JUDGMENT OF THE COURT
13 February 1985 [1]

In Case 267/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht [Federal Administrative Court] for a preliminary ruling in the proceedings pending before that court between

Aissatou Diatta, a Senegalese national residing in West Berlin,

and

Land Berlin, represented by the Polizeipräsident [Chief Commissioner of Police], Berlin,

on the interpretation of Articles 10 and 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), U. Everling, K. Bahlmann and R. Joliet, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Administrator

gives the following

1 — Language of the Case: German.

JUDGMENT

Facts and Issues

1. Facts and procedure

On 3 July 1977 Aissatou Diatta, a Senegalese national, married a French national, who has lived and worked in West Berlin for several years and who holds a residence permit issued to nationals of Member States of the EEC. The permit was most recently extended until 21 August 1985.

On 13 August 1977 Mrs Diatta joined her husband in West Berlin and moved into his apartment.

Since February 1978 Mrs Diatta has been employed continuously as a domestic help. On 13 March 1978 she obtained a temporary residence permit which was valid until 16 March 1980.

Mrs Diatta has lived apart from her husband since 29 August 1978 and occupies her own rented accommodation in West Berlin. She intends to divorce her husband as soon as it is possible under French law.

On the expiry of her residence permit, Mrs Diatta applied to the competent authority for an extension. That application was rejected by the Polizeipräsident [Chief Commissioner of Police], Berlin, by a decision of 29 August 1980, on the ground that she was no longer a member of the family of a national of a Member State of the EEC and that she did not live with her husband.

The complaint lodged by Mrs Diatta against that decision was dismissed by a decision of 12 December 1980 of the Senator für Inneres [the member of the Berlin Senate with responsibility for internal affairs].

Mrs Diatta appealed to the Verwaltungsgericht [Administrative Court] Berlin, which, by judgment of 6 November 1981, partly allowed her appeal. It quashed the administrative decisions in question and ordered the Polizeipräsident to reconsider Mrs Diatta's application under the Ausländergesetz [Aliens Law] of 28 April 1965. The Verwaltungsgericht dismissed the rest of the appeal and ruled that Mrs Diatta was not entitled to a residence permit under Paragraph 7 (1) of the Aufenthaltsgesetz/EWG [German Law on the entry and residence of EEC nationals] of 22 July 1969, on the ground that she did not live with her husband, a national of a Member State.

On 27 April 1982 the Oberverwaltungsgericht [Higher administrative court] Berlin dismissed Mrs Diatta's appeal against the decision of the Verwaltungsgericht. In the meantime, on 4 February 1982, the Polizeipräsident had, in the exercise of his discretion, again refused to grant a residence permit.

Mrs Diatta appealed on a point of law to the Bundesverwaltungsgericht [Federal administrative court].

The First Senate of the Bundesverwaltungsgericht took the view that, in order to give judgment, it required an interpretation of Articles 10 and 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. By order of 18 October 1983 it therefore decided, pursuant to Article 177 of the EEC Treaty, to stay the proceedings and to request the Court of Justice to give a preliminary ruling on the following questions:

(1) Is Article 10 (1) of Regulation (EEC) No 1612/68 to be interpreted as meaning that the spouse of a worker who is a national of a Member State

and who is employed in the territory of another Member State may be said to live 'with the worker' if she has in fact separated from her spouse permanently but none the less lives in her own accommodation in the same place as the worker?

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

The order of the Bundesverwaltungsgericht was registered at the Court on 5 December 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 9 February 1984 by Mrs Diatta, the plaintiff in the main proceedings, represented by Dieter Eichhorn, Rechtsanwalt, Berlin, on 12 March by the Land Berlin, represented by Heinz Scholze, Rechtsanwalt, Berlin, on 13 March by the Commission of the European Communities, represented by Manfred Beschel, a member of its Legal Department, on 15 March by the Government of the Kingdom of the Netherlands, represented by I. Verkade, Secretary General at the Ministry for Foreign Affairs, and by the United Kingdom, represented by G. Dagtoglou, of the Treasury Solicitor's Department, and on 16 March 1984 by the Federal Republic of Germany, represented by Martin Seidel, Ministerialrat, and Ernst Röder, Regierungsrat at the Ministry for Economic Affairs.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the parties to concentrate their oral arguments at the hearing on a certain number of questions notified to them in advance.

