JUDGMENT OF THE COURT
17 June 1997 *

In Joined Cases C-65/95 and C-111/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the High Court of Justice, Queen's Bench Division (United Kingdom), for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for the Home Department,

ex parte **Mann Singh Shingara** (C-65/95),

and between

The Queen

and

Secretary of State for the Home Department,

ex parte **Abbas Radiom** (C-111/95),

* Language of the case: English.

on the interpretation of Articles 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. L. Murray and L. Sevón (Rapporteur), (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mr Shingara, by Ian Macdonald QC and Raza Husain, Barrister, instructed by Michael Ellman, Solicitor,

— Mr Radiom, by Nicholas Blake QC and Duran Seddon, Barrister, instructed by Christopher Randall, Solicitor,

— the Government of the United Kingdom, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, assisted by Stephen Richards and Ian Burnett, Barristers,

— the French Government, by Catherine de Salins, Head of Subdirectorate in the Legal Directorate of the Ministry of Foreign Affairs, and Anne de Bourgoing, Head of Department in the same directorate, acting as Agents,

— the Commission of the European Communities, by Christopher Docksey and Pieter van Nuffel, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1996,

gives the following

Judgment

1 By orders of 3 February 1995, received at the Court on 13 March (C-65/95) and 3 April (C-111/95) 1995, the High Court of Justice, Queen's Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty five questions on the interpretation of Articles 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117, hereinafter 'the directive').

2 Before the national court the applicants in the main action, who have been refused entry into the United Kingdom, are seeking in particular a declaration that they are entitled to an appeal under Article 8 of the directive against the decisions adopted with regard to them by the Home Secretary for reasons of public policy, or to an examination of their situation by an independent authority in accordance with Article 9 of the directive.

3 Article 8 of the directive provides:

'the person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.'

4 Article 9 reads as follows:

'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 the 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.'

5 Appeals against exclusion from the United Kingdom are governed by Section 13 of the 1971 Immigration Act, the relevant provisions of which are as follows:

'(1) Subject to the provisions of this part of this Act, a person who is refused leave to enter the United Kingdom under this Act may appeal to an adjudicator against the decision that he requires leave or against the refusal.

(2) Subject to the provisions of this part of this Act, a person who, on an application duly made, is refused a certificate of entitlement or an entry clearance may appeal to an adjudicator against the refusal.

...

(5) A person shall not be entitled to appeal against a refusal of leave to enter, or against a refusal of an entry clearance, if the Secretary of State certifies that directions have been given by the Secretary of State (and not by a person acting under his authority) for the appellants not to be given entry to the United Kingdom on the ground that his exclusion is conducive to the public good, or if the leave to enter or entry clearance was refused in obedience to any such directions.'

6 Those administrative remedies must be distinguished, in the United Kingdom, from applications for judicial review, whereby the legality of decisions of public authorities is subject to review by the ordinary courts, that is to say, the High Court of Justice (in England, Wales and Northern Ireland) and the Court of Session (in Scotland).

7 Mr Shingara, who is of French nationality, attempted to visit the United Kingdom on 29 March 1991 but was refused entry. The notice refusing him entry indicated, first, that the Secretary of State had personally decided that it would be contrary to the interests of public policy and public security to allow Mr Shingara to enter the United Kingdom, and, secondly, that he was not entitled to appeal against the refusal of leave to enter. According to the order for reference, the Secretary of State indicated that the refusal was based on Mr Shingara's alleged links with Sikh extremists.

8 Some years later, on 15 July 1993, Mr Shingara arrived at the Port of Dover and was admitted to the United Kingdom after showing his French identity card. On 22 July 1993 he was arrested in Birmingham and detained as an illegal entrant. On 30 July 1993 he was granted leave to apply for judicial review of his detention and on the same day was released and returned to France.

9 Before the High Court, Mr Shingara challenges the decision of 22 July 1993 of the Secretary of State to treat him as an illegal entrant, to detain him, to remove him from the United Kingdom and to exclude him therefrom. He therefore seeks to have the decision quashed and a declaration that he is entitled to appeal against his exclusion or to have his case referred for consideration to an independent authority.

10 Mr Radiom, who has both Iranian and Irish nationality, resides in Ireland.

11 In May 1983 he was granted indefinite leave to remain in the United Kingdom. According to the letter from the Home Office the authorization was granted on the basis of his status as a non-Community alien.

