# OPINION OF ADVOCATE GENERAL STIX-HACKL

## delivered on 13 September 2001 [1]

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## I — Introduction

1. The Belgian Conseil d'État has referred a number of questions to the Court of Justice concerning the legal position of nationals of non-Member States who are married to Community citizens. More specifically, they concern refusal to allow entry at the frontier, refusal to issue a residence permit, expulsion and legal remedies.

## II — Legal background

### A — *Community law*

2. Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [2] applies, by virtue of Article 1(2), also to the spouse and to members of the family of certain nationals of a Member State who fulfil the conditions in the regulations and directives adopted on the basis of the Treaty in regard to the exercise of an employed or self-employed activity or the freedom to provide services.

3. Article 3 provides:

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

2 — OJ English Special Edition (1963-1964) p. 117.

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

(3) Expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit shall not justify expulsion from the territory.

(4) The State which issued the identity card or passport shall allow the holder of such a document to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.'

4. Article 8 lays down that the person concerned must have the same legal remedies in respect of the decision refusing entry, the issue or extension of a residence permit, or the decision ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.

5. Article 9(1) and (2) states:

'(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 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.'

6. 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[3] apply, pursuant to Article 1 thereof, to the persons to whom Regulation (EEC) No 1612/68 applies.

7. Article 3 provides:

'(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. Member States shall accord to such persons every facility for obtaining any necessary visas.'

8. Article 4 provides:

'(1) Member States shall grant the right of residence in their territory to the persons referred to in Article 1 who are able to produce the documents listed in paragraph 3.

(2) As proof of the right of residence, a document entitled "Residence Permit for a National of a Member State of the EEC" shall be issued. This document must include a statement that it has been issued pursuant to Regulation (EEC) No 1612/68 and to the measures taken by the Member States for the implementation of the present Directive. The text of such statement is given in the annex to this Directive.

(3) For the issue of a Residence Permit for a National of a Member State of the EEC, Member States may require only the production of the following documents:

— by the worker:

(a) the document with which he entered their territory;

(b) a confirmation of engagement from the employer or a certificate of employment;

3 — OJ, English Special Edition 1968 (II), p. 485.

— by the members of the worker's family:

(c) the document with which they entered the territory;

(d) a document issued by the competent authority of the State of origin or the State whence they came, proving their relationship;

(e) in the cases referred to in Article 10(1) and (2) of Regulation (EEC) No 1612/68, a document issued by the competent authority of the State of origin or the State whence they came, testifying that they are dependent on the worker or that they live under his roof in such country.

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

9. Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community[4] provides as follows:

'(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.'

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

10. 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 [5] applies, according to Article 1 thereof, *inter alios* to the following persons:

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

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

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

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

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

11. Under Article 3(1), the Member States are to grant to the persons referred to in Article 1 the right to enter their territory merely on production of a valid identity card or passport.

12. Article 3(2) is worded in the same manner as Article 3(2) of Directive 68/360.

13. Article 4(3) provides:

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

5 — OJ 1973 L 172, p. 14.

14. Article 6 provides:

'An applicant for a residence permit or right of abode shall not be required by a Member State to produce anything other than the following, namely:

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4.'

15. Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third-countries whose nationals must be in possession of visas when crossing the external borders of the Member States [6] lays down rules on the visa obligation, *inter alia* with regard to nationals of third-countries listed in the annex. That regulation was replaced by Council Regulation (EC) No 574/1999 of 12 March 1999 determining the third-countries whose nationals must be in possession of visas when crossing external borders of the Member States. [7]

B — *National law*

16. Title II, Chapter I (Articles 40 to 47) of the Law of 15 December 1980 (as amended on numerous occasions) on access to the territory, residence, establishment and expulsion of foreign nationals [8] contains provisions concerning 'foreign nationals who are nationals of the Member States of the European Communities, members of their family and foreign nationals who are members of the family of a Belgian national'. These provisions were adopted in the light of the EC Treaty and Regulation No 1612/68 and in order to implement various directives.

17. In implementation of Article 42 of the Law of 15 December 1980, a Royal Decree of 8 October 1981 laid down the conditions for recognising the right of residence and the procedure for issuing a residence permit.

18. On 28 August 1997 the Minister of the Interior and the Minister of Justice issued a circular concerning the procedure for pub-

6 — OJ 1995 L 234, p. 1.

7 — OJ 1999 L 72, p. 2.

8 — *Moniteur belge* of 31 December 1980.

lication of banns of marriage and the documents which must be produced in order to obtain a visa for the purpose of contracting a marriage in the Kingdom of Belgium or to obtain a visa for the purpose of reuniting a family on the basis of a marriage contracted abroad ('the Circular') [9].

19. Paragraph 4 of the Circular provides as follows:

'(4) Lodging an application for residence after celebration of a marriage

... as regards residence, it is to be remembered that the documents required for entry into the Kingdom must be produced in support of the application for residence submitted under subparagraphs (i) or (iv) of the first paragraph of Article 10 or Article 40(3) to (6) of the Law of 15 December 1980 on access to the territory, residence, establishment and expulsion of foreign nationals.

That means specifically that the foreign national must be in possession of a valid national passport or travel document in lieu of a passport, bearing if necessary a visa or equivalent authorisation valid for Belgium affixed by a Belgian diplomatic or consular representative or by such a representative of a State party to an international Convention concerning the crossing of external borders which is binding on Belgium (Article 2 of the Law of 15 December 1980).

Where a foreign national fails to produce the abovementioned entry documents, his application for residence shall in principle be declared inadmissible.'

Neither the Law of 15 December 1980 nor the Royal Decree of 8 October 1981 provides expressly for this inadmissibility.

20. Paragraph 6 of the circular provides *inter alia* as follows:

'Documents which must be produced for the purpose of reuniting a family on the basis of a marriage contracted abroad

A. Reuniting a family on the basis of subparagraphs (i) or (iv) of the first paragraph of Article 10 of the Law of 15 December 1980

...

9 — *Moniteur belge* of 1 October 1997.

(2) Under subparagraph (i) of the first paragraph of Article 10 of the Law (application of bilateral agreements relating to the employment in Belgium of foreign workers concluded between Belgium and Morocco, Turkey, Tunisia, Algeria and Yugoslavia, approved by the Law of 13 December 1976 — M.B., 17 June 1977):

...

