OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 13 September 2001 [1]

I — Introduction

1. The Immigration Appeal Tribunal asks the Court whether a national of a non-member country who is married to a citizen of the Union may rely on Article 49 EC or on Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, in order to obtain the right of residence in the spouse's State of origin. The present case concerns a Philippine national who is married to a national of the United Kingdom.

II — Facts and main proceedings

2. Mary Carpenter, a Philippine national, was given leave in 1994 to enter the United Kingdom as a visitor for six months. She overstayed that leave, and in May 1996 married Peter Carpenter, a national of the United Kingdom, with whom she had been living since October 1995. Mr Carpenter has two children from his first marriage, which was dissolved in 1996. Mrs Carpenter now cares for the children.

3. Mr Carpenter operates as sole owner an undertaking which sells advertisements in periodicals and offers the editors of those periodicals various services in connection with administration and publication of advertisements. The undertaking is established in the United Kingdom, as are some of its customers. A substantial part of the undertaking's business is, however, conducted with customers established in other Member States. In addition, Mr Carpenter attends meetings for business purposes in other Member States. The undertaking, whose success depends on the direct personal input of Mr Carpenter, has four full-time employees. From 1996 to 1998 its net profit more than doubled. Mr Carpenter attributes this to his wife, who relieved him in caring for the children.

4. On 15 July 1996 Mrs Carpenter applied to the Secretary of State for leave to remain

1 — Original language: German.

as the spouse of a United Kingdom national. The application was refused on 21 July 1997. Together with the refusal, the Secretary of State took a decision to make a deportation order against Mrs Carpenter.

5. Mrs Carpenter appealed to an adjudicator against the Secretary of State's decision. The appeal was dismissed on 10 June 1998. She thereupon appealed to the Immigration Appeal Tribunal. The Tribunal granted permission to appeal on 30 November 1998, and referred the following question to the Court of Justice:

'In circumstances where:

(a) a national of a Member State, who is established in that Member State and who provides services to persons in other Member States; and

(b) has a spouse who is not a national of a Member State;

can the non-national spouse rely on

(i) Article 49 EC and/or

(ii) Directive 73/148/EEC

to provide the non-national spouse with the right to reside with his or her spouse in his or her spouse's Member State of origin?

Is the answer to the question referred different if the non-national spouse indirectly assists the national of a Member State in carrying on the provision of services in other Member States by carrying out childcare?'

III — Legal background

A — *Community law*

6. Article 1(1) of Directive 73/148/EEC states:

'The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

(a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;

(b) nationals of Member States wishing to go to another Member State as recipients of services;

(c) the spouse and the children under 21 years of age of such nationals, irrespective of their nationality;

(d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.'

7. Article 3(1) states:

'Member States shall grant to the persons referred to in Article 1 [the] right to enter their territory merely on production of a valid identity card or passport.'

8. Article 4(2) states:

'The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

Where such period exceeds three months, the Member State in the territory of which the services are performed shall issue a right of abode as proof of the right of residence.

Where the period does not exceed three months, the identity card or passport with

which the person concerned entered the territory shall be sufficient to cover his stay. The Member State may, however, require the person concerned to report his presence in the territory.'

9. Article 4(3) provides:

'A member of the family who is not a national of a Member State shall be issued with a residence document which shall have the same validity as that issued to the national on whom he is dependent.'

B — *National law*

10. The basic provisions on immigration are to be found in the Immigration Act 1971 (amended by the Immigration Act 1988).

Under Section 3(1) of the Immigration Act 1971, persons who are subject to immigration control may enter the United Kingdom only with leave to enter. Leave to remain may be granted for a limited or unlimited period.

Section 3(5) of the Immigration Act 1971 states:

'A person who is not a British Citizen shall be liable to deportation from the United Kingdom —

(a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave...'.

Section 7(1) of the Immigration Act 1988 provides:

'A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.'

IV — Submissions of the parties

A — *Submissions of Mrs Carpenter*

1. Basic observations

11. Mrs Carpenter states that she is the spouse of Mr Carpenter, a citizen of the Union. Her spouse exercises the freedom to provide services under Community law, in so far as he travels to other Member States in order to provide services there. His travelling is made substantially easier by her: she travels with him, or remains in the United Kingdom when he is travelling and looks after his children. Her expulsion to the Philippines for any length of time 'would hinder the provision of services and hinders the integration of the internal market'. Any substantial restriction of the freedom to provide services is, according to Mrs Carpenter, against the aims of the Treaty.