12 On 9 March 1989 Mr Radiom, who had worked in the United Kingdom for the Iranian consular service since 1983, was informed by the Home Office that following the severance of diplomatic relations between the United Kingdom and the Islamic Republic of Iran he would be detained and deported if he did not leave the United Kingdom within seven days. He complied with that instruction.

13 On 2 July 1992 he sought clarification of his situation and in particular drew attention to the fact that he was a Community national. In its response of 24 September 1992 the Home Office stated that the decision was on grounds of the public good, adding that if he attempted to enter the United Kingdom he would be refused entry on grounds of public policy and that should it be found that he had entered the United Kingdom action would be taken to remove him. He was also informed that there was no right of appeal.

14 On 13 October 1992 Mr Radiom applied to the Home Office for a Community residence permit.

15 The application was refused by letter of 23 November 1992, in which it was stated that notwithstanding the fact that he was a Community national, he had no right of appeal.

16 According to the order for reference the Secretary of State stated that the decision was justified by Mr Radiom's links to the Iranian regime. The order also indicates that the Secretary of State personally considered, in the light of the application for judicial review, the withdrawal of the exclusion order, but concluded that it would not be in the interests of national security for the order to be withdrawn.

17 Mr Radiom made an application to the High Court for judicial review of the decision of 23 November 1992 rejecting his application for a residence permit.

18 Considering that both cases raised questions concerning the interpretation of the directive, the High Court decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. (1) In Article 8 of Council Directive 64/221/EEC of 25 February 1964, do the words "the same legal remedies ... as are available to nationals of the State concerned in respect of acts of the administration" refer (a) to specific remedies available in respect of decisions concerning entry by nationals of the State concerned (*in casu*, an appeal to an immigration adjudicator) or (b) do they refer only to remedies available in respect of acts of the administration generally (*in casu*, an application for judicial review)?

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

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

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

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

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

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

   (c) a decision ordering expulsion?

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

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

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

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

19 By order of the President of the Court of 8 May 1995 Cases C-65/95 and C-111/95 were joined for the purposes of the written procedure, the oral procedure and the judgment.

First and second questions

20 The first part of the first question asks in substance whether, on a proper construction of Article 8 of the directive, where under the national legislation of a Member State (i) remedies are available in respect of acts of the administration generally and (ii) different remedies are available in respect of decisions concerning entry by nationals of the State concerned, the obligation imposed on the Member State by that provision is satisfied if nationals of other Member States enjoy the same remedies as those available against acts of the administration generally in that Member State.

21 The applicants in the main proceedings rely in particular on the judgment of the Court of Justice in Case 98/79 *Pecastaing* v *Belgian State* [1980] ECR 691, according to which Article 8 of the directive covers all the remedies available in a Member State in respect of acts of the administration within the framework of the judicial system and the division of jurisdiction between judicial bodies in the State in question. They maintain that where nationals of a Member State have a specific right of appeal against any refusal of recognition of their right of entry, nationals of other Member States must have the same right of appeal in respect of a similar refusal, even if the reasons for the refusal differ. The fact that both their cases concern the right of entry into the national territory provides, they maintain, a sufficient degree of similarity to require that judicial remedies of appeal be available.

22 The Commission shares that opinion and states that Article 8 of the directive requires the authorities in the Member States to accord Community nationals the same remedies as those available to nationals of the Member State concerned in comparable circumstances.

23 By contrast, the Government of the United Kingdom argues that Article 8 refers to remedies in general and the guarantee of the availability of judicial review is sufficient to comply with its provisions. The directive does not call for comparisons between the circumstances of a national of a Member State refused entry into another Member State and the hypothetical and unlikely situation of a national of a Member State refused entry into his home State for reasons of national security.

24 The Court notes that Article 8 does not govern the ways in which remedies are to be made available, for instance by stipulating the courts from which such remedies may be sought, such details being dependent upon the organization of the courts in each Member State (see, to that effect, *Pecastaing*, paragraph 11).

25 However, the obligation to grant the person concerned the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory as are available to nationals in respect of acts of the administration, means that a Member State cannot, without being in breach of the obligation imposed by Article 8, organize, for persons covered by the directive, legal remedies governed by special procedures affording lesser safeguards than those pertaining to remedies available to nationals in respect of acts of the administration (*Pecastaing*, paragraph 10, and Joined Cases C-297/88 and C-197/89 *Dzodzi* v *Belgian State* [1990] ECR I-3763, paragraph 58).