— evidence that the spouse is employed in Belgium (certificate from the employer, employment contract, entry in the commercial register,...);

— a copy of the work permit or trading licence of the spouse in Belgium;

— evidence that the spouse in Belgium has worked there for at least three months (one month in the case of Turkish nationals).'

III — Facts and main proceedings

21. On the 28 November 1997 the Mouvement contre le racisme, l'antisemitisme et la xénophobie ASBL (Movement to combat racism, anti-Semitism and xenophobia) ('MRAX') brought an action before the Belgian Conseil d'Etat (Administrative Section) for annulment of paragraphs 4 and 6 of the Circular.

22. The Conseil d'Etat dismissed the application with regard to paragraph 6.

23. With regard to paragraph 4, MRAX submitted that the provision in question infringes Articles 8 and 9 of Directive 64/221, Article 10 of Directive 68/360, 'Article 6 of the Maastricht Treaty' and a number of provisions of Belgian law.

24. As the Conseil d'Etat considers that the interpretation of the provisions of Community law relevant to the main proceedings is not obvious, it has referred the following questions to the Court of Justice for a preliminary ruling, by order of 23 November 1999:

'1. Must Article 3 of Directive 68/360 of 15 October 1968, Article 3 of Direc-

tive 73/148 of 21 May 1973 and Regulation No 2317/95 of 25 September 1995, read in the light of the principles of proportionality and non-discrimination and the right to respect for family life, be interpreted as meaning that the Member States may, at the border, send back foreign nationals subject to a visa requirement and married to Community nationals who attempt to enter the territory of a Member State without being in possession of an identity document or visa?

2. Must Article 4 of Directive 68/360 and Article 6 of Directive 73/148, read in the light of Article 3 of each of those directives and of the principles of proportionality and non-discrimination and the right to respect for family life, be interpreted as meaning that Member States may refuse to issue a residence permit to the spouse of a Community national who has entered their territory unlawfully and issue an expulsion order against him?

3. Do Articles 3 and 4(3) of Directive 68/360, Article 3 of Directive 73/148 and Article 3(3) of Directive 64/221 of 25 February 1964 mean that the Member States may neither withhold a residence permit nor expel a foreign spouse of a Community national who has entered national territory unlawfully but whose visa has expired when application is made for the issue of that permit?

4. Must Articles 1 and 9(2) of Directive 64/221 of 25 February 1964 be interpreted as meaning that foreign spouses of Community nationals who are not in possession of identity documents or a visa or whose visa has expired have the right to refer the matter to the competent authority mentioned in Article 9(1) when applying for the issue of a first residence permit or when they have an expulsion order made against them before the issue thereof?'

## IV — Preliminary observations on reunification of families

25. The present proceedings essentially concern the question of the right of residence of non-Member State nationals married to a Member State national, in particular the protection of family life against measures terminating residence or measures which impede reunification of the family, and also legal remedies.

26. The great value attached to reunification of families [10] is already evident from the fact that rules on it have been laid down

10 — See in that regard the communication of the Commission, the Council and the European Parliament on Community immigration policy of 22 November 2000, COM (2000) 757 final, page 10 *et seq.*

in a series of international legal instruments, such as the International Covenant on Civil and Political Rights, in the Conventions on the Rights of the Child, in the International Convention on the Protection of the Rights of All Migratory Workers and Members of their Families, in the European Convention on the Legal Status of Migrant Workers, and in the European Convention on the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), and in the European Social Charter.

27. Furthermore, for many years reunification of families has been one of the main reasons for immigration into the European Union. Reunification of families is also an important factor in the integration of non-Member State nationals who have already established themselves in the European Union before the members of their family.

28. In that context it should be noted that, apart from rules on non-Member State nationals who are members of the family of Member State nationals, Community law as it currently stands does not contain any provisions on reunification of families. Because of its lack of binding legal force, it is not necessary to consider the 1993 Resolution of the Council on family reunification. [11]

29. On the other hand, the Action Plan of the Council and of the Commission on an 'Area of freedom, security and justice' adopted following the Treaty of Amsterdam provides for a series of specific legal instruments. They include the — planned — directive concerning the right to family reunification; at the moment, however, the Council has before it only the amended proposal of the Commission for discussion. [12]

30. As Community law currently stands, the legal situation of non-Member State nationals who are members of the family of a Member State national who is living in his Member State and who has not exercised his right to freedom of movement, is determined solely by national provisions on family reunification. [13]

31. Under Community law as it currently stands, there is therefore a material difference between a non-Member State national, whose spouse makes use of his rights derived from Community law, and a non-Member State national whose spouse has never made use of those rights. [14]

11 — Council document SN 2828/1/93 WGI 1497 REV 1. See for more details Handoll, *Free Movement of Persons in the EU*, 1995, 367 et seq.

12 — COM (2000) 624 final.

13 — Cf. the Commission in its Proposal for a directive concerning family reunification, COM (1999) 638 final, No 7.5; Martin, Loi du 15 Décembre 1980, *Revue du droit des étrangers* 1996, 722 (725).

14 — Case C-206/91 *Koua Poirrez* [1992] ECR I-6685, paragraph 13, concerning freedom of movement for workers.

That is also the essential starting point in the present proceedings.

32. Save where otherwise indicated, the following remarks concerning non-Member State nationals refer to non-Member State nationals who are married to Community citizens.

## V — The first question (refusal of entry at the frontier)

33. The first question concerns refusal to allow a non-Member State national spouse of a Community citizen entry at the frontier without a passport or visa, that frontier being Belgium's external frontier.

### A — *Submissions of the parties*

34. MRAX submits that the refusal to allow an alien entry at the border infringes Article 3 of Directive 68/360, Article 3 of Directive 73/148, Regulation No 2317/95 and Article 8(2) of the ECHR.

According to MRAX, examination of the visa requirements should be carried out in Belgium and not in the country of origin of the non-Member State national.

35. The Belgian Government maintains that it is for the Member States to examine whether the persons who wish to enter their territory, or who have already entered it and assert a right of residence, may rely on Community law. It is necessary to prove identity and family relationships.