2. Written observations submitted to the Court

Mrs Diatta, the plaintiff in the main proceedings, takes the view that, under Articles 10 and 11 of Regulation No 1612/68, she has an independent right to the residence permit which she seeks.

(a) In her view, Article 10 (1) of Regulation No 1612/68 establishes a right of residence for the spouse of a worker who is a national of a Member State of the EEC also where the spouse lives in the same place although in separate accommodation. Article 10 does not refer expressly to cohabitation. It merely states that the worker must make available accommodation for the use of his wife. The decisive requirement, according to the letter and spirit of that provision, is that the worker must make accommodation available for his spouse so as to ensure that the members of his family who join him are not homeless and do not live in unsatisfactory conditions, which would be contrary to public policy and public security. Article 10 (3) refers to housing 'considered as normal ... in the region where he is employed' so as to avoid any discrimination or difference of treatment between national and foreign workers. Considerations of public security

and public policy led the legislature to require as a condition for the spouse's right of residence that the worker should make such housing available to her. That does not however prevent the spouse from obtaining additional space by renting her own accommodation.

Since the existence of accommodation satisfying the criteria laid down by the regulation represents the only legal condition for granting the spouse a personal right, founded on public law, to entry and residence, Regulation No 1612/68 may not be interpreted restrictively as meaning that it requires married couples to maintain normal married life together.

Since it is possible under German law to separate legally whilst living under the same roof, the requirement that the worker and his spouse must live together amounts to a mere formality. In such a case, it is quite impossible for a third party or the authorities to verify whether married life subsists, although, legally, the position is the same where the spouse sets up a new independent home. The continuation of married life cannot be the decisive criterion. The spouses' centre of interests cannot be reduced to life in one and the same dwelling. Otherwise, where the couple are legally separated, the decision to grant the spouse a right of residence would be completely arbitrary, depending on whether they continue to live in the matrimonial home or whether they live in two separate dwellings.

If it were a mandatory condition that the married couple live under the same roof, the worker could at any time cause his spouse to be expelled by depriving her of accommodation. If it were impossible for the spouse evicted in that way to set up an independent home without being threatened with expulsion, she would be placed in a position of dependence which would be incompatible with the principles relating to a person's right to self-determination.

Whilst the marriage continues to exist, reconciliation of the spouses is theoretically possible. That would not be so if the residence permit were refused and the spouse were thus compelled to leave.

As long as a marriage has not been dissolved by a decision having the force of *res judicata*, the administrative authorities may not assess the likelihood of a reconcilation or come to the conclusion that the marriage has irretrievably broken down. Otherwise the administrative authorities would pre-judge the decision of the courts.

Under Article 48 of the EEC Treaty the members of a worker's family have a personal right, founded on public law, to enter and to reside in the territory of another Member State. Thus the spouse is protected by the law and that protection must be maintained for as long as the marriage itself exists. The spouse's right is not merely consequential. It pertains to her personally and is provided for by law; for example, it continues to exist after the worker's death. The independent nature of the personal right of a member of the worker's family has been recognized by the Court of Justice in matters relating to social security. The Court has adopted the principle that it would be contrary to the spirit and the purpose of the Community provisions not to grant the family of a worker from another Member State the rights given to nationals. In view of the spirit of the provisions in question, that principle has also been applied in relation to the members of the worker's family with a view to improving their legal position under

Regulation No 1612/68. The Court's decisions have tended to reinforce the legal position of the members of a worker's family who have come to join him, and to recognize that they have independent rights. It would be contrary to that trend of extensive interpretation to interpret Article 10 (1) of Regulation No. 1612/68 restrictively as meaning that the spouses are required to live together in a common dwelling.

