OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 26 November 1996 *

1. The High Court of Justice (Queen's Bench Division) has referred to the Court of Justice for a preliminary ruling five questions on the interpretation of 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, [1] (hereinafter 'the Directive').

2. The High Court considers that an answer to those questions is needed to enable it to give a decision on applications made by Mr Shingara and Mr Radiom for judicial review of the refusal by the United Kingdom authorities, on grounds of public security, to allow them entry to the United Kingdom.

Facts and procedure in the Radiom case (as set out in the order for reference)

3. Mr Radiom, an Iranian national who has been married to a British citizen since 1981, acquired Irish nationality in 1982. In May 1983 he received indefinite leave to remain in the United Kingdom, not because of his status as a Community national (which the Home Office is not on record as being aware of at that time) but as a non-Community alien: his application for a residence permit had been based on the fact that he was married to a British citizen.

4. Between 1983 and 1989 Mr Radiom worked in the Iranian consular service, first in Manchester and then in London. In 1989 the United Kingdom severed diplomatic relations with Iran and on 9 March 1989 the Foreign Office [2] informed him that if he did not leave the United Kingdom within seven days he would be detained and deported. He left without waiting for that threat to be carried out. It appears that at that time he was told that he was to be deported on grounds of national security but no further details were given.

* Original language: Spanish.

1 — OJ, English Special Edition 1963-1964, p. 117.

2 — In the order for reference it is stated that the notice came from the Home Office but the document appended to the application in the main proceedings shows that in fact it came from the Foreign Office.

5. On 2 July 1992 Mr Radiom's solicitors wrote to the Home Office pointing out that he was a Community national and enquiring what the position would be if he returned to the United Kingdom to work. The official reply, dated 24 September 1992, was that the decision expelling him had been adopted on grounds of national security (there being no right of appeal) and that 'should Mr Radiom now attempt to enter the United Kingdom he will be refused entry on conducive grounds and will have no right of appeal. Should he be found to have entered the United Kingdom removal action will be instigated and again Mr Radiom will have no right of appeal.'

6. On 13 October 1992, after receiving that reply, Mr Radiom's solicitors wrote to the Home Office formally applying for the issue of a Community Residence Permit and asked that, in the event of a refusal, they should be provided with 'details of the appeal rights of our client in relation to that refusal which will satisfy Directive 64/221/EEC, Article 9'.

7. The Home Office's negative reply, dated 23 November 1992, repeated that 'should he now attempt to enter the United Kingdom or be found to have done so, he will be refused leave to enter and/or removed as an illegal entrant. There will be no right of appeal against any such decision.' [3]

8. In his application for judicial review by the High Court of that decision of 23 November 1992, Mr Radiom seeks a declaration that he is entitled to the grant of a residence permit and to an appeal, or to have the Secretary of State obtain an advisory opinion from an independent authority.

9. In the High Court, the representative of the Secretary of State gave the grounds on which the latter personally directed Mr Radiom's expulsion in 1989 and on which, having reconsidered the matter himself, he did not change his position:

'... the decision to exclude the Applicant from the United Kingdom in 1989 was made at the personal direction of the then Home Secretary on the grounds that his presence in the United Kingdom would not be condu-

3 — The Home Office added the following comments concerning the Directive: 'In your letter you quoted a Directive 64/221/EEC, Article 9, which has regard to the appeal rights of European Community nationals (including Irish). ... I am advised that it is possible to exclude European Community nationals (including Irish). I am further advised that if the reasons for exclusion are such that the decision normally attracts no right of appeal (i. e. national security, conducive to the public good) then, even though the person is a European Community national (including Irish), he/she has no right of appeal.'

cive to the public good nor in the interests of national security.

... The reason for the making of the decision in 1989 was that the Applicant was known to advocate violence against dissidents who objected to the Khomeini regime in Iran and that he was also known to have been involved in the collection of information about dissident Iranian nationals in the United Kingdom. At that time the Iranian regime was engaged in a programme of assassination of dissidents, These assassinations continue, throughout Europe and elsewhere. The basis of the decision taken in 1989 related exclusively to the personal conduct of the Applicant. Disclosure of more information concerning the grounds upon which the decision was made would be contrary to the security of the realm.

The Secretary of State has personally further considered the withdrawal of the exclusion order, in the light of the application for judicial review, but in view of the Applicant's previous history and present information available to the Home Secretary that the Applicant continues to support and work towards the objectives of the Iranian government, he has taken the view that it would not be in the interests of national security that the exclusion order should be withdrawn. To say more would not be in the interests of national security.'

Facts and procedure in the Shingara case (as set out in the order for reference)

10. Mr Shingara, originally from India, is of French nationality. On 29 March 1991 he attempted to enter the United Kingdom but was refused leave to enter by personal direction of the Secretary of State, who considered that to allow his entry 'would be contrary to the interests of public policy and public security'.

11. The official notice excluding him also stated: 'You are not entitled to appeal against refusal of leave to enter because this was in obedience to directions given by the Secretary of State personally on the ground stated above.' The same terms were used in a further notice from the Home Office of 26 April 1991, in which it was also stated that Mr Shingara had no right of appeal against the decision.

12. On 10 November 1992 his solicitors wrote to the Home Office, stating that 'Under Article 9(2) of Directive 64/221 Mr Singh Shingara should have been able to refer his case for consideration by an administrative authority, and [been] entitled to submit his defence in person (unless it could

be shown that his presence would be contrary to the interest of national security).

In the circumstances we must request immediate arrangements for an appeal, failing which we shall be obliged to apply for judicial review.'

13. The reply from the Home Office, dated 18 May 1993, confirmed that there was no right of appeal.

14. Mr Shingara did not in fact lodge any appeal but on 15 July 1993 arrived at the Port of Dover with his wife and children and was granted entry on production of his French identity card. He made no mention to the immigration officer of the earlier refusal of leave to enter or of the grounds for it.

15. On 22 July 1993 Mr Shingara was arrested in Birmingham as an illegal entrant. The notice served on him on that date states: '... I am satisfied that you are an illegal entrant as defined in section 33(1) of the Immigration Act 1971. ... I propose to give directions for your removal from the United Kingdom in due course and details will be given to you separately.'

16. On 30 July 1993 leave was granted to move for judicial review to challenge Mr Shingara's detention. On that day he was released from custody and returned to France.

17. Before the High Court, Mr Shingara seeks to challenge the decision of 22 July 1993 to treat him as an illegal entrant and to detain him and remove him from the United Kingdom and exclude him from the United Kingdom. He seeks to quash that decision and asks for a declaration that he is entitled to appeal against his exclusion or to have his case referred for consideration to an independent authority pursuant to Article 9(2) of the Directive.

18. The representative of the Secretary of State gave the High Court the following reasons for the 1991 decision: '... in the view of the Secretary of State, the Applicant was an individual engaged in activities promoting Sikh extremism in the United Kingdom and terrorism elsewhere. The Applicant is the leader of Babbar Khalsa (BK) in France, a Sikh organization which supports terrorist

activities in India. To give further reasons would be contrary to national security and incompatible with the protection of intelligence sources.'