Many aspects concerning the person who is a non-Member State national can be clarified only by the Belgian representation in the person's country of origin. Issue of a visa in the third-country is therefore preferable to issue in Belgium itself.

Moreover, the requirement for a visa represents a means in particular of examining whether the person who claims to be entering the territory of a Member State as the spouse of a Member State national actually satisfies the necessary conditions. Accordingly, the Member State can, on the basis of Directive 64/221, refuse certain rights to Member State nationals and members of their families.

36. The Austrian Government agrees with the submissions of the Belgian Government, in so far as different treatment resulting from the visa obligation is not based on non-objective considerations and does not therefore constitute discrimination. The same holds for the different treatment of persons who have complied with their obligation to obtain a visa, on the one hand, and persons who have not complied with this obligation, on the other.

In the light of the free movement of persons and the principle of proportionality, a Member State may provide for exceptions from the general principle that a visa is required in specific cases in which the person concerned can plead exceptional circumstances, as Article 4 of Regulation No 574/99 also provides.

37. In the Commission's view, if it is possible to refuse entry to a Member State national if he cannot prove his nationality, the same must hold for non-Member State nationals who are unable to establish their right on the basis of a family link to a Member State national.

If, however, a non-Member State national can prove rights derived from Community law, the lack of a visa cannot affect those rights and cannot justify a refusal of entry at the frontier, which is the very negation of those rights. Refusal of entry is therefore a disproportionate measure.

For a person who has a family link to a migrant worker, the visa has a merely formal character and must be issued virtually automatically by the Member State in which entry is sought. In no way does the visa serve to determine the position under Community law of the person concerned. The right of entry is derived under Community law solely through the family link.

The assistance of consulates in the non-Member State nationals' countries of origin is merely an organisational measure and cannot restrict rights derived under Community law.

B — *Assessment*

38. As Community law currently stands, the status of spouses who are non-Member State nationals is determined by the legal status of the Community national. Those non-Member State nationals therefore have

only rights derived through their spouse, for example rights of entry and residence.

39. The status conferred by Community law on non-Member State nationals is not, however, the result of primary law but only of secondary law.

40. Pursuant to Article 1 of Directive 68/360 and Article 1 of Directive 73/148, non-Member State nationals who are married to Community nationals fall within the scope *ratione personae* of both directives. They are thus privileged non-Member State nationals.

1. Entry conditions — Power of the Member States to demand a visa

41. The national court's first question concerns the power of the Member States to deny entry at the frontier to non-Member State nationals who are married to Community nationals and who have no passport or visa.

42. For members of the family, in particular spouses of Community nationals, the essentially similar provisions (at least in the German version) of Article 3(1) of Directive 68/360 and Directive 73/148 apply. They provide that the Member States are to grant the right to enter their territory 'merely' [15] on production of a valid identity card or passport.

43. However, Article 3(2) of Directive 68/360 and of Directive 73/148 — which are identical in the language of procedure and almost the same in the German version [16] create an exception to this basic obligation of the Member States and the corresponding right of entry. Those parallel provisions allow a Member State to demand a visa from members of the family who are non-Member State nationals.

44. Article 3 of Directive 68/360 and of Directive 73/148 therefore maintain the visa obligation for such members of the family. [17] Therein lies a further material difference from nationals of the Member States. In return, Article 3(2) of both direc-

15 — In the German version; this word is missing in some language versions of Directive 68/360. That is, however, of no legal significance.

16 — Irrelevant to the English version of this Opinion.

17 — Carlier, 'La circulation des personnes dans l'Union européenne', *Journal des tribunaux. Droit européen*, 1995, 97 (104); Hailbronner, *Neuere Entwicklungen im europäischen Ausländerrecht*, 1997, 18; Maresceau, 'La libre circulation des personnes et les ressortissants d'Etats tiers', in: Demaret (Hrsg.), *Relations exterieurs de la Communauté européenne et marché intérieur: aspects juridiques et fonctionels*, 1986, 106 (111 f.).

tives requires the Member States to accord the members of the family 'every facility' for obtaining any necessary visas.

45. Regulation No 2317/95, replaced by Regulation No 574/1999, contains a list of third-countries, whose nationals must be in possession of a visa when crossing the Community's external frontier. As these regulations do not adopt any special rules for spouses of Community nationals, it must be assumed that this visa obligation also applies to this group of persons.

46. Article 4 of each regulation also militates in favour of a visa obligation for non-Member State nationals who are members of the family. They exempt particular categories of persons from the visa obligation. As the category of family members who are non-Member State nationals is not one of them, it must be concluded *a contrario* that such members of the family are not exempt from the visa obligation.

47. Likewise, it would be contrary to Article 3(2) of Directive 68/360 and of Directive 73/148 to infer from them a general obligation on the Member States to issue a visa to members of the family. Both provisions restrict the Member States' obligation to according 'every facility'.

48. On the other hand, it can be inferred from the fact that 'every facility' is to be accorded that in any event the procedure for issuing a visa is to be facilitated. It might be assumed that there is an obligation to accelerate the procedure in comparison with procedures concerning non-privileged non-Member State nationals, in particular in order to reduce the period for processing the application.

49. In any event, it must be concluded that the Member States have not only a power but in certain cases also an obligation to require a visa from members of the family if they are not nationals of a Member State.

50. It is now necessary to examine the powers retained by the Member States when a non-Member State national does not have a passport or visa. The national court's question is confined to the Member States' power to refuse entry at the frontier. It is therefore unnecessary to examine, as the Commission does, the Member States' rights to impose penalties.

2. Power of the Member States to refuse entry at the frontier

51. First it should be emphasised once again that, although the power and — in some cases — the obligation of the Member States to demand a visa of non-Member State nationals, including spouses of Community citizens, is expressly regulated in Community law, the question of refusal of entry at the frontier is not.

52. Refusal of entry is one of several possible measures which the Member State may take in that connection. It must, however, be made clear that a power or an obligation to refuse entry does not follow automatically from the visa obligation for non-Member State nationals.