(b) Article 11 of Regulation No 1612/68 applies not only to nationals of the Member States of the EEC but also to those of other countries. It expressly provides that the spouse of a national of a Member State has the right to take up any activity as an employed person throughout the territory of the host State. A restrictive interpretation of Article 10 of Regulation No 1612/68 which makes the right of residence subject to the requirement of a common dwelling prevents the operation of that right. The freedom of movement provided for in Article 11 also necessarily entails the possibility of choosing a separate home, where the spouse undertakes employment elsewhere than at her partner's place of residence.

The fact that the motives for establishing a separate home may be different cannot alter the legal position.

Article 11 of Regulation No 1612/68 establishes a more extensive right of residence than that provided for under Article 10. It cannot be interpreted restrictively in the light of Article 10. That would be contrary to the express wording given to Article 11 by the legislature. In this instance it is necessary to assess and apply Article 11 without reference to the conditions laid down in Article 10.

The *Land Berlin*, the defendant in the main proceedings, proposes that the two questions referred to the Court should be answered in the negative.

(a) The expression 'to install oneself with someone', whether construed literally or in the light of the aims of Article 10 (1) of Regulation No 1612/68, means 'to share accommodation with someone'. Article 10 (3) lays down as a precondition for the application of Article 10 (1) that the worker must have available for his family housing considered normal for national workers in the region where he is employed. It is not enough that a married couple who are separated live in the same place and that each has accommodation which is satisfactory as far as he or she is concerned. Article 10 of the regulation, like the Aufenthaltsgesetz/EWG, is intended to protect the workers in question and to ensure that their family links are maintained.

To grant to the families of Community workers a right of residence which is not based on a requirement that the family should live together would in practice have unacceptable consequences.

(b) Regulation No 1612/68 succeeded Regulation No 15 of the Council of 16 August 1961 concerning the first measures for establishing freedom of movement for workers within the Community (Journal Officiel No 57, p. 1073) and Regulation No 38/64 of the Council of 25 March 1964 on freedom of movement for workers within the Community (Journal Officiel No 62, p. 965). It constituted the third and final phase in the introduction of the freedom of movement for workers provided for in Article 48 of the EEC Treaty.

Article 48 confers on the workers concerned not only equality as regards the right to work (Article 48 (3) (a)) but also a right of

residence (Article 48 (3) (c)). Regulation No 1612/68 distinguishes between the two elements of the provisions. Only the 'right to work' component is governed by Article 11.

That is clear from the wording of the provision. The members of the family concerned have 'the right to take up any activity as an employed person throughout the territory of that same State'. There is no mention in Article 11 of any right of residence or right of establishment for the members of the family.

That interpretation is supported by reference to the history of Article 11 of Regulation No 1612/68. Articles 10 and 11 thereof are based on Articles 17 and 18 of Regulation No 38/64, which appeared in Title II ('Workers' families'). The first sentence of Article 18 (1) of Regulation No 38/64 referred expressly to Article 17 and had the effect that if a member of the family lacked the requisite legal status under Article 17 he did not have an independent right of residence: the conditions for the right of residence under Article 17 of Regulation No 38/64 must be satisfied before a member of the family could be granted the right to undertake employment. The fact that Article 11 of Regulation No 1612/68 does not refer expressly to Article 10 cannot call in question the existence of such a correlation. Where the family relationship between the worker with the right of residence and the member of the family who seeks that right ceases to exist or where there has not even been any attempt to establish such a relationship, there can be no question of an independent right of residence for the members of the family. Both the Community regulations and the German Law on the entry and residence of EEC nationals are intended to promote the movement of workers within the Community. The protection of family rights in that context is based on a desire to protect the workers themselves. Rights cannot be granted to members of the family where that consideration no longer operates.

The *Government of the Federal Republic of Germany* also considers that the two questions referred to the Court by the Bundesverwaltungsgericht call for a negative reply.

(a) The very wording of Article 10 (1) of Regulation No 1612/68 establishes that the spouse's right of residence exists in principle only if she lives in the worker's home.

That interpretation is in conformity with the spirit and the purpose of the provision.

It follows from the fifth recital in the preamble to Regulation No 1612/68 that the purpose of Article 10 (1) (a) is to enable the worker to live with his family, thus allowing spouses to create and maintain normal married life, which is characterized by the existence of a common home.