The questions referred to the Court

19. Before giving a decision on the applications described above, the High Court considers it necessary to obtain from the Court of Justice a ruling resolving certain doubts concerning the interpretation and application of the Directive. The questions are as follows:

'1. (1) In Article 8 of Council Directive 64/221/EEC of 25 February 1964, do the words "the same legal remedies ... as are available to nationals of the State concerned in respect of acts of the administration" refer

(a) to specific remedies available in respect of decisions concerning entry by nationals of the State concerned (*in casu*, an appeal to an immigration adjudicator) or

(b) do they refer only to remedies available in respect of acts of the administration generally (*in casu*, an application for judicial review)?

(2) If the answer to (1) is (a), do the words quoted from Article 8 of Directive 64/221 refer only to the legal remedies available to nationals of the State concerned in the same circumstances (*in casu*, refusal of entry on grounds of national security), or do they also refer to the specific remedies available in analogous or similar circumstances to nationals of the State concerned; and, if so, how similar or analogous must the circumstances be?

2. In the light of the answer to Question 1, where a Community national is refused entry into the United Kingdom on grounds of national security does Article 8 of Directive 64/221 require that national to have a right of appeal to an immigration adjudicator if, on the correct construction of the relevant provisions of national law, a British national refused entry to the United Kingdom on grounds of national security has a right of appeal for the purpose of establishing that he is a British national and is therefore entitled to enter the United Kingdom irrespective of whether his presence in the United Kingdom is undesirable for reasons of national security?

3. Do the opening words of Article 9(1) of Directive 64/221 ("where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect") apply equally to Article 9(2)?

4. Where a decision has been taken to exclude a Community national from the territory of a Member State other than his own on public policy or public security grounds and the Community national has left that territory without there having been an appeal or reference for an advisory opinion to an independent competent authority pursuant to Article 8 or Article 9 of Council Directive 64/221, does that Community national have a right of reference to an independent competent authority under Article 9(2) if that national subsequently returns or seeks to return to the territory of the Member State concerned, in respect of:

(a) the refusal of an application for a residence permit, or

(b) the refusal of an application for entry, or

(c) a decision ordering expulsion?

5. Do the answers to Question 4 vary according to whether:

(a) the applicant has entered the territory of the Member State before asking for a residence permit;

(b) the applicant has been expelled from the Member State before he has asked for a residence permit, or has never asked for a residence permit;

(c) the earlier departure was as a result of a decision ordering expulsion, or of a threat of detention and expulsion and was followed by a decision to exclude?'

The Community provisions of which an interpretation is sought

20. The Directive is intended to coordinate the laws, regulations and administrative provisions of the Member States concerning residence of nationals of other Member States in their territory, their movement and their expulsion, when decided on for reasons

of public policy, public security or public health. Accordingly, it affects, first and foremost, the conditions governing the entry and residence of such persons.

21. The Directive contains both substantive and procedural rules. The former (Article 2(2) and Articles 3 and 4) limit the grounds which the Member States may invoke as affecting 'public policy, public security or public health'. None of the preliminary questions seeks any interpretation of those concepts. [4]

22. As regards requirements of a procedural nature, the Directive requires each Member State to grant the nationals of the other Member States the possibility of challenging administrative measures in this area. And it is precisely with that requirement that the preliminary questions are concerned.

23. Article 6 of the Directive provides: 'The person concerned shall be informed of the grounds of public policy, public security or public health upon which the decision taken in his case is based, unless this is contrary to the interests of the security of the State involved.'

24. Article 7 of the Directive provides: 'The person concerned shall be officially notified of any decision to refuse the issue or renewal of a residence permit or to expel him from the territory. The period allowed for leaving the territory shall be stated in this notification. Save in cases of urgency, this period shall be not less than fifteen days if the person concerned has not yet been granted a residence permit and not less than one month in all other cases.'

25. Article 8 of the Directive specifically refers to the conditions governing legal remedies in respect of earlier decisions: 'The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.'

26. Finally, Article 9 of the Directive provides:

'1. Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have

4 — The order for reference recognizes that 'Both applicants have submissions to make about the grounds upon which the respondent has made his decisions to exclude them from the United Kingdom. ... Counsel have not at this stage sought to develop their submissions on the correctness or adequacy of the exclusion grounds and no issue arises calling for any further reference.'

suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion.

2. Any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit shall, where that person so requests, be referred for consideration to the authority whose prior opinion is required under paragraph 1. The person concerned shall then be entitled to submit his defence in person, except where this would be contrary to the interests of national security.'

The domestic provisions governing the entry of foreign nationals

27. According to its settled case-law, it is not for the Court of Justice to interpret national law or to appraise the effects thereof in proceedings under Article 177 of the EC Treaty. However, I think it appropriate, for a better understanding of the legal background to the dispute, to indicate which provisions of national law are applicable, according to the order for reference.

28. Those provisions are contained in the Immigration Act 1971 and of them the following have a direct bearing on the present cases:

— Section 1(1) provides that all persons who are in the Act expressed to have the right of abode in the United Kingdom are to be free to live in, come and go into and from, the United Kingdom without let or hindrance except such as may be required under and in accordance with the Act to enable their right to be established or as may be otherwise lawfully imposed on any person.

— Section 2(1) provides that British citizens have the right of abode in the United Kingdom.

— Section 3(1) provides that, with certain exceptions, an alien may not enter the United Kingdom except with leave.

— Section 3(5)(b) provides for deportation among others of an alien whose deportation [5] is deemed by the Secretary of State to be *conducive to the public good*. A British citizen is not liable to deportation.

— Pursuant to Section 3(8), if a person asserts his British citizenship or lays claim to any exception, the burden of proof rests upon him.

29. As regards challenging administrative decisions concerning leave to enter, the Immigration Act provides for appeals against exclusion from the United Kingdom in section 13: '... a person who is refused leave to enter the United Kingdom under this Act may appeal to an adjudicator against the decision that he requires leave or against the refusal'. [6]

30. Section 13(5) of the Act withholds the right of appeal where the exclusion is certified by the Secretary of State to be *conducive to the public good*: 'A person shall not be entitled to appeal against a refusal of leave to enter, or against a refusal of an entry clearance, if the Secretary of State certifies that directions have been given by the Secretary of State (and not by a person acting under his authority) for the appellant not to be given entry to the United Kingdom on the ground that his exclusion is conducive to the public good, or if the leave to enter or entry clearance was refused in obedience to any such directions.' [7]

Free movement of nationals of the Member States within the Community: the right to enter the territory of the Member States and limitations of that right on grounds of public security or public policy

31. At the risk of stating the obvious, I must point out that from the outset the Treaty guaranteed freedom of movement for the nationals of one Member State to enable them to go to another Member State in order to engage in economic activities, either as workers (Article 48), or as self-employed

5 — I shall use the terms 'deportation' or 'expulsion' interchangeably to refer to decisions obliging a person, if necessary by recourse to force, to leave the territory of a State.