53. As an obligation to issue a visa at the frontier cannot be inferred from the obligation laid down in Article 3(2) of Directive 68/360 and of Directive 73/148 to 'afford every facility', a prohibition on refusing entry at the frontier cannot — at least at first sight — be inferred from it.

54. Instead, it is possible to infer from the entry conditions laid down in Article 3 of Directive 68/360 and of Directive 73/148 that the Member States have a power to refuse entry at the frontier. If a non-Member State national does not fulfil a condition, such as presentation of a valid passport or a valid visa, the Member States' obligation to grant him entry does not apply. Contrary to the Commission's view, it is not necessary to distinguish between whether the non-Member State national has no valid passport or — merely — no visa. Regulation No 2317/95, which was replaced by Regulation No 574/1999, shows that the visa requirement is not a lesser obligation. Article 5 of both regulations defines visa expressly as 'a decision... which is required for entry'. Community law therefore proceeds from the premise that the visa is a requirement, and even a necessary condition, for entry.

55. It is therefore necessary to consider the principle of non-discrimination referred to in the national court's question. It will then be necessary to examine the significance attached to the rights to respect for family life in a situation such as that in the main proceedings.

56. The principle of proportionality, to which the question expressly refers, will not be examined separately but in conjunction with the right to respect for family life. One of the conditions for the legality of

interference with this fundamental right is the proportionality of the measure adopted by the State concerned.

(a) Principle of non-discrimination

57. As regards the principle of non-discrimination, the present case essentially concerns the question whether non-Member State nationals who have a passport or a visa can be treated differently with regard to entry than non-Member State nationals who do not fulfil that condition.

58. It must first of all be pointed out that a mere difference in treatment does not infringe the prohibition of discrimination. Different treatment of two groups of persons is permissible if objectively justified.

59. Although legal writers disagree as to whether non-Member State nationals can also rely on the prohibition of discrimination, the special nature of the present proceedings lies in the fact that they concern non-Member State nationals who are spouses of Community nationals, thus non-Member State nationals who — at least in some respects — are covered by Community law. To that extent the prohibition of discrimination is also applicable to them. However, even if one can thus proceed on the basis that non-Member State nationals, who are subject to derived Community law, fall within the scope of the Treaty and thus may rely on the prohibition of discrimination in Article 12 EC, it must be made clear that the present case does not concern equal treatment of non-Member State nationals and Belgian or Community nationals under that provision of the Treaty, but the treatment of two different groups of non-Member State nationals. It is therefore rather the general principle of equality, as part of general legal principles, which is the legal basis for the prohibition of discrimination. [18]

60. A distinction made by a Member State between non-Member State nationals without visas and non-Member State nationals with visas is based on a distinction that is not in itself discriminatory. In connection with rules relating to aliens, in particular those relating to entry, such a criterion is objective. Equal treatment of both groups of persons does not therefore appear to be required *eo ipso*.

18 — Joined Cases 117/76 and 16/77 *Ruckdeschel* [1997] ECR 1753, paragraph 7, and Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraph 18.

(b) Right to respect for family life and the principle of proportionality

61. The right to respect for family life, to which the national court refers, is a fundamental right. The Court of Justice must ensure observance of fundamental rights. [19] 'For that purpose, the court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect.' [20] 'Those principles have, moreover, been restated in Article 6(2) of the Treaty on European Union.' [21]

62. In the present case, the ECHR therefore plays a role in so far as it is a yardstick against which the relevant provisions of secondary law are to be measured. [22]

63. The national court's first question concerns the case of refusal to allow entry at the frontier. Such a refusal impinges on the right to respect for family life in various ways. First, it raises the issue of the negative obligation on the contracting parties or Member States derived from Article 8 ECHR, namely not to interfere with the spouses' right to live together. [23] Second, it touches on the State's positive obligation [24] to allow specified members of the family access to their territory. [25]

64. This therefore concerns the core of the right to respect for family life protected by Article 8 ECHR, [26] namely the protection of marital relationships. [27]

65. It must therefore be presumed that to refuse entry to a spouse at the frontier interferes with the right to respect for family life.

66. Such interference is permissible only if it satisfies the requirements of Article 8(2) ECHR. According to Article 8(2) it is

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

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

21 — Case C-274/99 P (previous footnote), paragraph 38.

22 — On interpretation of a regulation in the light of Article 8 ECHR, see Case 249/86 *Commission* v *Germany* [1989] ECR 1263, paragraph 10; see also Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, concerning the interpretation of a directive in the light of human rights and fundamental freedoms.

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

24 — Judgment of the ECHR in *Marckx* v *Belgium*, Series A, No 31, § 31.

25 — De Schutter, (cited in footnote 23), 546.

26 — Which corresponds to Article 7 of the Charter of Fundamental Rights of the European Union adopted in Nice on 7 December 2000 (OJ 2000 C 364, p. 1).

27 — Judgment of the ECHR *Abdulaziz, Cabales and Balkandali* v *United Kingdom*, Series A, No 94, § 62.

permissible if it is 'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'.

67. The Member States enjoy a certain amount of discretion in that regard. [28]

68. Restrictions on the right to respect for family life must, however, be narrowly construed. The present case concerns the criterion of the necessity of the interference, primarily the proportionality of the interference. That requires private and public interests to be weighed. All relevant circumstances of the particular case must be taken into account.

69. While it is for the Court of Justice to give to the national court the information on interpretation which is necessary to decide the dispute, it is for the national court to appraise the facts of the case in the light of the criteria adopted by the Court of Justice. That applies especially in view of the nature of the analysis to be carried out. [29] Application of the rules of Community law, like the rules for their implementation in a specific case, remains the task of the national court.

70. It must be remembered that the subject-matter of the main proceedings is not a specific set of circumstances but the review of a general, abstract national rule. For that reason, examination by reference to the ECHR must be confined to matters of principle.

71. The Member States must organise their legal systems in such a way that it is possible to take into account circumstances which are relevant to an examination of the proportionality of interfering with the right to respect for family life, such as family and other personal circumstances or whether it is reasonable for the third-country spouse living in the Member State to leave that State. [30] In order to take account of the collective aspects of the right to respect for family life, it is therefore necessary to have regard to the interests of the other members of the family as well as to the interests of the person directly concerned.