Mrs Carpenter is aware that under Community law she does not herself have the right of residence in any Member State. Her rights in this respect are, in her opinion, derived from those of her spouse, that is, from his right to provide services and his freedom to travel within the Union. She is further aware that a Member State is entitled to enact rules to regulate the provision of services in its territory. This power of the Member State follows, according to Mrs Carpenter, from the Court's judgment in *Alpine Investments*. [2]

2. The principle of proportionality

12. Mrs Carpenter considers that the principle of proportionality is infringed because the decision to make a deportation order against her was made on the sole ground that she had stayed in the United Kingdom longer than allowed. No grounds of public order or public health, as provided for in Article 8 of Directive 73/148, were asserted.

13. She refers in this connection to the *Singh* judgment. [3] In that judgment the Court held that a national of a Member State who has exercised his rights deriving from Community law in another Member State is entitled to return to his State of origin in the company of his spouse who is a national of a non-member country. According to Mrs Carpenter, it follows from that judgment that the rights of Community nationals founded on the Treaty cannot be fully effective if a Community national is deterred from exercising them by obstacles raised in his country of

2 — Case C-384/93 *Alpine Investments* [1995] ECR I-1141.
3 — Case C-370/90 *Singh* [1992] ECR I-4265.

origin to the entry and residence of his spouse who is a national of a non-member country.

It also follows from that judgment, in her opinion, that the spouse from a non-member country of a citizen of the Union must have the same right to enter or reside in the State of origin of the citizen of the Union as to enter or reside in another Member State.

14. Mrs Carpenter further states that her spouse must have the same Community law rights in the United Kingdom as in another Member State. If he took his spouse with him to another Member State, that Member State would have to allow both spouses to enter.

15. Moreover, while the *Singh* judgment concerns freedom of movement for workers and freedom of establishment, persons who provide services should not have less rights. The parallel nature of those fundamental freedoms is apparent from the case-law of the Court.

16. Mrs Carpenter similarly addresses the question of a wholly internal situation, which in her opinion is not present here. Since Mr Carpenter provides services throughout the internal market, it cannot be argued that the restriction placed on her is of purely internal significance.

She supports this argument by reference to the judgment in *Moser*,[4] from which it does not, in her view, follow that the situation of Mr and Mrs Carpenter is a wholly internal one. Their situation is completely different from that at issue in *Moser*. *Moser* concerned a national of a Member State who had never resided, worked or provided services in another Member State. In that case the Court therefore held that the Treaty is not applicable to such a situation.

The situation of Mr Carpenter, however, is comparable rather with the facts of the *Stanton* case.[5] Mrs Carpenter points out that in that case the Court concluded that the Treaty precludes a national provision which places at a disadvantage persons who pursue economic activities in another Member State.

3. The principle of non-discrimination

17. With respect to the principle of non-discrimination, Mrs Carpenter submits that if she had, for example, married a French national who — like Mr Carpenter — had been established in the United King-

4 — Case 180/83 *Moser* [1984] ECR 2539, paragraph 20.

5 — Case 143/87 *Stanton* v *INASTI* [1988] ECR 3877, paragraph 14. That case concerned a rule which provided that persons who were gainfully employed in one Member State were exempted from the obligation to pay contributions to the social insurance scheme for self-employed persons in that Member State, but refused that exemption to persons who were gainfully employed in another Member State.

dom and had provided services from there to other Member States, Community law would preclude her deportation to the Philippines. That is because the exercise of the right of freedom to provide services by such a French national would be seriously restricted if his spouse from a non-member country were deported. A British national such as Mr Carpenter may thus not be in a less favourable position than a French national in the United Kingdom. As appears from the Court's case-law, such a provision concerning 'immigration' is discriminatory and therefore in breach of the Treaty.

B — *Submissions of the United Kingdom Government*

18. The United Kingdom Government states that the national provisions at issue pursue the aim of ensuring the application of the national procedures and rules on immigration. Immigration law distinguishes between persons who have only a limited right of entry and persons who have the right to reside in the United Kingdom. It must also be ensured that the rules are not evaded. Thus marriages may not be contracted for the sole purpose of residence.

19. As regards the applicability of Article 49 EC or Directive 73/148, the United Kingdom Government points out that the right to enter a Member State and reside there derives from that directive, not from primary law. A correct interpretation of Article 4(2) and (3) of Directive 73/148 shows, for example, that a British national who wishes to provide services in another Member State has the right to reside in that Member State for the duration of the provision of services. His spouse may also reside there for the same period. Those provisions do not, on the other hand, found any right of residence for British nationals in the United Kingdom (that right derives from national law).

20. The United Kingdom Government then refers to paragraphs 17 and 18 of the *Singh* judgment. [6] It appears from that passage, first, that nationals of a Member State are entitled to enter the territory of another Member State and reside there in order to pursue an economic activity. It follows, second, that their spouses have the same rights.