6 — Decisions of the adjudicators may in turn be challenged under certain conditions before the Immigration Appeal Tribunal (section 20 of the Immigration Act). Both the adjudicators and the members of the Appeal Tribunal are appointed by the Lord Chancellor, normally from among lawyers with certain professional experience.

7 — Section 33 of the Immigration Act defines 'entry clearance' as a 'visa, entry certificate or other document which, in accordance with the immigration rules, is to be taken as evidence or the requisite evidence of a person's eligibility, though not a British citizen, for entry into the United Kingdom (but does not include a work permit)'.

persons (Article 52) or as providers of services (Article 59). [8]

32. The Single Act introduced, in connection with the 'internal market', the concept of an 'area without internal frontiers': thus, Article 7a of the EC Treaty provides that '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'.

33. Article 8a of the EC Treaty as amended by the Treaty on Europan Union, added by Article G. C of the Treaty on European Union, under the heading 'Citizenship of the Union', provides 'Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect'.

34. The creation of citizenship of the Union, with the corollary described above of freedom of movement for citizens throughout the territory of the Member States, represents a considerable qualitative step forward in that, as the Commission rightly points out, it separates that freedom from its functional or instrumental elements (the link with an economic activity or attainment of the internal market) and raises it to the level of a genuinely independent right inherent in the political status of the citizens of the Union.

35. I do not consider it necessary, in this case, to examine to what extent the free movement of persons, in the successive stages of development of the EEC Treaty, has been at odds with maintenance of control formalities for nationals of other Member States at internal frontiers. [9]

36. I think it need merely be repeated that, even before the Single Act, the right to enter the territory of a Member State was not subject, for nationals of other Member States

8 — The case-law of the Court of Justice has also included within the scope of that freedom tourists, as recipients of services (Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, and students (Case C-357/89 *Raulin* [1992] ECR I-1027).

9 — The problem is encountered in particular in the situation which arose after 31 December 1992, the final date for the implementation of Article 7a of the Treaty. On 18 November 1993 the European Parliament brought an action (Case C-445/93) before the Court of Justice under Article 175 of the Treaty for a declaration that the Commission had infringed the Treaty by failing to put forward the necessary proposals to establish free movement of persons within the internal market in accordance with Article 7a of the Treaty. On 12 July 1995 the Commission adopted a Proposal for a Directive on the elimination of controls on persons crossing internal frontiers which treats such removal as a consequence of 'the clear and unconditional obligation enshrined in Article 7a' of the Treaty. The European Parliament, in response to that development, considered that its action had become devoid of purpose and so informed the Court of Justice which, by order of 11 July 1996, decided to bring the proceedings to an end. Also, the application of the Schengen Agreement by seven Member States as from 26 March 1995 is, as such, not a matter of Community law.

relying on Articles 48, 52 or 59 of the Treaty, to any kind of administrative authorization since it is a right which derives directly from the Treaty. [10]

37. Specifically, and again with respect to the situation prevailing before the Single Act, provisions of secondary law expressly prohibited the right of entry from being subjected to permits or administrative authorizations, only presentation of an identity document proving nationality of a Member State being required. [11]

38. Those principles, and the consequent prohibitions, form part of the *acquis communautaire* and subsequent changes to the Treaty have merely strengthened them. They are thus binding on all the Member States. [12]

39. The free movement of persons, in those terms, may however be restricted: the Treaty, throughout the various changes it has undergone, has never purported to deprive the Member States entirely of a traditional prerogative inherent in their sovereignty by virtue of which they may limit the freedom of movement of foreign nationals, denying them entry to or deporting them from their territory.

40. Recognition of that prerogative, which is in turn limited by Community law, [13] is in any event included in the rules governing each of the freedoms I have mentioned: in Article 48(3) of the Treaty, in relation to workers, [14] and in Article 56(1) of the Treaty

10 — Paragraph 17 of the judgment in Case C-370/90 *Singh* [1992] ECR I-4265 states (at I-4294) '... the nationals of Member States have in particular the right, which they derive directly from Articles 48 and 52 of the Treaty, to enter and reside in the territory of other Member States in order to pursue an economic activity there as envisaged by those provisions (see in particular the judgments in Case 48/75 *Royer* [1976] ECR 497, paragraph 31, and Case C-363/89 *Roux* v *Belgian State* [1991] ECR I-273, paragraph 9)'.

11 — Thus, by virtue of Article 3 of 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):
'1. Member States shall allow the persons referred to in Article 1 to enter their territory simply on production of a valid identity card or passport.
2. No entry visa or equivalent document may be demanded save from members of the family who are not nationals of a Member State. ... .'
Similar terms are used in 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 (OJ 1973 L 172, p. 14.)

12 — The United Kingdom legislation on immigration was expressly amended to that effect: section 7 of the Immigration Act 1988 removes the requirement of obtaining an entry permit for access to the United Kingdom for persons entitled to do so under Community law.

13 — It is expressly stated in Case 41/74 *Van Duyn* [1974] ECR 1337 that 'Directive 64/221 is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals'.

14 — 'It shall entail the right, subject to limitations justified on grounds of public policy, public security and public health ...'

in relation to self-employed persons, which [15] is also applicable to the freedom to provide services.

41. The decisions taken can be based only on grounds of public policy, public security or public health. As stated earlier, the precise aim of the Directive is to coordinate the national rules governing measures of that kind, as regards both substance and procedure.

42. The case-law of the Court of Justice has specifically taken the view that, as a basis for decisions restricting freedom of movement, public policy must be construed restrictively. [16]

43. To summarize, the Member States retain the power to deny, on the qualified grounds which I have mentioned, both access to and residence in their territories to nationals of other Member States. However, that power may only be validly exercised in accordance with the rules of Community law.

Entitlement to legal remedies under Article 8 of the Directive (first and second preliminary questions)

44. By the first two questions, which it is appropriate to consider together, the referring court seeks an interpretation by the Court of Justice of Article 8 of the Directive as regards the requirement that all acts adopted by the authorities of each Member State in this area must be amenable to 'the same legal remedies ... as are available to nationals of the State concerned in respect of acts of the administration'.

45. The question asks whether the term 'the same legal remedies' [17] is to be taken to refer to the specific remedies available to nationals concerning entry to, residence in and expulsion from the territory of their own State or, on the contrary, to those remedies which are generally available in respect of acts of the

15 — 'The provisions of this Chapter [on freedom of establishment] shall not prejudice the applicability of provisions ... providing for special treatment for foreign nationals on grounds of public policy, public security or public health.'

16 — In Case 36/75 *Rutili* [1975] ECR 1219 the Court stated: 'By virtue of the reservation contained in Article 48(3), Member States continue to be, in principle, free to determine the requirements of public policy in the light of their national needs ... Nevertheless, the concept of public policy must, in the Community context and where, in particular, it is used as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers, be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community.'

