus in particular the aim of those concerned may readily be subject to manipulation. Nor is that altered by regard being had, as the Greek Government proposes, to stated or objective intentions.

175. Secondly, in regard to objective criteria: the judgment in *Emsland-Stärke* requires for a finding of misuse that in addition to subjective conditions objective conditions must also be satisfied. In the present case the duration of residence in Ireland is taken to constitute an objective condition. Both in *Lair* and in *Knoors* significance was attached to duration of residence. In *Lair* it was significant for the Court that the person concerned worked only for a very short period in another Member State. In *Knoors* the Court held that in a case where the Community legislature had laid down a minimum period of residence in another Member State the Member State no longer had a justified interest in being authorised to prevent abuse. By dint of *a contrario* reasoning, such an interest would be capable of subsisting where the Community legislature has laid down no minimum period.

176. However, objective criteria lend themselves to being circumvented. In my view legal certainty requires that the factors taken into account by the national authorities in reviewing the issue of misuse be discernible. That entails the risk that persons concerned may adjust their situation so as to satisfy the conditions laid down. I would point to the statement by Mrs

Akrich to the effect that she was assuming that her period of residence in Ireland together with her husband had to be of at least six months' duration. Incidentally, the application of a minimum period for residence in another Member State prejudices the Court's case-law under which the status of Community worker is attained even after a very short period of occupational activity in another Member State.

177. The United Kingdom Government appears to acknowledge the possibility of circumvention and opts for a combination of subjective and objective criteria on the basis of which misuse may be established. [89] I do not see how such a combination of criteria can serve to remove the problems raised. For, in regard to the subjective criteria, or motives, the persons concerned do not have to practice openness and, in regard to the objective criteria, they may satisfy these.

178. Thus I come to my third point: the dividing line between misuse of EC law and use of EC law for a purpose which in actual fact was not contemplated by the Community legislature though rendered possible by it. In that connection I have in mind also the criterion applied by the Court in the *Centros* judgment, that is to say the concept of a matter 'inherent' to the exercise of a right. [90]

179. I will illustrate that point in this way. Community law makes it possible for a national of one Member State to install himself in another Member State. A citizen of the Union may have all kinds of reasons for installing himself in another Member State. One such reason may be that another Member State offers him a more favourable legal regime. That was the case in *Centros* where the person concerned opted for a Member State having a system of company law favourable to him. That is much more frequently the case as a result of differences in the tax legislation of the Member States. Community law can have no complaint with such mobility; rather it is precisely the objective of Community law to promote mobility.

180. The installation of Mr and Mrs Akrich in Ireland must be viewed as a use of EC law for a purpose not contemplated by the EC legislature but which is inherent in EC law. The EC legislature did not intend to create a right that can be used in order to evade national immigration laws but did create a right in favour of a national of a Member State to install himself in

89 — The list of criteria — not included in this Opinion — seeks to provide the Court with a means of assessment in a case such as this where a married couple has temporarily moved to another Member State.

90 — See paragraph 100 above.

another Member State together with his spouse. Installation in that other Member State constitutes the key element of the freedom given by Community law to nationals of the Union.

181. In other words, the installation of a worker in another Member State in order to benefit from a more favourable legal system is by its nature not a misuse of Community law.

182. That being said, the question arises as to whether the same is true of the return of a Community worker to his own Member State. I am of the opinion that, in view of the judgment in *Singh*, [91] the answer to this question cannot be other than affirmative. In accordance with the judgment in that case, the conditions for his entry and residence must be at least equivalent to those to which the Community worker is entitled under the EC Treaty or secondary Community law in the territory of another Member State. It thus makes no difference whether Mrs Akrich installs herself with her husband after her departure from Ireland in a Member State other than the United Kingdom — in which case there would by definition be no misuse of Community law — or whether she intends to return to the United Kingdom, as in the present case.

183. I will not go further into the question as to the extent to which the rights of Mr and Mrs Akrich under Community law continue to subsist after a return to the United Kingdom. Nor is that necessary. In my view it is established that return to one's own Member State under the conditions laid down in Community law is inherent in the freedom of movement of persons. By its very nature there is no abuse of Community law where the persons concerned on such return rely on the rights conferred on them by Community law.

184. I conclude that in the situation arising in the main proceedings there can be no question of a misuse of Community law.

185. Whatever the significance to be attached in general terms to the doctrine of misuse of Community law, [92] I conclude that in the situation arising in the main proceedings there can be no question of such a misuse.

91 — Cited above in footnote 2, paragraph 19.

92 — I would refer to paragraph 98 of the *TV10* judgment in which the Court upheld national legislation seeking to counter abuse of Community law, notwithstanding the fact that that legislation impeded freedom of movement within the European Union.

VIII — Conclusion

186. In light of the foregoing I propose that the Court should reply as follows to the questions referred to it by the Immigration Appeal Tribunal:

— A national of a Member State who has pursued an occupational activity in another Member State as a worker within the meaning of Article 39 EC continues after returning to his own country to enjoy rights under Community law, in particular Article 39 EC. Those rights include the right in favour of the worker's spouse to installation with the worker in the worker's country, irrespective of the nationality of the spouse. In such a case the worker's spouse has an autonomous right under Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community to remain in the Member State of which the worker is a national.

— None the less, the Member State of which the worker is a national may, relying on an overriding national interest, refuse entry to the worker's spouse, following a prior individual assessment, on the basis of criteria laid down in national immigration law in a case where a spouse who is a national of a non-Member State has not been admitted to the European Union in accordance with the immigration laws of a Member State.

— That Member State's competence in that regard stems from the interest in the viability and enforceability of immigration laws.

— The intentions of the worker and his spouse in making use of the rights conferred on them by Community law and, in particular, the rules on freedom of movement for workers are immaterial.