26 By contrast, where national law provides no specific procedures for the remedies available to persons covered by the directive as regards entry, refusal to issue or renew a residence permit, or decisions of expulsion, the obligation imposed on Member States by Article 8 is fulfilled if nationals of other Member States enjoy the same remedies as those generally available against acts of the administration in that Member State (*Pecastaing*, paragraph 11).

27 As regards the main proceedings here, the national legislation provides for remedies in respect of acts of the administration generally and another kind of remedy in respect of decisions concerning entry of nationals of the Member State concerned. In addition, the order for reference states that the latter remedy is also available to non-nationals regarding entry, with the exception, however, of refusals of entry on grounds of the public good. In order to determine whether the remedies available to nationals of other Member States under Article 8 of the directive are to be assessed by reference to the second type of remedy, rather than that provided in respect of acts of the administration generally, it is necessary to see whether the circumstances in which nationals of the Member State concerned enjoy that remedy are sufficiently comparable to those mentioned in Article 8 of the directive.

28 As the Court of Justice held in Joined Cases 115/181 and 116/81 *Adoui and Cornuaille* v *Belgian State* [1982] ECR 1665, paragraph 7, the reservations contained in

Articles 48 and 56 of the EC Treaty permit Member States to adopt, with respect to the nationals of other Member States and on the grounds specified in those provisions, in particular grounds justified by the requirements of public policy, measures which they cannot apply to their own nationals, inasmuch as they have no authority to expel the latter from the national territory or to deny them access thereto.

29 It follows that the remedies available to nationals of other Member States in the circumstances defined by the directive — that is to say, where a decision concerning entry into the country, the issue or renewal of a residence permit or expulsion has been taken for reasons of public order or public security — cannot be assessed by reference to the remedies available to nationals concerning the right of entry.

30 The two situations are indeed in no way comparable: whereas in the case of nationals the right of entry is a consequence of the status of national, so that there can be no margin of discretion for the State as regards the exercise of that right, the special circumstances which may justify reliance on the concept of public policy as against nationals of other Member States may vary over time and from one country to another, and it is therefore necessary to allow the competent national authorities a margin of discretion (Case 41/71 *Van Duyn* v *Home Office* [1974] ECR 1337, paragraph 18).

31 Consequently, the reply to the first part of the first question is that on a proper construction of Article 8 of the directive, where under the national legislation of a Member State remedies are available in respect of acts of the administration generally and different remedies are available in respect of decisions concerning entry by nationals of that Member State, the obligation imposed on the Member State by that provision is satisfied if nationals of other Member States enjoy the same remedies as those available against acts of the administration generally in that Member State.

32 In the light of that reply it is not necessary to answer either the second part of the first question or the second question.

Third question

33 The third question asks whether, on a proper construction of Article 9 of the directive, the three hypotheses mentioned in Article 9(1) (namely 'where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect') apply equally as regards Article 9(2), that is to say, where the decision challenged is a refusal to issue a first residence permit or a decision ordering expulsion before the issue of such a permit.

34 As the Court has already held, the provisions of Article 9 of the directive complement those of Article 8. Their purpose is to provide minimum procedural guarantees for persons affected by one of the measures referred to in the three cases defined in Article 9(1). Where the right of appeal is restricted to the legality of the decision, the purpose of the intervention of the competent authority referred to in Article 9(1) is to enable an exhaustive examination of all the facts and circumstances, including the expediency of the proposed measure, to be carried out before the decision is finally taken (Case 131/79 *Regina* v *Secretary of State for Home Affairs*, ex parte *Santillo* [1980] ECR 1585, paragraph 12; *Adoui and Cornuaille*, paragraph 15, and Case C-175/94 *R* v *Secretary of State for the Home Department*, ex parte *Gallagher* [1995] ECR I-4253, paragraph 17).

35 If Article 9(2) of the directive were to be interpreted as meaning that the addressee of a decision refusing to issue a first residence permit or a decision ordering expulsion before the issue of such a permit was entitled to obtain an opinion from the competent authority mentioned in Article 9(1) in circumstances other than those defined in that paragraph, he would be entitled to do so even where the remedies

available entailed a review of the substance and an exhaustive examination of all the facts and circumstances. Such an interpretation would not be in accordance with the purpose of the provisions, since the procedure of referral for consideration and an opinion provided for in Article 9 is intended to mitigate the effect of deficiencies in the remedies referred to in Article 8 of the directive (*Pecastaing*, paragraph 20).