17 — The generic term 'the same legal remedies' is used in the English version to describe this type of challenge. A restricted procedure within that general category is that of 'appeals to a court of law' referred to in Article 9 of the Directive.

administration, regardless of the area in which they were adopted.

46. In my opinion, the answer most in conformity with the provision is the second one: the government decisions at issue, relating to aliens, must be amenable to the same legal remedies as are in general available to the nationals of the State in question against any act of the administration.

47. The literal wording of the provision confirms that the point of reference is the general system for challenging administrative measures. That general system must, according to the terms of Article 8 of the Directive, be made available to foreign nationals when they wish to challenge decisions of the administration concerning entry, residence and expulsion, adopted on grounds of public policy, public security and public health.

48. The same conclusion is reached if the rationale of the provision is considered: it would not be very logical for Article 8 of the Directive to refer to specific remedies, available to nationals, which nationals do not need to use: nationals of the Member States do not need to challenge acts of the administration denying them entry to or directing their expulsion from their country of origin, since, by definition, [18] they cannot be the subject of such measures. [19]

49. Consequently, it would be rather illogical for the Directive to seek to extend to foreign nationals a type of specific remedy designed for nationals, for which there is no explanation in domestic law precisely because it has no purpose.

50. The applicants maintain, however, that the correct answer must be the other one because, where United Kingdom nationals are affected by government decisions of that kind, the Immigration Act of 1971 provides specific means of contesting them.

18 — The Court of Justice held in *Singh*, cited above, paragraph 22, that whilst it is true, as then contended by the United Kingdom Government, that a national of a Member State enters and resides in the territory of that State by virtue of rights attendant upon his nationality and not by virtue of those conferred by Community law, Article 3 of the Fourth Additional Protocol to the European Human Rights Convention provides that a State may not expel its nationals from its own territory.

19 — In the case of the legislation of the United Kingdom (which has not ratified the Fourth Additional Protocol to the European Human Rights Convention), this is recognized by the national court itself: '... a decision to exclude someone whose British citizenship gives him a right of abode in the United Kingdom would be a flagrant and gross denial of the right of abode set out in section 1(1) of the Act. It is unthinkable that a Secretary of State would ever act so perversely as to make such a decision.'

51. I do not share that view: although it seems to me to be inspired by a laudable aim, which I support, namely the extension of means of reviewing government decisions, I believe that it derives from incorrect reasoning.

52. According to the applicants, it is possible for the United Kingdom administration *de facto* to deny entry into the United Kingdom (or to direct expulsion) of a British national, either because the relevant authorities are unaware that the person concerned is a British national or because his nationality is disputed or has not been properly proved. To cover such an eventuality, the Immigration Act allows British nationals specific recourse to the immigration adjudicator.

53. In my view, such rights of recourse cannot be regarded as specific remedies intended to render the decision at issue subject to judicial scrutiny or examination of its validity at law in the strict sense. They are simply means of proving that the person concerned possesses British nationality. When that status is proved, any further action is unnecessary, since such persons cannot be expelled from or denied entry to the United Kingdom.

54. A second argument put forward in support of the applicants' case is that Article 8 of the Directive is superfluous since, with or without it, no State can deny nationals of another State the possibility of challenging measures generally available to its own nationals because, by doing so, it would be guilty of discrimination on grounds of nationality contrary to the Treaty.

55. However, the apparent strength of that argument fades if it is borne in mind that there is nothing to prevent the Community legislature from repeating in any directive, in relation to its specific subject-matter, the requirements deriving from the general prohibition of discrimination on grounds of nationality contained in the Treaty.

56. For all those reasons, I consider that Article 8 of the Directive, by requiring each State to grant foreign nationals the same remedies as those available to their own nationals against acts of the administration, refers to the general procedures for challenging such acts.

57. That, moreover, was the conclusion reached by the Court of Justice in its judgment of 18 October 1990 in *Dzodzi*, [20] in which it analysed Article 8 of the Directive. The reasoning of the Court of Justice, which

20 — Joined Cases C-297/88 and C-197/89 [1990] ECR I-3763.

in my opinion must continue to be followed, was as follows:

'58. That provision defines the decisions referred to by the directive as "acts of the administration" and imposes upon the Member States the obligation to make available to any person affected by such acts the same legal remedies as are available to nationals in respect of acts of the administration. Accordingly, a Member State cannot, without being in breach of the obligation imposed by Article 8, organize, for persons covered by the directive, legal remedies governed by special procedures affording lesser safeguards than those pertaining to remedies available to nationals in respect of acts of the administration (judgment in Case 98/79 *Pecastaing* v *Belgium* [1980] ECR 691, paragraph 10).

59. It follows that if, in a Member State, the administrative courts are not empowered to grant a stay of execution of an administrative decision or interim protective measures with regard to the execution of such a decision, but such power is vested in the ordinary courts, that State is obliged to permit persons covered by the directive to apply to those courts on the same terms as nationals. It must nevertheless be emphasized that such rights depend essentially on the organization of the courts and the division of the jurisdiction of judicial bodies in the various Member States, since the only obligation imposed upon the Member States by Article 8 is to grant to persons protected under Community law rights of appeal which are not less favourable than those available to nationals of the State concerned against acts of the administration (judgment in *Pecastaing* v *Belgium*, cited above, paragraph 11).

60. Accordingly, the reply to be given is that under Article 8 of Directive 64/221 of 25 February 1964 the Member States are under a duty to secure for the persons covered by that directive judicial protection which is not less favourable, in particular as regards the authority before which an appeal may be brought and the powers of that authority, than the protection which those States afford their own nationals as regards appeals against acts of the administration.'

58. In the United Kingdom legal system, the general means of challenging or appealing against acts of the administration is judicial review. The requirement of Article 8 of the Directive is thus in principle satisfied by allowing the addressees of the government decisions concerned to have them scrutinized by the competent judicial authorities by way of judicial review.

59. Throughout the written procedure, and with greater intensity at the hearing, the parties to the main proceedings have been in dispute as to which of the means of contesting measures (namely, that provided for by the Immigration Act, on the one hand, and

judicial review, on the other) allows more comprehensive examination of government decisions concerning the entry and expulsion of foreigners.

60. In my opinion, it is not for the Court of Justice, when giving a preliminary ruling, to make any pronouncement as to the greater or lesser efficacy of an appeal to an adjudicator or appeal tribunal as compared with judicial review before a court of law *stricto sensu*. The interpretation sought from the Court of Justice is concerned only with the terms of Article 8 of the Directive, and the answer must focus upon an analysis of those terms.

61. However, Article 8 of the Directive does not exhaust all the requirements of Community law as regards the procedural guarantees which must be available to the nationals of the Member States to protect and uphold their enforceable legal rights, where such rights derive from Community law.

62. There is already well-established case-law of the Court of Justice concerning the effectiveness of the remedies available for defending rights deriving from the Community legal order, [21] which requires a level of protection by the courts which cannot be disregarded by the legal systems of the Member States whose decisions are under challenge.