21. It is also apparent from paragraph 23 of that judgment that the Treaty does not bestow 'directly' on nationals of a Member State the right to enter their own Member State. Such a right is normally inherent in nationality and thus derives from national law.

6 — Case C-370/90, cited in note 3.

22. As regards the application of this principle from the case-law to the situation of Mrs Carpenter, the United Kingdom Government points out that Mr Carpenter has not exercised his right to freedom of movement. Neither he nor his spouse could therefore rely on the principle defined by the Court in *Singh* or on the case-law summarised in the *Asscher* judgment. [7] According to that case-law, nationals may rely on Community law as against their own Member State 'where by reason of their conduct they are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty'.

23. It submits that the case-law of the Court of Justice cited by Mrs Carpenter concerns different situations and cannot therefore be applied to the present case.

24. The United Kingdom Government then observes that Mr Carpenter's right to extend his business activities to other Member States does not give him the right to indirect assistance by a national of a non-member country who has no right of residence in the United Kingdom.

25. In conclusion, the United Kingdom Government submits that a person who is in a situation such as Mrs Carpenter's cannot therefore derive a right of entry or residence from Community law. A possible remedy might be provided by the European Convention on the Protection of Human Rights and Fundamental Freedoms.

C — *Submissions of the Commission*

26. According to the Commission, the situation of Mrs Carpenter must be clearly distinguished from that of a spouse, who is a national of a non-member country, of a citizen of the Union who exercises his right to freedom of movement and has thus left his Member State of origin and moved to another Member State in order to become established or to work there. The Commission observes that Mr Carpenter never intended to become established in a Member State other than the United Kingdom, where his undertaking has always been located and where he lives with Mrs Carpenter and his children.

27. In the Commission's view, the right of entry and residence for the spouse from a non-member country of a citizen of the Union, expressed in paragraph 23 of the *Singh* judgment, [8] may not be extended to a situation in which the citizen of the Union with his spouse never intended to become established in another Member State and merely provides services from his State of origin.

7 — Case C-107/94 *Asscher* [1996] ECR I-3089.

8 — Case C-370/90, cited in note 3.

28. Unlike Mrs Carpenter, Mr and Mrs Singh were moreover lawfully resident in the United Kingdom before transferring their residence to another Member State.

The Commission does not see how the situation of Mrs Carpenter can be regarded as a situation subject to Community law. It is inclined rather to the view that such a situation is to be classified as an internal situation in the sense of the Court's judgment in the *Morson and Jhanjan* case. [9]

29. Moreover, the immigration adjudicator's conclusion that the circumstance that Mrs Carpenter cares for the children indirectly assists Mr Carpenter to exercise his rights under Article 49 EC, that is, to devote himself more to his business, has nothing to do with the question whether Mr Carpenter actually has exercised his right of freedom of movement in such a way that his spouse comes under Community law. The fact that Mrs Carpenter cares for the children merely constitutes a possible factual complex and is based on a free decision of the two spouses.

V — Assessment

30. The question referred consists of two parts. The first part concerns the general question of the right of residence of a national of a non-member country, married to a citizen of the Union who provides services in other Member States, in the State of origin of the citizen of the Union. The second part of the question concerns a specific factual situation, namely where the national of a non-member country indirectly assists the citizen of the Union to whom he or she is married to provide services in other Member States, by caring for that citizen's children.

31. The question is moreover addressed to two possible legal bases: Article 49 EC and Directive 73/148.

A — *First part of the question referred: right of residence generally of spouses who are nationals of non-member countries*

32. The first part of the question referred must therefore be examined separately according to the two legal bases mentioned above.

1. Article 49 EC: freedom to provide services

33. First of all, the subject-matter of these and the main proceedings should be

9 — Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723. That case concerned the right of residence of mothers, nationals of non-member countries, whose children were employed in the Member State whose nationality they possessed.

remembered: the right of residence of Mrs Carpenter, that is, of a national of a non-member country who is married to a citizen of the Union.

34. Many of Mrs Carpenter's submissions, on the other hand, relate to the rights of Mr Carpenter, raising the question whether the measures taken by the United Kingdom to terminate her residence obstruct Mr Carpenter in providing services in other Member States, in other words, whether the measures constitute a restriction of the freedom to provide services.

35. The wording of the question referred shows clearly, however, that it is directed at Article 49 EC as a possible legal basis for a right of residence Mrs Carpenter, not Mr Carpenter, may have.

36. The question whether and to what extent the provisions of the United Kingdom on residence restrict Mr Carpenter's rights deriving from Community law, and whether such restrictions are justified, need not therefore be considered further for the present in this connection.

37. The question to be examined here is rather whether Mrs Carpenter can rely on Article 49 EC for her right of residence.