28 — Judgment of the ECHR *Ahmut* v *Netherlands* of 28 November 1996, Reports 1996-VI, 2031, § 63.

29 — Case C-446/98 *Fazenda Pública* [2000] ECR I-11435, paragraph 23.

30 — See judgment of the ECHR *Abdulaziz, Cabales and Balkandali* v *United Kingdom*, Series A, No 94.

72. The answer to the national court's first question is therefore that Article 3 of Directive 68/360, Article 3 of Directive 73/148 and Regulation No 2317/95 are to be interpreted as meaning that the Member States may refuse entry at the frontier to non-Member State national spouses of Community nationals who are required to have a visa on entry but who attempt to enter the territory of a Member State without being in possession of a passport or visa only if that is compatible with the right to respect for family life, in particular with the principle of proportionality.

## VI — The second question (unlawful entry)

73. The national court's second question concerns refusal of a residence permit and expulsion from the territory in the event of the unlawful entry of the non-Member State national spouse of a Community citizen.

### A — *Arguments of the parties*

74. MRAX states that, under Belgian law, a non-Member State national who has married a Belgian national during his illegal residence in Belgium must return to his country of origin in order to acquire a visa for his residence permit.

The Belgian Government treats non-Member State nationals who have acquired a visa in their country of origin and apply for a residence permit differently from non-Member State nationals who apply for a residence permit without being in possession of a visa. MRAX questions whether this different treatment of the two groups is justified, because both groups are in fact not so different: in one case there are non-Member State nationals who have applied for a visa, who are in their country of origin and request entry into Belgium, while in the other case there are non-Member State nationals who are illegally resident in Belgium, and therefore already in Belgian territory, who have married there and are already enjoying a family life with their partner.

75. The Belgian Government contends that Article 4 of Directive 68/360 and Article 6 of Directive 73/148 should be interpreted as meaning that they allow a Member State to refuse to grant a residence permit to a non-Member State national spouse of a Community citizen and to order him to leave their territory, if he has unlawfully entered that territory. Any other interpretation would deprive Article 3 of Directive 68/360 and Article 3 of Directive 73/148 of any meaning and effectiveness.

Finally, the Belgian Government submits that in view of the interests at stake, namely public order, on the one hand, and respect for private family life, on the other, removal from the national territory cannot be regarded as disproportionate.

76. The Austrian Government observes that both primary and secondary law provide for the termination of the right of even a national of a Member State to reside in another Member State, if the conditions for further residence are not, or are no longer, fulfilled. It can be inferred from the relevant provisions of Article 10 of Directive 68/360 and of Article 8 of Directive 73/148 that expulsion of a non-Member State national who is a member of a family is *a fortiori* permissible.

77. The Commission submits that under Directive 64/221 a residence permit can be refused only on grounds of public order and security and that such a measure must be based exclusively on the personal conduct of the person concerned. Unlawful entry into the territory of a Member State cannot be regarded systematically as a threat to public order and call in question the right of residence. The Member States should in any event impose proportionate penalties. Removal from the national territory and imprisonment seems in any event to be disproportionate.

B — *Assessment*

78. It must first be observed that a distinction must be drawn between the right of residence and the residence permit. While the right of residence follows as a matter of law from Article 4 of Directive 68/360 or Article 4 of Directive 73/148, the issue of a residence permit is not a measure by a Member State 'giving rise to rights'. [31] That means that it cannot be constitutive of the right of residence.

1. Refusal of a residence permit

79. It must first be emphasised that the national court's second question relates to the case where the non-Member State national has entered the territory unlawfully.

80. Article 4 of Directive 68/360 and Article 6 of Directive 73/148 provide that for the issue of the residence permit, only the production of the documents listed in that provision can be demanded, for example, the passport with which the person concerned entered the territory. It can be inferred from this that the Member States are obliged to issue a residence permit where those conditions are satisfied.

31 — Case 48/75 *Royer* [1976] ECR 497, paragraph 33.

81. Neither Article 4 of Directive 68/360 or Article 4 and 6 of Directive 73/148, nor Article 3 of either directive, refer to whether or not the entry was lawful or unlawful. It must be concluded from this that the Community legislature clearly did not wish to make the issue of the residence permit dependent on that circumstance.

82. Refusal of a residence permit must be classified as a public order measure. According to Article 3(1) of Directive 64/221, measures taken on such grounds are to be based 'exclusively on the personal conduct of the individual concerned'. A general, abstract national rule, such as that in the Circular at issue in the proceedings, which does not impose an obligation to examine the individual case, i.e. that such factors be taken into account, for example in that it requires a residence permit to be refused generally in the event of unlawful entry, is therefore impermissible.

2. Expulsion from the territory

83. Article 3(3) of Directive 64/221 expressly prohibits expulsion from the territory only where the identity card or passport used to enter the country has expired.

84. However, the national court's second question concerns the case where there has been unlawful entry into the country. This case is not expressly covered by Article 3(3). One could conclude from this, *a contrario*, that in such cases the Member States are entitled to expel the person from their territory.

85. Nevertheless, the other provisions of Article 3 of Directive 64/221 militate against such *a contrario* reasoning. Article 3(3) should probably be understood as a *lex specialis* in comparison with the general prohibition in Article 3(1). In the absence of a special rule, penalties for unlawful entry fall under the general rule in Article 3(1) of Directive 64/221.

86. Expulsion from the territory represents a measure taken on grounds of public policy within the meaning of Article 3(1). However, Article 3(1) provides that such measures are to be based exclusively on the personal conduct of the person concerned. That means that a general, abstract national rule, such as that in the Circular,

is therefore impermissible where it does not ensure an examination of the individual case, i.e. the taking into account of such factors, for example by laying down generally the penalty of expulsion from the territory in the event of unlawful entry.

87. According to the judgment of the Court of Justice in *Royer* expulsion of a Community citizen from a Member State's territory is not permitted 'if it [is] based solely on that person's failure to comply with the legal formalities concerning the control of aliens or on the lack of a residence permit'. [32]

88. In *Pieck* [33] the Court of Justice held that a recommendation for deportation was impermissible where a Community citizen had failed to obtain the special residence permit prescribed by Article 4 of Directive 68/360.