63. It may happen that national legal machinery for challenging administrative measures does not fully meet the requirements of that case-law. Indeed, in the United Kingdom's case, the Court of Justice held, in *Factortame and Others*, [22] that it was necessary to set aside, as being contrary to Community law, a national rule which, in the opinion of the House of Lords, prevented United Kingdom courts from granting interim relief to protect rights deriving from a Community provision having direct effect.

64. In the same way, if judicial review of government decisions concerning the entry or expulsion of foreign nationals did not allow the courts to undertake complete and effective examination of such decisions, as a result of restrictions on judicial activity such as to render nugatory their review of the substance of such decisions, Community law would require such restrictions to be set aside and the applicants to be afforded adequate judicial protection.

21 — This point will be considered in detail in point 72 et seq. of this Opinion.

22 — Case C-213/89 *Factortame and Others* [1990] ECR I-2433, in particular p. I-2455.

65. In other words, the interpretation of the Directive cannot disregard the development of the case-law of the Court of Justice concerning judicial protection of rights deriving from Community provisions. This means:

(a) that Article 8 of the Directive obliges the Member States to afford Community nationals the same degree of legal protection, at least, as that available to their own nationals in relation to decisions of the administration — protection which, in the United Kingdom, is provided by judicial review;

(b) that system of protection would not meet the general requirements of Community law, interpreted in accordance with the case-law of the Court of Justice, if it did not permit full and effective judicial scrutiny of the acts of the administration regarding the entry and expulsion of nationals of other Member States, even where adopted on grounds of national security.

66. It must be recognized, nevertheless, that the wording of Article 9 of the Directive appears to allow certain restrictions on judicial control in this area, which I must analyse.

Is the exclusion or limitation of judicial remedies, as permitted by Article 9 of the Directive, valid?

67. Article 9 of the Directive imposes the requirement of an opinion from an authority — other than that which adopts the final decision — in any of the following three cases: 'where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect'. To what extent can those cases be regarded as valid under Community law today?

68. Examination of the abovementioned provision prompts me to ask three questions:

— Is it permissible, from the Community law standpoint, that government decisions affecting the free movement of persons may be excluded from review by the courts?

— Is it permissible, from the Community law standpoint, that a court hearing an appeal against such government decisions may not be able to examine the substance of such measures?

— Is it permissible, from the Community law standpoint, that suspension of the operation of such measures, by way of protection inherent in the court proceedings available for review thereof, is either not provided for or is excluded?

69. I shall attempt to give a separate answer to each of those three questions. And I shall say straight away that it seems to me that the first two questions must be answered in the negative.

(i) *The exclusion of judicial remedies*

70. Although understandable as Community law stood in 1964, the possibility of excluding review by a court of law of certain government decisions of the kind envisaged by the Directive seems to me, following developments in the case-law since then, to be incompatible with Community law today.

71. That development of the case-law was clearly summarized by the Court of Justice in its judgment of 3 December 1992 in *Borelli* v *Commission*, [23] citing an earlier decision: '... As the Court observed in particular in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and in Case 222/86 *Unectef* v *Heylens* [1987] ECR 4097, paragraph 14, the requirement of judicial control of any decision of a national authority reflects a general principle of Community law stemming from the constitutional traditions common to the Member States and has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.' [24]

72. In his Opinion of 17 May 1990 in *Factortame*, Advocate General Tesauro considered, even then, that 'in the light of the Court's well-settled case-law ... national courts are required to afford complete and effective judicial protection to individuals on whom enforceable legal rights are conferred under a directly effective Community provision ...'. [25]

23 — Case C-97/91 [1992] ECR I-6313, paragraph 14.

24 — The reference in *Borelli* to Article 6 of the European Human Rights Convention must be qualified as regards administrative decisions in matters governed by public law, as was rightly pointed out by Eduardo García de Enterría in his article 'The extension of the Jurisdiction of National Administrative Courts by Community Law: the Judgment of the Court of Justice in *Borelli* and Article 5 of the EC Treaty', *Yearbook of European Law 1993*, Oxford, pp. 19 to 37. Although the European Human Rights Court is adopting an increasingly broad interpretation of the term 'civil rights', the protection of which is the purpose of Article 6 of the Convention (see for example the judgments of that court in the cases of *Editions Périscope*, *Ortenberg* and *Procola*), the right of access to the courts provided for by that article does not extend to disputes of a strictly administrative nature. In the case of *Schouten and Meldrum* (Series A, No 394, 1994), the European Human Rights Court held that matters relating exclusively to public law, such as for example obligations deriving from tax provisions, were not of a 'civil' nature for the purposes of Article 6.

25 — Point 15.

73. That same approach was in fact confirmed in the judgment in *Factortame*: 'In accordance with the case-law of the Court, it is for the national courts, in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law ...'. [26]

74. Specifically with regard to the right to freedom of movement for workers, the judgment in *Heylens*, cited earlier, after classifying it as a fundamental right conferred by the Treaty on all Community workers, held that 'the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right'. [27]

75. Thus, the doctrine expounded by the Court of Justice has raised the right of citizens to judicial protection to the status of an essential guarantee within the Community legal order. In contrast to the position in relation to Article 6 of the European Human Rights Convention, the requirement of effective judicial protection, in the Community sphere, is not limited merely to 'civil rights' but extends to all rights deriving from the provisions of Community law. [28]

76. I do not think it is necessary to expand on the foregoing considerations, which can clearly be regarded as part of the *acquis communautaire*. In view of the clarity of the case-law cited, further comment is unnecessary.

77. The Directive, in contrast, allows the minimum procedural safeguard to be 'lowered', in that Article 9 tolerates the lack of an appeal to a court of law against expulsion orders adopted by national government authorities, subject only to the requirement of obtaining an opinion from another national authority which, moreover, is not binding.

26 — Paragraph 19.

27 — Paragraph 14.

28 — The contrast is particularly clear specifically in cases concerning the rules for the entry and expulsion of aliens. Disputes in this area are not covered by the safeguard provided by Article 6 of the European Human Rights Convention, though they are covered by Article 13. The report of 27 June 1995 of the European Commission of Human Rights in the case of *Chahal* v *United Kingdom* (Application 22414/93) concludes that there was an infringement of Article 13 of the Convention because 'the powers of review by United Kingdom courts when national security is involved is too restrictive to satisfy the requirements of Article 13 of the Convention'. That case was concerned with an order expelling an Indian, adopted by the United Kingdom authorities on grounds of national security. In its judgment of 15 November 1996 (not yet published) the European Court of Human Rights, in deciding that case, stated: 'Having regard to the extent of the deficiencies of both judicial review proceedings and the advisory panel, the Court cannot consider that the remedies taken together satisfy the requirements of Article 13 in conjunction with Article 3.'

78. In my opinion, although that situation may have been acceptable in 1964, when the judgments of the Court of Justice to which I have referred had not yet been delivered, it must now be rejected in the light of the case-law that has developed since that time.