38. As a national of the Philippines, however, Mrs Carpenter cannot herself rely on the fundamental freedoms, and hence not on Article 49. Since she cannot rely on the freedom to provide services, she cannot derive any right of residence therefrom. The relevant provisions concerning the entry and residence of nationals of non-member countries are rather to be found in secondary law, which will thus have to be considered below.

39. Accordingly, a spouse of a citizen of the Union who is a national of a non-member country may not base a right of residence on Article 49 EC.

40. However, the freedom to provide services is of relevance at any rate as a criterion of the interpretation consistent with Community law of Directive 73/148 and of national law.

41. According to the principle of interpretation consistent with Community law, firstly, the provisions of secondary law are to be interpreted in the light of primary law; in the present case that means that they must be interpreted in the light of the primary-law freedom to provide services (see below, section 2(b)). Secondly, the principle of interpretation consistent with Community law also includes the obligation to interpret national law in the light

of the corresponding primary and secondary Community law. For the present case that means that the United Kingdom is obliged to interpret its law on foreigners, in particular the Immigration Act, in the light of the freedom to provide services and of Directive 73/148.

2. Directive 73/148

42. Under Community law currently in force, that is, under Directive 73/148 which is material in this case, the residence status of a national of a non-member country who is married to a citizen of the Union depends on the legal position of the citizen of the Union.

43. Under Article 1(1)(c) of the directive, it applies also to spouses of nationals of Member States irrespective of their nationality, and hence also to Philippine nationals who are married to British nationals. Under Article 4(3) of the directive, a member of the family who does not possess the nationality of a Member State must be issued with a residence document with the same validity as that of the national from whom the rights of the member of the family who is a national of a non-member country are derived.

44. Nationals of non-member countries who are married to citizens of the Union thus only have rights derived from those of their spouses. That includes the right of residence at issue in the present case.

45. First, then, as a basic condition for the national of a non-member-country to be able to derive rights from his or her spouse, it must be examined whether the spouse is exercising rights under Community law at all, in other words, whether there is a Community connection. There must not therefore be a purely internal situation, because in that case the necessary point of attachment for the rights of the non-member-country national would be absent.

46. The criteria in the light of which Directive 73/148 and the national law transposing that directive must be interpreted must then be considered more closely. Besides the freedom to provide services which is material here, these are the general principles of law. As the Court has consistently held, those principles include fundamental rights. [10]

10 — On the interpretation of a regulation in the light of Article 8 of the European Convention on Human Rights, see Case 249/86 *Commission* v *Germany* [1989] ECR 1263, paragraph 10; see also Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, on the interpretation of a directive in the light of the Convention.

47. Freedom to provide services and fundamental rights also set limits to the Member States' discretion in connection with transposition. In a case such as that in the main proceedings, they could therefore restrict in principle, as regards legislation and enforcement, the freedom of the United Kingdom to act in the field of the law on foreigners.

(a) Community connection as a general condition for the applicability of Directive 73/148

(aa) Principle: Community connection in the context of fundamental freedoms

48. Spouses of citizens of the Union who are nationals of non-member countries are afforded a right of residence by Directive 73/148 only if the citizen of the Union also exercises his rights deriving from Community law. The right of residence of nationals of non-member countries thus presupposes a Community connection. In the present case, a possible point of connection could be the fundamental freedoms.

49. The Court has consistently held that the fundamental freedoms are not applicable to situations which are confined in all respects within a single Member State. [11]

50. That principle applies to primary law, in the present case the Treaty provisions on freedom to provide services. But it also applies to the measures adopted to implement the provisions of primary law. [12] The relevant measure of secondary law in the present case is Directive 73/148.

51. It must therefore always be examined whether the factual situation to be assessed has a point of contact with a factual situation to which Community law refers.

52. If the necessary Community connection is absent, that is, if a citizen of the Union is not exercising his Community law rights, then he, and with him his spouse who is a national of a non-member country, are subject to national law alone. [13] That applies also to the right of residence. [14]

11 — Case C-97/98 *Jägerskiöld* [1999] ECR I-7319, paragraph 42, and Case C-134/95 *USSL No 47 di Biella* [1997] ECR I-195, paragraph 19.

12 — See on this point Case C-206/91 *Koua Poirrez* [1992] ECR I-6685, paragraph 11 and the cases cited there.

13 — Martin, 'Loi du 15 Décembre 1980', *Revue du droit des étrangers*, 1996, 722 (725).

14 — 'Wer zu wenig wandert, den bestraft das Leben' — Gutmann, 'Europäisches Aufenthaltsrecht für Drittstaatsangehörige', *Anwaltsblatt* 2000, 482 (484).