An interpretation which goes beyond the wording of Article 10 (1) (a) should at least take into account the spirit and purpose of that provision. There is clearly no question of preserving family unity where the spouses abandon married life together and live separately on a permanent basis so that the spouse who followed the migrant worker into another Member State occupies his or her own accommodation. Such a separation removes the legal basis for the entitlement to special treatment under Article 10 (1) of Regulation No 1612/68.

(b) An affirmative reply to the second question would mean that the right of residence of the worker's spouse or children is determined, where they take up an activity as an employed person, on the basis of Article 11 rather than Article 10. Thus Article 10 (1) (a) would be deprived of any effect as regards that class of persons. Such an interpretation cannot be accepted.

Article 11 of Regulation No 1612/68 governs only the question of the rights of the spouse and the children regarding access to the labour market. That follows from the wording of the provision, which refers to a legal situation identical to that contemplated in Article 18 (1) of Regulation No 38/64.

Article 11 of Regulation No 1612/68 confers on the worker's spouse and children the right to work 'throughout the territory' of the Member State. Even where the migrant worker and his spouse work in different places, and where it is impossible to continue family life on a daily basis, it is essential that the spouses have the will to live together and that they in some way demonstrate that will, for example by spending the weekends together.

In allowing the spouse to take up employment throughout the territory of the host State, regardless of the place of residence of the migrant worker, the Community regulation seeks to improve the spouse's employment prospects. That does not entail a modification in her status regarding the right of residence and in particular does not provide the basis for a right of residence not subject to the conditions laid down in Article 10. The members of the family who do not possess the nationality of a Member State have no independent right to freedom of movement.

The *United Kingdom* submits that Article 10 of Regulation No 1612/68 does not confer any right on a spouse who is separated from a worker coming within the scope of that provision and who cannot seriously be deemed to live with him. Article 11 does not confer on such a spouse an independent right of residence.

(a) Article 10 (1) is not to be interpreted as embracing the circumstances which pertain to the plaintiff. The right conferred by Article 10, *inter alia* on the spouses of workers, is the right of specified persons to 'install' themselves 'with' a worker. The use of the concept of installation in this context clearly anticipates the existence of an intimate and current relationship between the worker and those persons. Article 10 is primarily intended to cover the situation where a worker moves his home to take up employment in a Member State; unless, in such a case, provision were made enabling the worker's family to join and remain with him in that Member State, freedom of movement as provided for under Article 48 of the EEC Treaty would not, in any real sense, be achieved. It would however, be quite unnecessary for the achievement of freedom of movement, and would distort the significance of the use of the concept of 'installation', if that article were to be interpreted as affording rights to persons who no longer, in any real sense, relate to the worker so as to comprise an integral family unit.

Article 10 (3) of Regulation No 1612/68 cannot be interpreted as providing that the sole condition imposed on the spouse's right of residence is that a worker must be able to make available normal accommodation, even if there is no intention or likelihood

that his spouse will avail herself of that accommodation.

(b) Article 11 of Regulation No 1612/68 makes no provision for a right of residence independent of the conditions specified in Article 10.

Article 11 does not establish a right of residence. That right, limited as it is, is contained in Article 10. What Article 11 does is to confer a right to undertake employment upon the same class of beneficiaries as are embraced by Article 10. Furthermore, it is clear that the two provisions are related and are to be regarded as complementary: they benefit the same classes of person and exist for the common purpose of eliminating obstacles to the mobility of workers. Article 10 establishes the worker's right to be joined by his family; Article 11 (together with Article 12) establishes the conditions for the integration of that family into the host country. That common purpose would not be advanced if Articles 10 and 11 were to be regarded as providing for entirely separate and distinct rights.

The complementary relationship between Articles 10 and 11 only makes sense if Article 11 is interpreted subject to the qualifications contained in Article 10.

In connection with the question as to the conditions of Article 10 to which Article 11 is subject, it is possible to make the following remarks:

Where the spouses are, and have been for some time, living apart, the fact that the worker makes available for his wife 'normal housing' does nothing to promote the overriding objective of the regulation, which is to remove obstacles to the maintenance of family life and so encourage the movement of workers.