79. The minimum permissible standard, according to that case-law, necessarily implies that judicial review must be available for acts of the administration which adversely affect rights derived from Community law and, specifically, the right of any citizen of any Member State to go to another State.

80. The first hypothesis of the three provided for by Article 9 of the Directive is thus seen to be contrary to a general principle of Community law.

(ii) *Restrictions on legal remedies in the courts*

81. Likewise, the second hypothesis provided for in Article 9 of the Directive (legal remedy limited to examination of the legality of the decision) does not today appear acceptable if it means that the powers of the court to adjudicate on the substance are restricted with the result that it is able only to consider whether the formal requirements for the government decision to be legal have been fulfilled regarding, for example, the competence of the decision-making authority, the proper conduct of the procedure and similar matters.

82. Having earlier drawn attention to the case-law of the Court of Justice concerning the need for remedies to be available before the courts to defend rights deriving from Community law, I must now focus on the 'effective' nature of such remedies, also prescribed by that case-law.

83. The requirement of effectiveness comprises two aspects: there must be no restrictions on the court's examination of the case and it must be in a position to ensure sufficient protection at the appropriate time. I shall return to the latter point when dealing with the question of interim measures.

84. The requirement of a remedy in the courts against decisions adversely affecting freedom of movement would be undermined if the Member States were able to impose restrictions on that remedy such as to render it virtually ineffective.

85. That would be the case if national rules limited judicial review to the merely external aspects of decisions on the entry or expulsion of foreign nationals, thereby preventing the courts from considering the merits of the dispute, that is to say whether or not the decision was in harmony with the principle of proportionality and the other relevant legal rules.

86. In the case-law of the Court of Justice some of those rules have been interpreted as follows:

— The reason for the decision must be the personal conduct of the individual concerned (Article 3 of the Directive), and cannot be based on reasons of a 'general preventive' nature. [29]

— The mere existence of previous criminal convictions (Article 3(2) of the Directive) is not sufficient to justify an expulsion order, unless the person concerned has acted in such a way as to represent an immediate threat to public policy. [30]

— The personal conduct of a foreign national cannot be regarded as sufficiently serious to justify an expulsion measure if that same conduct, on the part of a national, does not also attract repressive or other measures designed to combat it. [31]

87. The judicial authorities would be unable to verify whether or not the decisions of the governmental authorities in this area complied with those rules and similar requirements and with the general principles of Community law (in particular the abovementioned principle of proportionality) if they were able to examine only the formal validity and not the merits of expulsion decisions. [32]

88. Thus, there can only be 'effective protection' to the extent to which the legal remedy allows full review of the administrative act at issue.

29 — Case 67/74 *Bonsignore* [1975] ECR 297.

30 — Case 30/77 *Bouchereau* [1977] ECR 1999.

31 — Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665.

32 — This does not mean that, in appraising concepts of such an indeterminate nature as 'public security' and 'public policy', the government authorities are not allowed some discretion, which will be examined by the courts only on the basis of the approach normally adopted by them for review of the administration's exercise of discretionary powers.

89. I therefore consider that the second hypothesis envisaged by Article 9 of the Directive is likewise not in conformity with the right to protection by the courts, as a principle of Community law.

(iii) *The non-suspensory effect of the legal remedies*

90. More difficulties arise from the third hypothesis envisaged by Article 9 of the Directive: 'where the appeal cannot have suspensory effect'.

91. In the first place, there is a terminological problem: the English version states 'where the appeal cannot have suspensory effect'. That expression differs in an essential respect from the French version ('s'ils n'ont pas d'effet suspensif'), the Spanish version ('cuando el recurso no tenga efectos suspensivos'), the Italian version ('si essi non hanno effetto sospensivo') and the German version ('oder keine aufschiebende Wirkung haben').

92. The difference lies in the fact that, in the English version, the third hypothesis implies that the appeal 'cannot' have suspensory effect. In contrast, in the other language versions the appeal may, but need not necessarily, have such effect: Article 9 of the Directive comes into play only where the procedural rules for appeals do not require an appeal in itself to have suspensory effect, but at the same time do not exclude the possibility that the court might direct suspension of the contested measure.

93. If the language version most in harmony with the meaning of the provision were the English version, there would be serious problems of compatibility with Community law as regards the justification of prohibiting interim measures in this area. [33]

94. To cite once more the judgment in *Factortame and Others* [34] (paragraph 21): 'the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seised of a dispute

33 — The same problem has arisen on several occasions in the constitutional case-law of a number of Member States. In a judgment of 7 July 1987 (No 115/1987), the Spanish Constitutional Court held to be unconstitutional Article 34 of the Ley Orgánica (Basic Law) of 1 July 1985 on the rights and freedoms of aliens in Spain, which provided 'in no case may suspension be granted of administrative resolutions adopted in accordance with this Law'. In its decision of 5 September 1986, the French Constitutional Council, examining the Law of 9 September 1986 in relation to the implementation of government decisions on the expulsion of aliens, stated that such decisions are permissible and do not conflict with Article 66 of the Constitution, since they may give rise to an appeal to the administrative court, accompanied by an application for suspension of operation.

34 — Cited in footnote 22.

governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law'.

95. The *Factortame* rule concerning interim measures is repeated in the judgment of 21 February 1991 in *Zuckerfabrik*, [35] and has recently been extended in the judgment of 9 November 1995 in *Atlanta*. [36] The latter judgment extends the powers of the national court beyond mere suspension of the enforcement of the contested measures, recognizing — under certain circumstances — the power to 'settle or regulate disputed legal positions or relationships' by means of interim measures. [37]

96. On the basis of that rule, which is now well established, and observing the general criterion that secondary legislation should as far as possible be interpreted in the manner most in harmony with the provisions of the Treaty and the general principles of Community law, I consider that the third hypothesis provided for in Article 9(1) of the Directive can refer only to procedural rules which, whilst not prohibiting suspensory effect for appeals to a court of law, likewise do not make it compulsory.

97. Thus interpreted, that hypothesis may be considered to be in conformity with Community law since the latter, although opposing the absolute prohibition of suspensory effect for appeals to courts of law relating to rights deriving from the Treaty, does not impose an obligation that the bringing of such appeals is to have suspensory effect, but rather merely provides for that possibility.

98. On the same point, in *Dzodzi*, cited above, a Belgian court asked the Court of Justice whether Article 9 of the Directive was to be interpreted as meaning 'that the persons concerned must be entitled to bring an action which would enable them to apply as a matter of urgency for the intervention of a national court or tribunal, prior to the enforcement of the measure complained of, in order to obtain in good time measures protecting the rights under threat'.

99. In the judgment in that case, the Court held, in reply to the question submitted in

35 — Joined Cases C-143/88 and C-92/89 [1991] ECR I-415.

36 — Case C-465/93 [1995] ECR I-3761.