53. Nationals of non-member countries who are married to citizens of the Union in their State of origin are thus, if those citizens of the Union do not exercise their rights under Community law, placed in a worse position than nationals of non-member countries who are married to citizens of the Union who exercise their rights under Community law.

54. In this way, nationals of non-member countries who are married to British nationals and live in the United Kingdom could be disadvantaged generally as against nationals of non-member countries whose spouses come from another Member State and exercise their rights. That would be the case if the spouse worked, for example, in another Member State as a migrant worker or provided services there: nationals of non-member countries who were married to French nationals and lived with them in the United Kingdom, for example, or who lived with their British spouses in France, would thus come under Community law.

55. Spouses who are nationals of non-member countries are therefore placed in a worse position only where the spouse who is a citizen of the Union does not exercise his or her Community law rights.

56. A national of a non-member country whose spouse, as a citizen of the Union, 'has never exercised' [15] the right of freedom to provide services cannot therefore derive any rights from that spouse under Community law.

57. The fact that application of Community law — including application to spouses who are nationals of non-member countries — to such internal situations is excluded therefore results in reverse discrimination. [16]

58. Such reverse discrimination can be eliminated either by the Community legislature itself, for instance by provisions on reuniting families, or — without this being required under Community law — by the Member States themselves, [17] if where the question arises they assimilate the status of nationals of non-member countries married to their own nationals to the status of nationals of non-member countries married to nationals of other Member States who exercise their rights under Community law. This possibility of 'assimilation' has indeed already been made use of by several Member States. [18]

15 — Case C-206/91, cited in note 12, paragraph 13, concerning a member of a worker's family.

16 — See Dollat, *Libre circulation des personnes et citoyenneté européenne: enjeux et perspectives*, 1998, 104 f.; Martin, cited in note 13, 725.

17 — On the elimination of disadvantages by national law, see Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 23.

18 — Martin, cited in note 13, 725.

(bb) Community connection as a specific condition on the facts of the present case

59. To determine the status of Mrs Carpenter in relation to the right of residence, it is thus necessary first to determine the status of Mr Carpenter. It is apparent from the documents in the case that a Community law right possibly being exercised by Mr Carpenter is the freedom to provide services.

60. In the present case Mr Carpenter admittedly has his residence and his place of business in the United Kingdom, but his business activity is not confined to the domestic market, [19] he also carries on economic activities outside the United Kingdom.

61. As is also apparent from the documents in the case, Mr Carpenter derives a large part of his turnover from commissions by undertakings from other Member States. Some of the services are to be classified as cross-frontier services, in so far as the provider of the service travels to another Member State. [20]

62. According to the Court's case-law, a situation already has a Community connection even where, for instance, 'a degree of extraneity may derive in particular from the fact that an athlete participates in a competition in a Member State other than that in which he is established'. [21]

Mr Carpenter may at any rate be compared to such a professional athlete at least in so far as he too travels to other Member States in order to provide services there.

63. Besides this 'active' freedom to provide services, in view of the nature of Mr Carpenter's economic activity, 'correspondence services' also come into consideration. These comprise services where there is no change of place by the provider and recipient of the service but the services themselves are provided across a frontier. Such services too have been recognised by the Court [22] as services with a Community connection.

64. A substantial argument for Mr Carpenter's situation not being a wholly internal one but falling under Community law is also provided by the *Singh* judgment. The

19 — Compare Case C-108/98 *RI.SAN.* [1999] ECR I-5219, paragraph 21, which concerned an undertaking which operated in the market of its State of establishment.

20 — Case C-106/91 *Ramrath* [1992] ECR I-3351.

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

22 — Joined Cases C-34/95, C-35/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843, Case C-384/93, cited in note 2, and Case 155/73 *Sacchi* [1974] ECR 409.

facts of that case differ from the present one in two points, but these differences are not legally significant.

65. One difference is that Mr and Mrs Singh worked in another Member State as employees, not as providers of services like Mr Carpenter. However, the fact that Mr Carpenter thus exercised a different fundamental freedom, namely the freedom to provide services, may not in itself make any essential difference as regards the presence of a Community connection.

66. The second difference between the cases is that Mr and Mrs Singh returned to the United Kingdom, Mrs Singh's State of origin, after residing in Germany for nearly three years. Mr and Mrs Carpenter, by contrast, did not return to the United Kingdom, but were there and wish to remain there. That this too makes no essential difference follows, in my opinion, from the fact that in *Singh* the Court saw the exercise of Community rights not in the return from another Member State to the State of origin within the Union, but in Mrs Singh moving to another Member State to exercise her Community rights there, namely the freedom of movement for workers.

67. That Mr and Mrs Singh consequently settled in another Member State is not a legally relevant particular feature of the case. That circumstance is connected rather with the fact that they exercised a different fundamental freedom from Mr Carpenter, the freedom of movement for workers.