89. The judgments in *Royer* and *Pieck* seem in principle to be transposable to privileged non-Member State nationals, such as spouses of Community citizens, with regard to the matters at issue here.

90. However, it is settled case-law that other penalties, such as fines or imprisonment, are basically permissible in the case of unlawful acts, including infringements of the entry rules. That is, however, subject to the condition that the penalty be 'proportionate' [34] or, in other words, an 'appropriate punishment for infringement'. [35]

(a) Principle of non-discrimination

91. With regard to the principle of non-discrimination as a general principle of law, it should be pointed out — as I have in answering the first question — that drawing a distinction with regard to the issue of a residence permit, between whether or not the applicant has a valid visa, should not be classified from the outset as lacking objectivity. The identical treatment of those two categories is therefore not required *eo ipso*.

32 — Judgment in Case 48/75 (cited in footnote 31), paragraphs 38 to 40.

33 — Case 157/79 *Pieck* [1980] ECR 2171, paragraph 20.

34 — Case 118/75 *Watson and Belmann* [1976] ECR 1185, paragraphs 21 and 22.

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

(b) Right to respect for family life and the principle of proportionality

92. It is necessary to emphasise, in connection with the answer to the second question too, that the national proceedings are general in character and that the task of the Court of Justice is to give the national court merely indications as to the interpretation of Community law that are necessary for it to decide the dispute. Consequently, it is necessary to restrict oneself to matters of principle, in particular with regard to interpretation in the light of the ECHR. Application of the Community rules, and of the national rules implementing them in a particular case, remains the task of the national court.

93. In the present case, as I have already indicated, it is necessary to proceed from the premise that a refusal to grant a residence permit for the spouse of a Community citizen and his expulsion from the territory interferes with the right to respect for family life.

94. Such interference is permissible only upon the conditions already set out above and which are to be construed narrowly, the Member States enjoying a degree of discretion in that regard.

95. When balancing private and public interests in the course of assessing proportionality, all relevant circumstances of the particular case must be taken into account.

96. In the present case, it is necessary to give particular weight also to the fact that the non-Member State national concerned has infringed the rules relating to aliens.

97. The answer to the second question is therefore that Article 4 of Directive 68/360 and Article 6 of Directive 73/148 in conjunction with Article 3 of those directives and Article 3 of Directive 64/221 are to be interpreted as meaning that the Member States may refuse to issue a residence permit to the spouse of a Community citizen who has entered their territory unlawfully and adopt a measure expelling him from the territory only if that is compatible with the right to respect for family life, and in particular with the principle of proportionality.

## VII — The third question (lawful entry, expiry of the visa)

98. The national court's third question concerns the refusal of the right of resi-

dence and expulsion of a non-Member State national spouse of a Community citizen who has lawfully entered the territory and whose visa has expired when he applies for a residence permit.

A — *Arguments of the parties*

99. MRAX submits that the expiry of the visa cannot justify expulsion from the territory of the Member State, as is provided for in Article 4 of the Circular. Article 4 of Directive 68/360 does not require that the documents under which entry was permitted must still be valid.

100. According to the Belgian Government, the answer to this question is clear from the wording of Article 3(3) of Directive 64/221. According to it, the document on the basis of which entry was permitted can, for the spouse of a Member State national, be none other than the passport with valid visa which is to be submitted when the residence permit is applied for. The expiry of that document after the issue of the residence permit on the basis of the production of the passport with valid visa cannot justify expulsion from the territory.

101. The Austrian Government submits that the expiry of the visa in the territory concerned after lawful entry of a non-Member State national spouse of a Member State national is not a case to which Article 3(3) of Directive 64/221 applies. Consequently, the question of justification for expulsion from the territory does not arise either. The expiry of the visa justifies refusal of a residence permit.

102. According to the Commission, the answer to this question is based on the same premises as in the case of unlawful entry. Because of the family connection with a Member State national, Directives 68/380 and 73/148 and the judgment in *Royer*, are to be applied.[36] The Commission infers from this that the expiry of a visa after entry does not in principle justify refusal of a residence permit. The absence of this formal requirement does not alter the validity of the passport for the purposes of issuing a residence permit. That is, moreover, confirmed by Article 3(3) of Directive 64/221. In the Commission's view, the Community legislature is thereby emphasising the substance of that formality and not merely its form. That is not affected by the fact that this provision governs only the expiry of an identity card or passport, not that of a visa.

36 — Judgment in Case 48/75 (cited in footnote 31).

B — *Assessment*

1. Refusal to issue a residence permit

103. Although Article 3(3) of Directive 64/221 governs the case where the *identity card or passport* expires, it relates to a case which is different in two respects from the case underlying the third question. First, that question concerns the case where a *visa* expires and not the document which made entry into the territory possible. Second, Article 3(3) governs the case where the documents expire *after issue* of the residence permit, whereas the third question concerns the case where the visa has already expired *before application is made* for the residence permit.

104. Article 3(3) of Directive 64/221 can therefore govern only expulsion from the territory, not also the issue of the residence permit.

105. The answer to the question whether the Member States may demand the production of a valid visa for the issue of a residence permit is to be found instead in the Community rules in which the conditions for the issue of a residence permit are expressly set out.

106. The formal conditions for the issue of a residence permit are laid down in Article 4(3) of Directive 68/360 and Article 6 of Directive 73/148.

107. Pursuant to those provisions, the Member States may demand from the applicant only the production of the document with which he entered their territory, a confirmation proving the family relationship and — under Directive 68/360 for particular members of the family — a document testifying that they are dependent on the worker or live under his roof.

108. Those provisions do not refer to a visa, nor therefore to the continuing validity of a visa.

109. A comparison between the provisions of Article 3 of Directive 68/360 and Article 3 of Directive 73/148, concerning the conditions for entry, shows that a valid visa cannot be a condition. Directive 73/148 expressly refers to the requirement for a visa.

110. Moreover, in view of the information already contained in the documents production of which may be required for the issue of a residence permit, a visa does not seem to be indispensable. The documents listed in Article 4(3) of Directive 68/360 and Article 6 of Directive 73/148 suffice to enable the Member States to establish in particular the identity and nationality of the person concerned.