The interpretation advanced by the plaintiff of the qualifying conditions of Article 10 for the purposes of Article 11 would provide arbitrary and unjustifiable results. Article 11 relates to the position of a 'spouse' and not that of a former spouse. It clearly refers to the present spouse of the worker. Where the spouses are divorced or separated it will be difficult to maintain that any real family life subsists. There is no logical reason for distinguishing between a separated spouse and a divorcee. Moreover, where by virtue of her separation from her husband the separated spouse has ceased to have any real connection with the Member State concerned, she cannot claim the right to continue to live and work in that State. With regard to the facts of the present case, it should also be noted that Article 48 of the Treaty does not in principle apply to nationals of non-member countries.

That interpretation is supported by other regulations which are indeed intended to confer a right on a member of a worker's family quite independently of the current exercise of rights by the worker himself and which spell out the independent nature of that right. For example, Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State (Official Journal, English Special Edition 1970 (II), p. 402) provides expressly that the members of the worker's family continue to enjoy certain rights derived from that worker's status after his death. Article 11 of Regulation No 1612/68 does not contain any special provision of that nature.

The *Government of the Kingdom of the Netherlands* submits the following observations:

(a) Article 10 of Regulation No 1612/68 establishes the right of a migrant worker to bring the members of his immediate family to the Member State where he works so that they can install themselves with him. That right helps to eliminate a serious obstacle to the mobility of workers.

It follows from both the wording and the purpose of Article 10 that the members of the worker's family must live with the worker. That proposition is confirmed by the requirement regarding housing, imposed by Article 10 (3). That provision would be deprived of its significance if the worker's family were free to set up home elsewhere, independently.

The spouse of a worker is not entitled to a right of installation under Article 10 (1) when she is separated on a permanent basis from the worker and is installed elsewhere in her own accommodation.

(b) Article 11 of Regulation No 1612/68 enables the spouse and children under 21 who reside with her in pursuance of Article 10 to contribute, by working, to their personal welfare and to their integration in the society in which they have settled.

Obstacles to that process set up by national legislation are excluded by Article 11, even where the members of the family concerned are not nationals of a Member State. Article 11 is the consequence of the facility afforded to the worker by Article 10 of allowing members of his family to install themselves with him. It does not accord them any independent right of residence. Where they are nationals of a Member State, they have such a right under Article 1 of Regulation No 1612/68, in so far as they undertake employment. That independent right of residence therefore may be added to the right of residence to which they are entitled under Article 10. In the event of the break-up of the family, only the right of residence based on Article 10 ceases to apply.

Where the members of the family are not nationals of a Member State, they have a right of residence only under Article 10 of the regulation. Where the family breaks up, the right of those persons to continue to reside in the same country must be considered in the light of the legislation of the Member State where they reside. That does not call in question the right to remain in the country which, in particular in the event of the worker's death, may arise from Regulation No 1251/70.

The *Commission* considers that, in addition to Articles 10 and 11 of Regulation No 1612/68, other Community provisions are relevant to this case. Although the EEC Treaty envisages in Article 48 *et seq.* only the freedom of movement of 'workers', it is generally accepted that the fundamental right to free movement is also available to the families of migrant workers. In the light of the facts of the present case, it is therefore also necessary to take into account the provisions of Council Directive No 68/360 of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (Official Journal, English Special Edition 1968 (II), p. 485), in particular Article 4 thereof, Article 3 of Regulation No 1251/70, Article 1 of Council Directive No 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (Official Journal, English Special Edition 1963-64, p. 117) and Council Directive No 72/194/EEC of

18 May 1972 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that State the scope of Directive No 64/221 (Official Journal, English Special Edition 1972 (II), p. 274).