68. So if Mr Carpenter settled in another Member State in order to work on an employed or self-employed basis there, his situation would correspond directly to that of Mr and Mrs Singh.

69. The principles laid down by the Court in the *Singh* judgment can therefore, in my opinion, be applied to the present case of a provider of services.

70. According to the Court's observations in paragraph 23 of *Singh*, what matters is that 'when a Community national... returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State'.

71. Mr Carpenter thus exercises his Community rights in two respects, first by travelling to another Member State for professional reasons to carry on self-em-

ployed activity there and, second, by also providing services across the frontier without himself travelling to another Member State.

72. All these circumstances show that the essential situation, as regards the present proceedings, of Mr and Mrs Carpenter is not a purely internal one. Rather, it has a Community connection, with the consequence that Community law is applicable to a situation such as that in the main proceedings.

73. It may therefore be concluded that in the present state of Community law Mrs Carpenter, as the spouse of a citizen of the Union, has a right of residence derived from her spouse, at least if — and only as long as [23] — her spouse exercises his rights under Community law.

74. Finally, the question of the risk of abuse should be considered, in particular the possible risk that national rules on residence concerning the legal position of spouses of nationals who are nationals of non-member countries could be evaded by the spouse who is a national being tempted to 'create' a Community connection. Thus it might be argued that nationals of a Member State might, for example, take up employment — even only for a short term — in another Member State precisely in order thereby to 'bring' themselves and the non-member-country spouse within the scope of Community law. It might further be argued that the spouses who are nationals of non-member countries would thus be removed from the exclusive application of national law and would obtain a legal position which might be more favourable than under national law, by thereby being given the possibility of a right of residence based on Community law.

75. On this point, it must be observed that there is no evidence of such an intention to evade in the present case, since Mr Carpenter already operated his business and offered services across frontiers before the marriage. Again, the authorities concerned clearly have no doubt that the marriage of Mr and Mrs Carpenter is not a sham marriage.

(b) Interpretation of Directive 73/148 and national law in the light of primary law

76. The material provisions of Directive 73/148 on the right of residence and the

23 — Watson, 'Free Movement of Workers: a one way ticket?', *Industrial Law Journal*, 1993, 68 (75), draws attention to the connection between economic activity of the spouse and the right of residence of his or her spouse of non-member-country nationality, referring to the judgment in *Singh*.

national provisions concerning the right of residence must therefore, on the basis of the above considerations, be interpreted in the light of the freedom to provide services.

77. If the United Kingdom rules on the right of residence of nationals of non-member countries who are married to a British national were in fact applied also to a case — such as the present one — in which the British national exercises his rights under Community law, they would bring about a restriction of those Community law rights.

78. That is because, according to the relevant case-law of the Court, the right of residence and fundamental freedoms are interlinked. According to the Court's judgment in the *Singh* case, the rights derived from the freedom of movement for workers and the freedom of establishment 'cannot be fully effective if [a Community national] may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse'. [24]

79. If that principle is taken to apply to all the fundamental freedoms, then that means, in the present case concerning the freedom to provide services, that restrictions on providing services in other Member States could follow, for Mr Carpenter, from his spouse being granted no right, or only a limited right, of residence.

(c) Interpretation of Directive 73/148 and national law in the light of fundamental rights

80. The relevant provisions of Directive 73/148 on the right of residence and the national provisions concerning the right of residence must also, however, be interpreted in the light of fundamental rights.

81. On this point, it must first be stated in principle that the Court has to ensure that fundamental rights are observed. [25] 'For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect...'. [26] 'Those principles have, moreover, been restated in Article 6(2) [EU]...'. [27]

24 — Case C-370/90, cited in note 3, paragraph 23.

25 — Joined Cases 60/84 and 61/84 *Cinéthèque* [1985] ECR 2605, paragraph 26, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 28.

26 — Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 37.

27 — Case C-274/99 P, cited in note 26, paragraph 38.

82. The Court does not, however, have jurisdiction to assess whether a national provision of a Member State which lies outside the scope of Community law is compatible with fundamental rights. [28]

83. For national rules which fall within the scope of Community law, on the other hand, the referring court must be given all the information on interpretation which it needs to be able to assess the compatibility of those national rules with fundamental rights.

84. The present proceedings concern the right to respect for family life enshrined in Article 8 of the European Convention on Human Rights. That includes as a central element [29] the protection of marriages. [30] In the present case there are also the ties between Mrs Carpenter and her stepchildren. [31]

85. The present case therefore concerns, firstly, the negative obligation of the Contracting Parties/Member States deriving from Article 8 of the Convention not to interfere with the right of spouses to cohabit. [32] Secondly, it concerns the positive obligation of the States [33] to afford certain members of the family access to their territory. [34]

86. It is obvious that a refusal of permission to reside and a decision on deportation in principle interfere with those rights.