111. In addition, the passport with which the non-Member State national entered the territory also contains the visa, even if it has in the meantime expired.

112. Where there has been a lawful entry into the territory, a residence permit may not therefore be refused solely on the ground that the visa has expired.

2. Expulsion from the territory

113. Article 3(3) of Directive 64/221 expressly prohibits expulsion from the territory only where the identity card or passport used to enter the country and to obtain a residence permit, has expired.

114. However, the fourth question concerns the expiry of the visa before an application is made. As this too is a penalty for infringement of a rule relating to aliens and a case not expressly dealt with in Article 3(3) of Directive 64/221, the approach to answering the third question must, as regards expulsion from the territory, be the same as in the context of the second question.

115. Failing special rules, the case of such an expired visa also falls under the general provisions of Article 3(1) of Directive 64/221. I refer in that regard to my remarks in connection with the second question.

116. According to the judgment of the Court of Justice in *Royer*, which can in principle be transposed to non-Member State nationals as regards the points at issue here, the Member States may not punish a failure to observe 'national provisions concerning the control of aliens' [37] with expulsion from the territory.

117. Breaches of national provisions concerning the control of aliens can however, be subject to 'appropriate sanctions necess-

37 — Judgment in Case 48/75 (cited in footnote 31), paragraphs 41 and 42.

ary in order to ensure the efficacity of those provisions'.[38] However, only 'appropriate punishment for infringement' may be imposed.[39]

118. That means that residence in the territory after the expiry of the visa may only be punished by an appropriate penalty, but not expulsion from the territory.

119. The answer to the third question is therefore that Article 3 and Article 4(3) of Directive 68/360, Articles 3 and 6 of Directive 73/148 and Article 3(3) of Directive 64/221 are to be interpreted as meaning that Member States may neither refuse a residence permit nor expel a non-Member State national spouse of a Community citizen who has lawfully entered the territory but whose visa has expired at the time when application is made for that permit.

## VIII — The fourth question (legal remedies)

120. The fourth question concerns the legal remedies of a non-Member State national spouse of a Community citizen.

### A — *Arguments of the parties*

121. MRAX submits that the current Belgian administrative practice does not comply with the Community directives or Article 44 of the Law of 15 December 1980. Non-Member State national spouses of Community nationals cannot apply for review under Articles 44 and 66 of that law. They can only make an application to the Conseil d'Etat for suspension or annulment of the relevant decision. The Conseil d'Etat may review only the decision's legality, but not its expediency in the light of the facts of the specific case. However, in all cases in which there is a threat to a right derived from Community law, an adequate means of redress must be available.

As regards the appeal provided for in Article 9 of Directive 64/221, MRAX refers to the judgment in the Joined Cases *Shingara and Radiom*.[40]

122. According to the Belgian Government, Articles 8 and 9 of Directive 64/221

38 — Case 48/75 (cited in footnote 31), paragraph 42.
39 — Case 8/77 (cited in footnote 35), paragraph 6.
40 — Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343.

are not applicable to persons who have entered unlawfully.

123. The Austrian Government submits, referring to the judgments of the Court of Justice in *Royer* and *Santillo*,[41] that a decision concerning expulsion from the territory cannot — except in the case of substantial urgency — be implemented against a person protected by Community law until he has been able to exhaust the remedies guaranteed to him in Articles 8 and 9 of Directive 64/221.

If the spouse of a Member State national does not fulfil the conditions for entry, Articles 8 and 9 of Directive 64/221 are not applicable.

This position is different, however, if the identity card or passport which allowed entry, and the issue of a residence permit, expires. That case does not justify expulsion from the territory and the person concerned enjoys the guaranteed appeal procedures, because the Directive applies to him without restriction.

41 — Case 131/79 *Santillo* [1980] ECR 1585.

124. The Commission takes the view that Article 1(2) of Directive 64/221 also applies to non-Member State nationals who are members of the family of a national of a Member State. If the family connection exists, such persons also enjoy the remedies provided for in Article 9(2) of Directive 64/221 even if their visa has expired.

On the other hand, if there is no identity card or passport, it refers to the answer which it believes should be given to the first question. It is necessary that the status of a person as a non-Member State national spouse of a Community national be capable of being established so that the spouse can enjoy the rights guaranteed by Community law.

B — *Assessment*

125. As is clear from the provisions of Article 9(2) of Directive 64/221 to be interpreted here, the fourth question concerns the review of 'decisions refusing the first residence permit' and 'decisions concerning expulsion from the territory' by a body other than the administrative authority. More specifically, it concerns the

question of the right of action, i.e. who has the right to apply for such a review.

126. The question distinguishes between four situations in which the applicant may find himself: no passport, no visa, expiry of passport, expiry of visa. Moreover, the question refers, with regard to the object of the review, to two different sets of circumstances: application for the first residence permit and expulsion from the territory before its issue. Consequently, the question contains eight different groups of cases.

127. It should first be pointed out that Article 9(2) of Directive 64/221 applies expressly both to 'decisions refusing the issue of a first residence permit' and also to 'decisions ordering expulsion of the person concerned before the issue of the permit'. As regards the scope of application *ratione materiae*, for which Directive 64/221 lays down an obligation to provide for a review, the fourth question does not therefore pose any difficulties of interpretation.

128. On the other hand, Article 9(2) of the directive does not define the persons entitled to apply for review, but refers merely to 'the persons concerned'.

129. As there is therefore no specific definition of the scope *ratione personae* with regard to the right to apply for review laid down in Article 9(2) of the directive, it is necessary to refer to the general provisions concerning that scope.

130. According to Article 1(2) of Directive 64/221, the provisions of the directive apply also to the spouse and the members of the family who fulfil the conditions in the regulations and directives adopted in this field in pursuance of the Treaty. The conditions under which the relevant family members in the present case fall within the scope of Directive 64/221 derive from primary law and the provisions of secondary law other than Directive 64/221 itself.

131. It would however be wrong to infer, as the Belgian Government does, from the words 'fulfil the conditions' that only persons who fulfil all conditions for entry and residence have a right of application. It would be just as incorrect to reduce the fourth question to the case of unlawful entry and, consequently, to deny non-Member State nationals who had already unlawfully entered the territory a right to apply for review.