Moroever, the rights to free movement of the members of migrant workers' families are not rights which pertain to those members but consequential rights. That is the case in particular where the members of the migrant worker's family are not nationals of a Member State. Only the relationship with the migrant worker confers on them the right to the freedom of movement provided for under Community law. Thus Article 4 of Directive No 68/360 states expressly that a member of the family who is not a national of a Member State is entitled to a residence document which has the same validity as that issued to the 'worker on whom he is dependent'. The aim is to ensure that if the worker exercises his right to free movement he is able to maintain and continue family relationships. Conversely, the severance of special family links with the migrant worker deprives the members of the family of the right to free movement established under Community law.

(a) With regard to the facts of the present case, it should be noted that the plaintiff in the main proceedings is still married to her husband and that she is a member of the family within the meaning of Article 10 *et seq.* of Regulation No 1612/68, Directive No 68/360 and Article 3 of Regulation No 1251/70. The only question is whether, in addition to the fact of marriage, the Community legislature has imposed additional conditions, concerning married life, which must be satisfied if the migrant worker's spouse is to be able to rely on the Community right to free movement.

The view that it is a necessary condition that the spouses live together in a common dwelling suggests that the Community legislation not only makes the exercise of the right to free movement subject to the existence of a valid, undissolved marriage, but also imposes specific conditions on the spouses, concerning the way in which they must conduct their married life, in order to qualify, as a family, for the right to free movement. The Community legislature never intended to lay down such rules.

The Community legislature did not intend to deal with specific problems of family law within the context of the right to free movement. There is no common concept, shared by all Member States and all individuals, as regards the substance of marital relations. To attempt to commit the Community legislature to the image of the family living 'under the same roof' or in the same dwelling goes far beyond the objectives pursued in the matter of free movement.

Other provisions of Community law clearly show that that is not the intention of Article 10 (1) and (3) of Regulation No 1612/68.

Article 11 itself states that the spouse of a migrant worker has the right 'to take up any activity as an employed person throughout the territory' of the Member State concerned. Clearly that provision does not provide for an independent right of residence. It confers on the spouse who has a right of residence by virtue of Article 10

and of Directive No 68/360, the additional right of undertaking employment. However, if the migrant worker's spouse has the right to seek employment throughout the territory, that provision is devoid of purpose unless she also has the possibility of living in a place other than that where the migrant worker himself resides.

Article 3 (3) and (4) of Directive No 68/360 is especially important in this context. It stipulates the conditions for the issue of a residence permit to the members of migrant workers' families. The Community legislature did not choose to impose for the issue of a residence permit to a migrant worker's spouse the additional requirement of a common dwelling. The only condition laid down is that the spouse should have the status of a member of the worker's family.

Article 10 (1) and (3) of Regulation No 1612/68 must be regarded in the light of its purpose of ensuring freedom of movement in the face of certain obstacles and difficulties created in the Member States by practices adopted by the authorities responsible for aliens. The situation of foreign workers and their families who are homeless or who live in overcrowded accommodation is a characteristic problem for those authorities. The requirement that the members of the migrant worker's family must have normal accommodation is intended to prevent the exercise of the right to free movement from creating unacceptable difficulties in the Member States; at the same time, the Community legislation expressly prohibits any discrimination in relation to national workers. The drafting of the regulation, whereby the members of the migrant worker's family have the right to 'install themselves' with the worker, is explained by the typical financial dependence of the spouse, who, at least at the outset, does not work. It emphasizes the responsibility of the migrant worker, who must provide normal accommodation for the members of his family. That provision may not however be interpreted as meaning that the existence of a common dwelling is a condition *sine qua non* for the residence of a migrant worker's spouse. It represents a compromise between, on the one hand, the authorities' concern about hygiene and conditions of accommodation and, on the other hand, the fundamental right to freedom of movement. It must therefore be construed as requiring only that normal housing must be genuinely available for the members of a migrant worker's family. The same applies to Article 3 of Regulation No 1251/70, which merely follows the criteria laid down in Article 10 of Regulation No 1612/68.

(b) The questions referred by the Bundesverwaltungsgericht require the following replies:

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

(2) Article 11 of Regulation No 1612/68 establishes for spouses of nationals of Member States who work and live in the territory of another Member State the right to exercise an activity as an employed person throughout the

territory of that Member State, subject to the sole condition that the spouses have the right of residence under Article 10 of Regulation No 1612/68.