87. Conversely, however, the right to respect for family life does not enjoy absolute protection. An interference with that right is permissible under Article 8(2) of the Convention if it 'is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

88. As regards such an interference with the right to respect for family life, Member

28 — Case C-299/95 *Kremzow* [1997] I-2629, paragraph 15.

29 — The corresponding provision of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 is Article 7 (OJ 2000 C 364, p. 1).

30 — ECHR, *Abdulaziz, Cabales and Balkandali*, Series A no 94, § 62.

31 — On the recognition of these ties, see the unpublished decision of the Commission of Human Rights of 7 December 1982 in application 9867/82 *Moodey* v *the United Kingdom*.

32 — On this aspect, see generally De Schutter, 'Le droit au regroupement familial au croisement des ordres juridiques européens', *Revue du droit des étrangers*, 1996, 531 (546). On the negative obligation, see the judgment of the ECHR of 11 July 2000 in *Ciliz* v *the Netherlands*, § 62.

33 — ECHR, *Marckx*, Series A no 31, § 31.

34 — De Schutter, cited in note 32, 546.

States admittedly enjoy a certain margin of appreciation. [35] However, that margin for its part is not unlimited either. Thus the conditions which permit restrictions of the right to respect for family life are to be interpreted strictly.

89. The assessment of whether an interference with fundamental rights is permissible therefore depends on taking into account the circumstances of the specific individual case. While it is for the Court to give the national court the information on interpretation which it needs in order to decide the particular case before it, [36] it is for the national court to assess the facts in question by reference to the criteria laid down by the Court. That applies in particular in view of the nature of the analysis to be carried out; [37] the application of provisions of Community law, and of the provisions transposing them, to a particular case remains the task of the national court. [38]

90. As regards the criteria to be taken into account by the national court in its analysis, it must first be pointed out that what is concerned here is the necessity of the interference with the right to respect for family life, and primarily the proportionality of the interference.

91. In such an analysis of proportionality, it must be examined in particular whether it is proportionate that Mrs Carpenter may apply for the necessary leave only from abroad. [39] In that connection, the reasonableness of such a procedure for Mrs Carpenter would have to be considered, in particular the reasonableness, for example, of the waiting time for obtaining leave. It would also have to be examined whether, if Mrs Carpenter were to stay in the Philippines, it would be reasonable for Mr Carpenter — possibly with his children — to live in the Philippines and be economically active there. [40]

92. The analysis of proportionality, that is, of the necessity of the interference, must consist essentially in balancing the severity of the interference, that is, the adverse effect on private interests, against the aim pursued by the provision of the law on foreigners, that is, the interests of the State.

93. The severity of the interference, in other words the adverse effect on private interests, should be assessed by reference to

35 — ECHR, *Ahmut* v *the Netherlands*, Reports 1996-VI, 2031, § 63.

36 — Case C-28/99 *Verdonck and Others* [2001] ECR I-3399, paragraph 28.

37 — Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraph 23 and the cases cited there.

38 — Case C-446/98, cited in note 37, paragraph 23.

39 — Compare application 12122/86 *Lukka* v *the United Kingdom*, DR 50, 268.

40 — ECHR, *Beldjoudi* v *France*, Series A no 234-A, §§ 78 ff.

a number of factors. These will include the family circumstances of Mrs Carpenter, that is, her family ties in the United Kingdom [41] and the Philippines. The personal circumstances of Mrs Carpenter, that is, her integration into the society and culture of the United Kingdom, [42] should also be assessed.

94. In the present case, besides the interests of Mrs Carpenter as a spouse, there are also the interests of the stepchildren, which are also protected in principle by the Convention. [43] The intensity of the relationship between Mrs Carpenter and her stepchildren and the ages of the children are relevant in this respect. [44]

95. In the present case the geographical distance between the Philippines and the United Kingdom and the possibility or impossibility of visits would also have to be taken into account.

96. Finally, whether the marriage took place before or after the breach of the provisions on the law on foreigners should also be considered. As is apparent from the documents in the case, Mrs Carpenter married after the expiry of her limited leave.

97. As regards the interests of the State, account should be taken of the aims pursued by the United Kingdom with its provisions on foreigners, in particular concerning the right of residence. Of the aims mentioned in Article 8(2) of the Convention, the protection of public order will generally be a possible one. [45] Finally, the seriousness of the breach of the provisions on foreigners committed by Mrs Carpenter, that is, remaining in the United Kingdom after the expiry of her limited leave, would have to be considered.

