OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 3 July 1990 *

Mr President,
Members of the Court,

1. The questions submitted for a preliminary ruling by the Tribunal de première instance (Court of First Instance), Brussels, and the Cour d'appel (Court of Appeal), Brussels, stem from provisions of Belgian legislation, which call for some explanation.

2. Without there being any need to go back over the case-law of the Court at length, it may be recalled that the Court has held as follows:

'... the Treaty provisions on freedom of movement for workers and the rules adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by Community law.

Such is undoubtedly the case with workers who have never exercised the right to freedom of movement within the Community'. [1]

In such a case the person concerned does not benefit by the Community right, and consequently his ascendants and his spouse are not entitled to invoke a 'derived' right of residence or right to remain. In view of those principles, a Community national and his family may enjoy a more favourable situation under Community law in a given Member State than nationals of that State enjoy under its legislation. The expression 'reverse discrimination' is commonly used to describe such a situation.

3. Apparently, the Belgian legislature wished to forestall such consequences by providing, in Article 40 of the Law of 15 December 1980, that the spouse, ascendants and descendants of a Belgian national are to be treated in the same way as Community nationals. And it is that very aspect of the national law which seems to have prompted the questions now before the Court, which arose in a dispute which I now propose to outline briefly.

4. Mrs Dzodzi, a Togolese national, arrived in Belgium in February 1987 and married Mr Herman, a Belgian national, on 14 February. Five days later Mrs Dzodzi applied to the local authority at Soumagnes for a residence permit. Subsequently, the couple had to leave for Togo and Mrs Dzodzi's name was removed from the local authority's population register on 17 March 1987. In early July 1987 the couple returned to Belgium. Mr Herman died on 28 July. On 28 August 1987, Mrs Dzodzi applied for a Belgian residence permit. An 'arrival declaration' of three months' validity was issued to her, and she was recommended to apply for a residence permit on the basis of the ordinary law on the ground that she was 'no longer covered by the Community

* Original language: French.

1 — Judgment in Joined Cases 35/82 and 36/82 *Morson and Jhanjan* v *Netherlands* [1982] ECR 3723, paragraphs 16 and 17.

directives'. The authorities subsequently rejected the applications made by Mrs Dzodzi on the basis of the Law of 15 December 1980 and issued her with a number of 'arrival declarations' intended to enable her to wind up her husband's estate.

5. At this point Mrs Dzodzi applied to the President of the Tribunal de première instance in Brussels for an order requiring the Belgian State to issue to her a residence permit in her capacity as the spouse of a national of a Member State of the European Economic Community. Three questions were submitted for a preliminary ruling in those proceedings. The first two questions concern the right of residence and the right to remain of a person in Mrs Dzodzi's position. The third question, which is to be answered if the first two are answered in the negative because Mrs Dzodzi's husband was a Belgian national, seeks to establish what the position would be if the deceased had been a national of a Member State other than Belgium. Mrs Dzodzi appealed against the order of the lower court, which had stayed the proceedings on the admissibility of the action and had reserved judgment on the application for a provisional residence permit. In the course of the appeal, the Cour d'appel, Brussels, in turn submitted two questions to this Court for a preliminary ruling. The first asks whether persons to whom Council Directive 64/221/EEC[2] applies may be debarred from resorting to proceedings for interim relief. The second question is concerned with the interpretation of Article 9 of the directive. The issue is, basically, whether interested persons must have access to a remedy whereby they can apply, as a matter of urgency, for a national judicial body to intervene before the measure complained of is carried out, the aim being to secure measures in time in order to protect the rights which are under threat.

6. It is not necessary to comment at length on the first two questions put by the Tribunal de première instance. It is clear from the documents forwarded by the national court and from the observations of the parties to the main proceedings that there is no factor connecting the situation under consideration by that court with Community law. This is the case where the spouse of the person concerned never exercised the right of free movement in the Community.[3] Mr Herman did not avail himself of his right of free movement in the Community, and therefore the situation is purely an internal one.

7. However, the national court appears to have anticipated that conclusion, for, in case the Court should give a ruling to that effect, it sets out an alternative question, after pointing out that under the national law the spouse of a Belgian national is treated as if he or she were a Community national. It asks this Court whether Mrs Dzodzi would have the right to reside and remain in Belgium if her husband had been a national of a Member State other than Belgium.