3. Oral procedure

At the sitting on 19 September 1984 oral argument was presented by Dr Ernst Röder, on behalf of the German Government, and by Manfred Beschel, on behalf of the Commission.

At the sitting, in contrast to the view which it advanced in its written observations, the Commission submitted that it was necessary to satisfy the conditions laid down in Article 10, namely the existence of a family relationship and reasonable accommodation, only at the time of entry into the territory of another Member State. Thus, in its view, the right of residence subsists even after the severance of the family or marital relationship. The Commission considers that it would be contrary to fundamental rights if a migrant worker could remove, unilaterally and arbitrarily, the protection accorded by Community law to the members of his family.

The Advocate General delivered his opinion at the sitting on 7 November 1984.

Decision

1 By an order dated 18 October 1983, which was received at the Court on 5 December 1983, the First Senate of the Bundesverwaltungsgericht [Federal Administrative Court] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Articles 10 and 11 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

2 The questions arose in a dispute between Mrs Diatta, a Senegalese national, and the Land Berlin, represented by the Polizeipräsident [Chief Commissioner of Police].

3 Mrs Diatta married a French national who resides and works in Berlin. She has worked continuously in Berlin since February 1978.

4 After living with her husband for some time, she separated from him on 29 August 1978 with the intention of divorcing and has lived since in separate accommodation.

5 On the expiry of her residence permit, Mrs Diatta requested an extension. By a decision of 29 August 1980, the Polizeipräsident rejected that request on the grounds that Mrs Diatta was no longer a member of the family of a national of a Member State of the EEC and that she did not live with her husband. That refusal was upheld by the Verwaltungsgericht [Administrative Court] on the ground that the spouses did not live together. On the other hand, the Verwaltungsgericht took the view that the family relationship still existed. Mrs Diatta appealed against that decision to the Oberverwaltungsgericht [Higher Administrative Court] and, following the dismissal of that appeal, to the Bundesverwaltungsgericht.

6 The Bundesverwaltungsgericht referred to the Court the following questions:

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

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

7 The two questions referred to the Court by the Bundesverwaltungsgericht are intended to establish whether the members of a migrant worker's family, as defined in Article 10 of Regulation No 1612/68, are necessarily required to live with him permanently in order to qualify for a right of residence under that provision, and whether Article 11 of that regulation establishes a right of residence independent of that provided for in Article 10.

8 Article 10 of Regulation No 1612/68 provides that:

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

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

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

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

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

9 Article 11 of that regulation states that:

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

10 Mrs Diatta, the plaintiff in the main proceedings, argues that Article 10 does not refer expressly to co-habitation; it merely requires the migrant worker to make available to the members of his family accommodation 'considered as normal'. The provision is intended to implement public policy and to protect public security by preventing the immigration of persons who would have to live in precarious conditions. However, that does not mean that the spouse or another member of the family cannot obtain additional space by renting separate accommodation. Moreover, Regulation No 1612/68 cannot be interpreted as requiring a married couple to live together. It is not for the immigration authorities to decide whether a reconciliation is still possible. Moreover, if co-habitation of the spouses were a mandatory condition, the worker could at any moment cause the expulsion of his

spouse by depriving her of a roof. Finally, Article 11 of the regulation establishes a more extensive right of residence than Article 10 and is necessarily based on the assumption that it is possible to choose to live in separate accommodation.

11 According to the Land Berlin, the defendant in the main proceedings, the sole aim of Article 10 of Regulation No 1612/68 is to protect migrant workers and to guarantee their mobility by enabling them to maintain their family ties. In consequence there are no grounds for granting a right of residence to the members of their families where that right is not derived from the fact that they live together. As for Article 11, that provision establishes not a right of residence but solely a right to work.