(d) Member States' entitlement to impose penalties for breach of national provisions concerning residence

98. In conclusion, the possibilities which the Member States retain under Community law of penalising infringements of provisions of the law on foreigners may be noted. The limits which Community law, including the fundamental rights, sets

41 — ECHR, *Beldjoudi* v *France*, Series A no 234-A, § 78.

42 — ECHR, *Moustaquim* v *Belgium*, Series A no 193, § 45.

43 — See the unpublished decision of the Commission of Human Rights of 7 December 1982 in application 9867/82 *Moodey* v *the United Kingdom*.

44 — It may be noted that the welfare of the children may even play a decisive part in the balancing of interests (ECHR, *Elsholz* v *Germany*, no 25735/94, § 48).

45 — Application 12122/86 *Lukka* v *the United Kingdom*, DR 50, 272.

the Member States here — once again — apply only, however, in cases where there is a Community connection.

99. Thus Member States may, for instance, impose penalties on spouses from non-member countries who remain in the territory after the expiry of limited leave to reside. The penalties must comply with the principle of proportionality, however, as developed by the Court in its case-law. It has consistently been held that penalties such as fines and imprisonment are permissible if they are proportionate [46] or — to put it differently — constitute 'the appropriate punishment for infringement'. [47]

100. As regards removal from the territory of a Member State, it must be pointed out that the case-law of the Court sets strict limits for such measures. According to the *Royer* judgment, for instance, expulsion is not permissible if it is 'based solely on [the] person's failure to comply with the legal formalities concerning the control of aliens or on the lack of a residence permit'. [48] In *Watson and Belmann* the Court made it clear that deportation is not permissible on the ground of failure to comply with declaration and registration formalities. [49]

101. The answer to the first part of the question referred should therefore be that a spouse, who is a national of a non-member country, of a national of a Member State resident in that Member State may not rely on Article 49 EC but may rely on Directive 73/148 to obtain the right to reside with his or her spouse in the latter's Member State of origin, if that spouse provides services to persons in other Member States. It must be taken into account here that Directive 73/148 is to be interpreted in the light of primary law and fundamental rights, in particular the right to respect for family life.

B — *Second part of the question referred: the spouse who is a national of a non-member country cares for the children of the citizen of the Union*

102. The second part of the question referred to the Court relates to the case

46 — Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraph 21.

47 — Case 8/77 *Sagulo and Others* [1977] ECR 1495, paragraph 6.

48 — Case 48/75 *Royer* [1976] ECR 497, paragraph 40.

49 — Case 118/75, cited in note 46, paragraph 20.

where the spouse who is not a national of a Member State indirectly assists the spouse who is a national of a Member State to provide services in other Member States by caring for the latter's children.

103. As the Commission rightly submits, the circumstance that Mrs Carpenter cares for Mr Carpenter's children and thus indirectly assists him to exercise the rights deriving from the freedom to provide services has nothing to do with the question whether Mr Carpenter has exercised his rights in such a way that his spouse comes within Community law.

104. The relevant provisions of secondary Community law also argue against the circumstance that the spouse cares for the children of the citizen of the Union being legally relevant for the right of residence. Thus the relevant Directive 73/148 refers in Article 1(1), with respect to its scope, to a series of circumstances such as the degree of relationship, age, dependency and living together as a household. The care of children is not included in this — exhaustive — list. It may be concluded that the Community legislature manifestly attached no importance in this connection to caring for children.

105. Finally, the case-law of the Court on the rights of nationals of non-member countries who are married to citizens of the Union also does not refer expressly to the circumstance that the national of a non-member country contributes to the professional activity of the citizen of the Union. Thus in the *Singh* judgment the Court focuses — as stated above — on the fact that the rights derived from the freedom of movement for workers and the freedom of establishment 'cannot be fully effective if [a Community national] may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse'. [50] That that principle must be taken to apply to all the fundamental freedoms has already been shown.

106. The alternative addressed in the second part of the question referred is therefore of no legal significance for the answer to the question, and so need not be considered further.

50 — Case C-370/90, cited in note 3, paragraph 23.

VI — Conclusion

107. Accordingly, I propose that the Court should give the following answer to the question referred to it:

Where a national of a Member State resident in that Member State provides services to persons in other Member States and is married to a spouse who is not a national of a Member State, the spouse who is a national of a non-member country may not rely on Article 49 EC but may rely on Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, to obtain the right to reside with his or her spouse in the latter's Member State of origin. It must be taken into account here that Directive 73/148 is to be interpreted in the light of freedom to provide services and of fundamental rights, in particular the right to respect for family life.

The answer to the question referred is no different if the spouse who is not a national of a Member State indirectly assists the spouse who is such a national to provide services in other Member States by caring for that spouse's children.