37 — The importance of that judgment has been highlighted by Eduardo García de Enterría in his article 'Sobre la posibilidad de que las jurisdicciones nacionales adopten medidas cautelares positivas (y no sólo suspensiones) contra los actos de sus administraciones respectivas dictados en ejecución de reglamentos comunitarios cuya validez se cuestiona (sentencia Atlanta del Tribunal de Justicia, 9 de noviembre de 1995)', *Revista Española de Derecho Administrativo* No 88 (1995), pp. 565 to 579. In general, regarding the case-law of the Court of Justice concerning protection by way of interim measures, see, by the same author, *La batalla por las medidas cautelares. Derecho Comunitario Europeo y proceso contencioso-administrativo español*, second edition, Madrid, 1995.

those very precise terms, that [38] 'Article 9 cannot be construed as requiring the provision, for the benefit of persons covered by the Directive, of a judicial appeal of the kind described by the Belgian court'.

100. The features of the system described by the Belgian court involved the following: (a) the need for an appeal to be available prior to enforcement of the decisions refusing a residence permit or making an expulsion order; (b) conferral of exclusive jurisdiction to hear such appeals on a judicial body able to give a decision under an emergency procedure and empowered to adopt interim measures regarding rights of residence.

101. The Court of Justice answered that preliminary question in the negative but at that time did not rule — since it was unnecessary to do so — as to the possibility of prohibiting interim measures in the course of appeal proceedings against government decisions covered by the Directive. That possibility had, in my view, already been excluded by its earlier case-law.

102. In any event, the judgments cited above confirm that in all cases not only must aliens have the possibility of going to court to challenge decisions concerning their entry to and expulsion from a Member State, but also, in the course of the appeal proceedings in which that challenge is made, the competent court may, as an interim measure, suspend the enforcement of those decisions or even adopt positive measures concerning the temporary situation of the person concerned.

103. To summarize, the third hypothesis provided for in Article 9(1) of the Directive will only be valid in my opinion in so far as it relates to an internal procedure which, whilst providing for the possibility of suspensory effect for an appeal to a court, does not automatically require it. A national regulation which — that being the impression given by the English version of the provision — absolutely withheld any suspensory effect for such appeals would not be compatible with Community law.

The third preliminary question

104. By this question, the national court asks whether the negative conditions laid down in the first part of Article 9(1) of the Directive, to which I have just referred, are also applicable to Article 9(2).

38 — Paragraph 67.

105. In the order for reference the judge says: 'all parties are agreed that the opening words ... apply to both parts of Article 9. I agree.' The United Kingdom and the Commission are also in favour of an answer in the affirmative.

106. For my part, subject to the reservations already expressed concerning the opening sentence of Article 9(1) of the Directive, I share that view.

107. The circumstances giving rise to the requirement of an opinion from a national independent authority are the same both in the cases envisaged in paragraph 1 (non-renewal of a residence permit or expulsion of the holder of a residence permit), [39] and in those envisaged in paragraph 2 (refusal of a first residence permit or expulsion of the applicant for such a permit even before it is granted).

108. The fact that those circumstances are referred to expressly only in Article 9(1) of the Directive is merely attributable to the drafting, or the systematic arrangement, of the sentence introducing the article as a whole, but it is clear from the meaning of the provision that paragraph 2 applies under the same conditions as paragraph 1.

109. The differences between the two paragraphs thus have nothing to do with the way they operate within the system for the review of acts of the administration in this area but relate only to the specific types of measures referred to by those paragraphs and the time at which the requirement of an opinion arises.

110. As the Court of Justice held in *Gallagher*, [40] 'the distinction between Article 9(1) and Article 9(2) is precisely that, in situations covered by Article 9(1), the opinion must be obtained before the decision is taken, whereas in situations covered by Article 9(2) the opinion is obtained after the decision has been taken and only at the request of the person concerned, if he has raised objections'.

111. The initial conditions for applicability are thus the same for both paragraphs of

39 — It must be borne in mind that, according to the judgment in Case C-175/94 *Gallagher* [1995] ECR I-4253), 'Article 9(1) covers the case of a national already lawfully residing within the territory of another Member State. That includes a person holding a residence permit, but also a national of another Member State who, according to the legislation of the host State, is not required to hold a residence permit. Article 9(1) therefore also applies to a decision not to expel such a national from the territory of a Member State.'

40 — Cited in the preceding footnote, paragraph 20.

Article 9 of the Directive, as all the parties to the proceedings recognize.

The fourth preliminary question: the scope of decisions to expel Community nationals

112. By its fourth question, the national court asks, essentially, whether a Community national expelled on grounds of public security from the territory of a Member State, who, having left the territory, seeks to re-enter it, is entitled to obtain the opinion provided for in Article 9(2) of the Directive, despite the fact that he did not previously appeal against the expulsion decision and no opinion was obtained in respect of it.

113. I consider that the question must be reformulated by the Court of Justice so that it can give a helpful interpretation of the provisions at issue. In fact, the two questions on this point originally suggested by the national court and amended after intervention by the lawyers for both parties referred to the application of Articles 8 and 9 [41] of the Directive to expulsion orders already put into effect and were not limited to Article 9(2) of the Directive.

114. In my opinion, the starting point for the ruling to be given by the Court of Justice should be the doctrine which it has been and is laying down concerning measures expelling Community nationals (*Adoui and Cornuaille*, cited above), and then the application of Articles 8 and 9 of the Directive to the cases referred to by the national court should be analysed.

115. Let me first say that the expulsion of Community nationals by the host State, on grounds of public security, continues to be a permissible measure, from the Community point of view, in the legislative situation prevailing after the Single Act, which established the principle that internal frontiers were to be abolished.

41 — The questions were originally worded as follows: 'Does the fact of an earlier expulsion or exclusion decision exhaust or remove rights under Articles 8 and 9 when the excluding Member State is asked to reconsider the admission to its territory of a Community national of another Member State? Does the answer differ according to whether the earlier decision was to expel or, following departure under threat of expulsion, was to exclude? When there has been an earlier expulsion or exclusion decision is a subsequent decision to remove a Community national who reaches the United Kingdom one which is capable of triggering a right under Article 9(2) to a reference of his case to an independent authority or is the removal decision one which merely gives effect to the earlier and which triggers no rights under the Article?'

116. Whatever its scope, that principle, now embodied in Article 7a of the Treaty, and likewise the freedom of movement associated with citizenship of the Union, recognized by Article 8a of the EC Treaty as amended by the Treaty on European Union, do not prevent the Member States from exercising their sovereign prerogative by virtue of which, on limited grounds, they may restrict the freedom of movement of non-nationals within the Community, even going so far as to expel them from national territory.

117. Such limitations on freedom of movement for non-nationals display a parallelism with the penalties of banishment which, in those countries where the law provides for them, also restrict the freedom of movement of nationals within their own State.