132. The wording itself indicates that there should be a broad interpretation of the

scope *ratione personae* of the right to apply for review. Article 9(2) refers to the 'persons concerned', without laying down any further conditions. The case-law of the Court of Justice also takes account of that in holding that Article 9(2) provides that 'persons against whom decisions have been adopted... may request that such decisions be considered... '.[42]

133. The following two hypothetical cases demonstrate that the right to apply for relief cannot depend, in all the sets of circumstances raised by the national court's question, on fulfilment of the conditions for entry and issue of the residence permit:

134. The first set of circumstances concerns the issue of the first residence permit. If a residence permit is refused to a non-Member State national because the authority erroneously assumes that the family relationship has not been proved, the non-Member State national concerned could not bring proceedings for review of the question whether the evidence produced by him represents adequate proof, if his passport has expired after entry.

135. The second set of circumstances concerns expulsion from the territory. If, for example, the passport of a non-Member State national expires and the Member State orders expulsion from the territory, that might infringe the prohibition in Article 3(3) of Directive 64/221. If, in such a case, the person concerned were denied the right to review of the expulsion decision, that would mean that one of the most serious interferences with his rights would not be reviewed.

136. The untenability of the Belgian Government's contention that non-Member State nationals must fulfil all conditions for entry and residence even for a right to apply for review becomes even clearer, where there is to be a substantive examination of whether or not one of the conditions for the issue of the residence permit exists. There could be no such substantive review, since formal conditions have not been satisfied. If the right of application were denied in all of the cases referred to in the national court's question, that would at the same time exclude a substantive review.

137. However, Article 9(2) of Directive 64/221 is inconsistent with the exclusion of the right of application in all cases. It cannot be inferred from that provision that review of particular aspects of the decisions to which it refers may be excluded.

138. For the sake of completeness I observe, however, that, subject to the

42 — Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* v *Belgium* [1982] ECR 1665, paragraph 15.

considerations set out in regard to the other questions by the national court, the lack of passport or visa or the expiry of a passport or visa may indeed be taken into account or punished in a procedure concerning the issue of a first residence permit or expulsion from the territory.

139. The question of the *legal* significance to be attributed to the absence of a passport or visa or the expiry of a passport or visa should be the subject-matter of the review procedure. A decision on that issue should therefore be made only in the context of the merits of the application and not of its admissibility.

140. To exclude the right of application where there is no passport or visa or where the passport or visa has expired would undermine the minimum procedural safeguard laid down by that provision. [43]

141. The general principles of Community law, including those of the ECHR, also militate in favour of an interpretation of the conditions for the right of application which is not too strict.

142. As Directive 64/221 grants rights to non-Member State nationals, this also applies to the requirement for judicial review of all corresponding decisions by a national authority, as guaranteed by Articles 6 and 13 of the ECHR. [44]

143. The principle of judicial review [45] entails that 'the rights thus conferred can be effectively relied upon'. [46]

144. Finally, a broad interpretation of the scope *ratione personae* of the right to apply for relief is indicated by the principle, which has become settled law of the Court of Justice, that the procedures intended to safeguard the rights granted by Community law may not render their exercise practically impossible or excessively difficult. [47] That would, however, be the case if the procedural right to apply for review was made dependent on the fulfilment of overstrict conditions.

43 — Judgment in Joined Cases 115/81 and 116/81 (cited in footnote 42), paragraph 15, and Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraph 62.

44 — See Case C-226/99 *Siples* [2001] ECR I-277, paragraph 17 and the cases cited there.

45 — Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18.

46 — Case C-185/97 *Coote* [1998] ECR I-5199, paragraph 20, and Case C-271/91 *Marshall* [1993] ECR I-4367, paragraph 22.

47 — See Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 85, and the cases cited there, and Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5, and Case 45/76 *Comet* [1976] ECR 2043, paragraphs 12 to 16.

145. The answer to the fourth question is therefore that Article 1 and Article 9(2) of Directive 64/221 are to be interpreted as meaning that non-Member State national spouses of Community citizens who have no passport or visa or whose passport or visa has expired may apply to the competent authority within the meaning of Article 9(1) where they apply for a first residence permit or are expelled before its issue, if they prove that they come within the scope of the persons referred to in Directive 64/221. The Member States must proceed in such a way that assertion of the rights granted by Community law is not rendered practically impossible or excessively difficult.

## IX — Conclusion

146. I therefore propose that the Court of Justice should answer the questions as follows:

(1) The answer to the national court's first question is that Article 3 of Directive 68/360/EEC, Article 3 of Directive 73/148/EEC and Regulation EEC No 2317/95 are to be interpreted as meaning that the Member States may refuse entry at the frontier to non-Member State national spouses of

Community nationals who are required to have a visa on entry but who attempt to enter the territory of a Member State without being in possession of a passport or visa only if that is compatible with the right to respect for family life, in particular with the principle of proportionality.

(2) The answer to the second question is that Article 4 of Directive 68/360 and Article 6 of Directive 73/148 in conjunction with Article 3 of those directives and Article 3 of Directive 64/221/EEC are to be interpreted as meaning that the Member States may refuse to issue a residence permit to the spouse of a Community citizen who has entered their territory unlawfully and adopt a measure expelling him from the territory only if that is compatible with the right to respect for family life, and in particular with the principle of proportionality.

(3) The answer to the third question is that Article 3 and Article 4(3) of Directive 68/360, Articles 3 and 6 of Directive 73/148 and Article 3(3) of Directive 64/221 are to be interpreted as meaning that Member States may neither refuse a residence permit nor expel a non-Member State national spouse of a Community citizen who has lawfully entered the territory but whose visa has expired at the time when application is made for that permit.

(4) The answer to the fourth question is that Article 1 and Article 9(2) of Directive 64/221 are to be interpreted as meaning that non-Member State national spouses of Community citizens who have no passport or visa or whose passport or visa has expired may apply to the competent authority within the meaning of Article 9(1) where they apply for a first residence permit or are expelled before its issue, if they prove that they come within the scope of the persons referred to in Directive 64/221. The Member States must proceed in such a way that assertion of the rights granted by Community law is not rendered practically impossible or excessively difficult.