36 Furthermore, in the case of decisions of expulsion, that interpretation would discriminate unfairly against a person already lawfully resident in a Member State whose situation therefore falls under Article 9(1) of the directive, compared with that of a person who has been the subject of a decision ordering expulsion before the issue of a residence permit, a situation covered by Article 9(2). The latter would therefore always be able to obtain an opinion, whereas the former would only be able to do so in the cases mentioned in Article 9(1).

37 Accordingly, the reply to the third question is that, on a proper construction of Article 9 of the directive, the three cases mentioned in Article 9(1) (namely 'where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect') apply equally as regards Article 9(2), that is to say, where the decision challenged is a refusal to issue a first residence permit or a decision ordering expulsion before the issue of such a permit.

Fourth and fifth questions

38 The fourth and fifth questions ask in substance whether a national of a Member State who has been refused entry into another Member State for reasons of public order or public security has a right of appeal under Article 8 of the directive and,

where appropriate, the right to obtain the opinion of an independent competent authority under Article 9 of the directive in respect of measures adopted subsequently which prevent his entering that State, even if the first decision has not been the subject of an appeal or an opinion.

39 Under the principles set out by the Court in *Adoui and Cornuaille*, paragraph 12, a Community national expelled from a Member State may apply for a fresh residence permit, and if that application is made after a reasonable time it must be examined by the competent administrative authority in that State, which must take into account, in particular, the arguments put forward to establish that there has been a material change in the circumstances which justified the first decision ordering expulsion.

40 Decisions prohibiting entry into a Member State of a national of another Member State constitute derogations from the fundamental principle of freedom of movement. Consequently, such a decision cannot be of unlimited duration. A Community national against whom such a prohibition has been issued must therefore be entitled to apply to have his situation re-examined if he considers that the circumstances which justified prohibiting him from entering the country no longer exist.

41 Such an examination must be made in the light of the circumstances obtaining when the application is lodged. The fact that in respect of a previous decision a Community national failed to appeal or the independent competent authority did not give an opinion, whether under Article 8 or under Article 9 of the directive, cannot prevent examination of a fresh application made by such a person.

42 When a fresh application has been made for entry or a residence permit, after a reasonable time has elapsed since the preceding decision, the person concerned is entitled to a new decision, which may be the subject of an appeal on the basis of Article 8 and, where appropriate, Article 9 of the directive.

43 There is a right to obtain the opinion of an independent authority in all the cases envisaged by the referring court in the fifth question. Measures justified on grounds of public order or public security must be based exclusively, in accordance with Article 3(1) of the directive, on the personal conduct of the individual concerned. In the light of those considerations, it is not necessary to examine the situation described in the fifth question in more detail.

44 The reply to the fourth and fifth questions is therefore that a national of a Member State against whom an initial decision refusing entry into another Member State has been made on grounds of public order or public security has a right of appeal under Article 8 of the directive and, if appropriate, a right to obtain the opinion of an independent competent authority in accordance with Article 9 of the directive, with respect to a fresh decision taken by the administrative authorities on an application made by him after a reasonable time has elapsed since the last decision prohibiting him from entering the country.

Costs

45 The costs incurred by the Governments of the United Kingdom and France, and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the High Court of Justice, Queen's Bench Division, by orders of 3 February 1995, hereby rules:

1. **On a proper construction of Article 8 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, where under the national legislation of a Member State remedies are available in respect of acts of the administration generally and different remedies are available in respect of decisions concerning entry by nationals of that Member State, the obligation imposed on the Member State by that provision is satisfied if nationals of other Member States enjoy the same remedies as those available against acts of the administration generally in that Member State.**

2. **On a proper construction of Article 9 of Directive 64/221, the three cases mentioned in Article 9(1) (namely 'where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect') apply equally as regards Article 9(2), that is to say, where the decision challenged is a refusal to issue a first residence permit or a decision ordering expulsion adopted before the issue of such a permit.**

3. **A national of a Member State against whom an initial decision refusing entry into another Member State has been made on grounds of public order**

or public security has a right of appeal under Article 8 of the directive and, if appropriate, a right to obtain the opinion of an independent competent authority in accordance with Article 9 of the directive, with respect to a fresh decision taken by the administrative authorities on an application made by him after a reasonable time has elapsed since the last decision prohibiting him from entering the country.

Rodríguez Iglesias Mancini Murray

Sevón Kakouris Kapteyn

Gulmann Edward Puissochet

Hirsch Wathelet

Delivered in open court in Luxembourg on 17 June 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President