118. However, the legitimacy of expulsion measures does not extend to the absolute suppression of freedom of movement within the Community from the temporal standpoint. In *Adoui and Cornuaille*, the Court of Justice, answering a question on the duration of the effects of measures expelling aliens, [42] laid down the following rule:

'As regards the possibility for a person against whom a decision has been taken ordering his expulsion from the territory of a Member State to be re-admitted to the territory of the State in question and apply there for a fresh residence permit, it must be stressed that any national of a Member State who wishes to seek employment in another Member State may re-apply for a residence permit. Such an application, when submitted after a reasonable period has elapsed, must be examined by the competent administrative authority in the host State, which must take into account, in particular, the arguments put forward by the person concerned purporting to establish that there has been a material change in the circumstances which justified the first decision ordering his expulsion.'

119. Whether the expulsion decision was, in due time, appealed against and confirmed, or whether it was not the subject of an appeal and, consequently, became final on expiry of the periods prescribed by law for an objection to be lodged, [43] I consider that the solution arrived at in *Adoui and Cornuaille* is fully applicable, and from it two relevant consequences follow:

(a) the coercive effects of the expulsion are maintained throughout a particular period (normally specified in the decision itself), so that entry by the person concerned into the national territory is prohibited for that period;

42 — Cited in footnote 31, paragraph 12. The question asked was: 'Under what circumstances can a person who has had a residence permit refused or withdrawn because his personal conduct presented a danger to the requirements of public policy of the host State subsequently regain entry into the territory of the State concerned and apply for a new residence permit? Is it possible to adopt a definitive decision expelling a national of a Member State from the territory?'

43 — At the hearing, Counsel for Mr Radiom and the United Kingdom Government took opposing stances as to the validity of the original decision (1989) ordering Mr Radiom's expulsion from the United Kingdom. In my opinion, it is not for the Court of Justice to give judgment on that matter, regarding which no specific question has been asked by the national court.

(b) nevertheless, the person concerned is entitled, 'after a reasonable period has elapsed' to ask the competent authorities to reconsider his case.

120. The first consequence is consistent with the very rationale of the expulsion measure and its legitimacy has been endorsed by the judgment in *Adoui and Cornuaille*, according to which 'where such a decision has been validly adopted in his case in accordance with Community law and continues to be legally effective so as to exclude him from the territory of the State in question, Community law contains no provision conferring upon him a right of entry into that territory during the examination of his further application'. [44] *A fortiori*, entry will continue to be prohibited if, after such an examination, the reply to the new application is still negative.

121. It is precisely in the latter circumstances that the requirements of judicial review imposed by the Directive come into play. A Community national is entitled to challenge the new refusal by the competent authorities — based on the fact that the circumstances giving rise to his expulsion continue to exist — having recourse to the procedures provided for by Articles 8 and 9 [45] of the Directive.

122. As is logical, the use of those appeal procedures must not be abusive or vexatious, resulting in the exhaustion of one remedy being followed almost immediately by another on the basis of the same facts: between recourse to one type of remedy and another a reasonable period may be required, as held in *Adoui and Cornuaille*.

123. The foregoing considerations provide the basis for an answer which, although going beyond the precise scope of the fourth preliminary question, may supply the national court with additional help in arriving at its decision.

124. The answer is the same in all three of the cases referred to in the fourth preliminary question: whether the person concerned has his application for an entry permit turned down or is denied a residence permit or is even the subject of a further expulsion order, he can in all cases exercise the rights granted to him by Articles 8 and 9 of the Directive, and the same applies if those decisions follow a previous expulsion decision

44 — Paragraph 12.

45 — Provided that, as far as Article 9 is concerned, the situation falls within the third hypothesis provided for therein, which, as stated earlier, is the only one that I consider compatible with Community law.

which was not appealed against at the relevant time. The exercise of such rights, however, will only be possible if a reasonable period elapses between the original expulsion order and the subsequent attempt to enter the territory of the Member State which issued the order.

127. A person who is still subject to an expulsion order is prohibited from entering the national territory and cannot exercise the right of freedom of movement. As I have already stated, that does not mean that he cannot ask the competent authorities to reconsider his legal position, and he may in addition appeal against any negative decision.

The fifth preliminary question

125. By its last preliminary question the national court asks whether the answer given to the fourth question changes in any respect where the circumstances of the Community national expelled on grounds of public policy or public security fall within any of the following three cases: (a) he entered the territory of the Member State before asking for a residence permit; (b) he has been expelled from the Member State before asking for a residence permit or has never asked for such a permit; (c) his earlier departure from the territory was the result of a decision ordering expulsion or the threat of detention and expulsion and was followed by a decision to exclude.

126. Since that question complements the fourth one, which, in turn, assumes the existence of a previous expulsion order issued by the competent authorities, the answer I suggest for the fourth question will not change in any of the three cases described above.

128. Whilst that situation persists, the Member State in question may endeavour to prevent the expelled person from entering its territory. It may also take steps to curtail the presence in its territory of any person who, in breach of the prohibition of entry inherent in the expulsion order, has gained access to its territory. Finally, it may order the expulsion of that person, and in so doing is merely giving direct effect to the original expulsion order.

129. If, as was recognized in *Adoui and Cornuaille*, a national who is the subject of a valid expulsion order has no right to enter the territory of the Member State in question whilst his application is being re-examined, then *a fortiori* he cannot enjoy that right — which would now be a right not of entry but of residence — when he has entered the country in disregard of the expulsion order made against him.

130. It follows that, in such circumstances, the decision to deport a person who was already the subject of a valid expulsion order made earlier and not revoked may be implemented immediately.

Conclusion

131. I therefore propose that the Court of Justice give the following answers to the questions referred to it by the High Court of Justice concerning the interpretation of Articles 8 and 9 of 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:

(1) The reference in Article 8 of Directive 64/221 to 'the same legal remedies ... as are available to nationals of the State concerned in respect of acts of the administration' is a reference to the general system of remedies available in each Member State with respect to such acts.

(2) Community nationals who have had an expulsion order made against them or have been refused entry to a Member State, on grounds of public health, public security or public policy, are entitled to challenge such measures before a judicial authority in that Member State by means of an effective remedy which ensures that the entire administrative decision, including its substantive grounds, is subjected to judicial scrutiny.

(3) The opening words of Article 9(1) of Directive 64/221 ('where there is no right of appeal to a court of law, or where such appeal may only be in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect') also apply to Article 9(2). The first two cases covered by those opening words must be regarded as contrary to the general principle of

Community law which guarantees individuals full and effective judicial protection of rights deriving from provisions of Community law which have direct effect.

(4) A Community national who has been refused entry to or expelled from a Member State on grounds of public health, public security or public policy may challenge such decisions by means of the remedies provided for in Article 8 of Directive 64/221. Both where he failed to avail himself of such remedies and where recourse to them was unsuccessful, he may also, after a reasonable period has elapsed, ask the administrative authorities to reconsider his case. In the event of a negative decision from those authorities in response to that request, he may rely on the provisions of Articles 8 and 9 of the said directive, provided that he does not exercise those rights abusively or vexatiously.