12 Furthermore, according to the Governments of the Federal Republic of Germany, the United Kingdom and the Netherlands, it is clear from the letter and spirit of Article 10 of the regulation that the spouse's right of residence exists only if she lives in the migrant worker's home. The fifth recital in the preamble to Regulation No 1612/68 shows that the purpose of that regulation is to enable the worker to live with his family. There can be no question of that where the spouses stop living together. Articles 10 and 11 of Regulation No 1612/68 take into account the two aspects of the legal position envisaged in Article 48 (3) of the EEC Treaty, namely the right to work and the right of residence. That interpretation is supported by the history of Articles 10 and 11 of Regulation No 1612/68, which were based on Articles 17 and 18 of Regulation No 38/64 of the Council of 25 March 1964 on freedom of movement for workers within the Community (Journal Officiel 1964, No 62, p. 965). Article 18 of Regulation No 38/64 states clearly that where a member of the family does not have the legal status defined in Article 17, he has no independent right of residence.

13 The Commission maintains that it is generally acknowledged that the fundamental right to free movement provided for in Article 48 *et seq.* of the Treaty is also granted to migrant workers' families. In the Commission's view, it is not therefore permissible to make the right to free movement subject to the manner in which the spouses wish to conduct their married life, by requiring them to live under the same roof. Attitudes to marital relationships vary according to the Member States and individuals. That is why Article 10 imposes no such requirement. Article 10 is

intended solely to ensure the existence of normal accommodation for immigrants in order to satisfy the requirements of the authorities responsible for aliens with regard to hygiene and accommodation. Similarly, it is clear from Article 4 (3) and (4) of Council Directive No 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 (Official Journal, English Special Edition 1968 (II), p. 485) that the issue of a residence permit is subject solely to the objective requirement of marriage and not to the additional requirement of a shared dwelling. At the hearing the Commission went further and expressed the view that the right of residence of members of a migrant worker's family and their right to exercise an activity as employed persons throughout the territory of the host State would not be extinguished in the event of severance of the family relationship after entry into that territory.

14 In order to reply to the questions submitted it is necessary to view Regulation No 1612/68 in its context.

15 That regulation is one of various measures intended to facilitate the achievement of the objectives of Article 48 of the Treaty. It must therefore enable a worker to move freely in the territory of the other Member States and to reside in their territory in order to work there.

16 To that end, Article 10 of the regulation provides that certain members of the migrant worker's family may also enter the territory of the Member State in which he is established and install themselves with him.

17 Having regard to its context and the objectives which it pursues, that provision cannot be interpreted restrictively.

18 In providing that a member of a migrant worker's family has the right to install himself with the worker, Article 10 of the regulation does not require that the member of the family in question must live permanently with the worker, but, as is clear from Article 10 (3), only that the accommodation which the worker has available must be such as may be considered normal for the purpose of

accommodating his family. A requirement that the family must live under the same roof permanently cannot be implied.

19 In addition such an interpretation corresponds to the spirit of Article 11 of the regulation, which gives the member of the family the right to take up any activity as an employed person throughout the territory of the Member State concerned, even though that activity is exercised at a place some distance from the place where the migrant worker resides.

20 It must be added that the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date.

21 As regards Article 11 of Regulation No 1612/68, it is clear from the terms of that provision that it does not confer on the members of a migrant worker's family an independent right of residence, but solely a right to exercise any activity as employed persons throughout the territory of the State in question. Article 11 cannot therefore constitute the legal basis for a right of residence without reference to the conditions laid down in Article 10.

22 Consequently, in reply to the questions referred to the Court by the Bundesverwaltungsgericht, it must be stated that the members of a migrant worker's family, as defined in Article 10 of Regulation No 1612/68, are not necessarily required to live permanently with him in order to qualify for a right of residence under that provision and Article 11 of the same regulation does not establish a right of residence independent of that provided for in Article 10.

Costs

23 The costs incurred by the Governments of the Federal Republic of Germany, the United Kingdom and the Netherlands and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Bundesverwaltungsgericht by order of 18 October 1983, hereby rules:

The members of a migrant worker's family, as defined in Article 10 of Regulation No 1612/68, are not necessarily required to live permanently with him in order to qualify for a right of residence under that provision and Article 11 of the same regulation does not establish a right of residence independent of that provided for in Article 10.

Mackenzie Stuart Bosco Due

Kakouris Everling Bahlmann Joliet

Delivered in open court in Luxembourg on 13 February 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President