8. The interpretative ruling is requested for the purposes of the application of the Belgian law containing the provision referred to above as is clear from the very wording of the question. However, in my opinion it is not competent to this Court to give the ruling requested of it. Nevertheless, I do not intend to invoke the principles laid down in the judgments in the cases of *Foglia* v *Novello*[4] as to the need for a genuine dispute — the existence of which, moreover,

2 — Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-64, p 117)

3 — See the judgment in *Morson and Jhanjan*, cited above

4 — Case 104/79 *Foglia* v *Novello* [1980] ECR 745 and Case 244/80 *Foglia* v *Novello* [1981] ECR 3045

is beyond doubt in this case. No more shall I propose that the Court express a view on the necessity or relevance of the question, which the national court alone is competent to assess. It is, however, appropriate to recall the function of the mechanism of the preliminary ruling:

'Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of *ensuring that in all circumstances this law is the same* in all States of the Community'. [5]

Inherently, this aim of the preliminary ruling procedure, namely to ensure that Community law is uniform in its effects, clearly applies only within the field of application of Community law, as it is defined by Community law and by Community law alone.

9. A reference made to Community law by a national law cannot extend the scope *ratione materiae* or *ratione personae* of Community law. Such a reference is unilateral and independent and, in referring to a given substantive provision of Community origin, has no effect on the field of application of Community law as such. It is Community law itself and Community law alone that defines the necessary connecting factor for the provisions governing the free movement of persons.

10. Where there is a reference of the sort made by Belgian law in this instance, the persons concerned are covered by national law alone. In such a case the Court's ruling on interpretation would not be to ensure that Community law has uniform effects, that is to say, uniform content in its field of application. It would be a *sui generis* operation designed to assist the national court in giving effect to national law alone and outside the field of application of Community law.

11. I would stress that the unity of the Community legal order is unaffected by situations outside its field of application, regardless of the substantive content of the provisions governing those situations. *There is no Community law outside its field of application*: what is important therefore for its proper application is its unity within the scope *ratione personae* and *ratione materiae* which it itself determines. The fact that the concepts which it uses within the limits of its scope may be employed on a unilateral basis in order to deal with a given aspect of a piece of national legislation cannot extend the field of application of Community law and, with it, the competence of the Court of Justice.

12. For the rest, I would like to touch on some of the queries which would be raised if the role of the preliminary reference mechanism were to be extended:

(i) Could courts against whose decisions no appeal will lie conceivably be bound by an obligation to request the Court for a preliminary ruling in cases similar to the present case?

(ii) Similarly, would it be possible to visualize, even in principle, an application to review the validity of Community provisions to which reference is made by national law on a unilateral and independent basis?

5 — Case 166/73 *Rheinmühlen* v *Einfuhr- und Vorratsstelle für Getreide* [1974] ECR 33, paragraph 2 (my emphasis).

(iii) Finally, and above all, what authority would the Court's ruling have? Irrespective of the attitude which the national court might foreseeably take after referring a question to this Court, which would be purely circumstantial, would it be legally bound by the terms of the ruling, given that it has to give effect to national law and to national law alone?

These serious questions cast some light on the grave difficulties which would be involved if the Court of Justice were to embark upon ill-defined cooperation, outside the confines and precise aims of the preliminary ruling mechanism. In other words, the Court's role would then consist in delivering opinions or giving advice of the kind which a legal expert is sometimes called upon to give to a domestic court when it is required to apply foreign law. That is not the role of this Court in the context of a preliminary ruling. [6]

13. Lastly, I propose that the Court should inform the Cour d'appel, in answer to its two questions, that Directive 64/221 may be relied upon only by persons who are in a situation which exhibits a factor linking it with Community law.

14. The need for such an answer is especially great, since it is clear from the grounds of its order that the Cour d'appel is in doubt as to whether Belgian legislation could, without infringing Community law, withhold from certain aliens the right to seek interim relief.

15. As I have already observed, a reference made by national law to Community law does not have the effect of extending the latter's field of application. But that would indeed be the result if a person in a merely domestic situation, subject to national law alone, could invoke Community law in order to have national legislation relied on against him set aside by virtue of the reference which the national legislation makes to Community provisions.

16. Accordingly, I propose that the Court should:

(1) rule, in answer to the first two questions of the Tribunal de première instance, Brussels, that where a Community national has not exercised the right of free movement within the Community, his or her spouse may not claim, under Community law, a right to enter, reside or remain in the Member State of which the aforesaid Community national is a national;

6 — 'The truly original innovation of the Treaties of Rome was to institute, *for the purpose of the application of Community law*, direct links between judicial authorities in the form of a relationship which is *far more than mere consultation*, namely a relationship pitched on the plane of jurisdiction and powers' Pescatore, P *Le droit de l'intégration*, 1972, A W Sijthoff-Leiden, Institut universitaire des hautes etudes internationales, Geneva (my emphasis)

(2) declare that it has no jurisdiction to answer the third question put by the Tribunal de première instance, Brussels;

(3) rule, in reply to the two questions put by the Cour d'appel, Brussels, that the procedural guarantees introduced by Articles 8 and 9 of Council Directive 64/221/EEC are not binding on the Member States *vis-à-vis* persons who are not in a situation provided for by Community law, for instance the spouse of a Community national where the latter has not worked as either an employed person or a self-employed person in a Member State other than a State of which he is a national.