OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 5 July 2001 [1]

I — Introduction

1. In this case the Immigration Appeals Tribunal has referred certain questions to the Court for a preliminary ruling. It seeks to ascertain from the Court to what extent Community law requires Member States to observe rights of residence in favour of members of the family of nationals of the European Union who have installed themselves in a host Member State with a worker, but where circumstances have subsequently changed. More particularly, the referring tribunal seeks to ascertain whether persons admitted into the United Kingdom as members of the family of a migrant worker within the meaning of the EC Treaty continue to enjoy the protection of Community law after the status which conferred that right on them (their status as members of the worker's family) no longer subsists. In addition, the referring court seeks an interpretation of Article 18 EC.

2. Two separate cases are involved which were joined by the referring tribunal for the purposes of the preliminary reference proceedings, namely the case of the 'R' family and that of the Baumbast family. In the case of the 'R' [2] family there was a divorce following which the children continued to live with the mother. In the case of the Baumbast family the father left for a non-Member State for occupational reasons, though the marriage remained intact.

II — Legal framework

3. Two sections of the EC Treaty are of particular relevance to the right of residence at issue in this case. Part Two concerning citizenship of the Union includes Article 18 EC (ex Article 8A of the EC Treaty), which provides:

'1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

1 — Original language: Dutch.

2 — For the sake of the privacy of those concerned that family is indicated by the letter R.

2. The Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1; save as otherwise provided in this Treaty, the Council shall act in accordance with the procedure referred to in Article 251. The Council shall act unanimously throughout this procedure.'

Title III of Part Three governs freedom of movement for workers. Article 39 EC (ex Article 48 of the EC Treaty) provides:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

...

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

...'

4. With a view to facilitating freedom of movement for workers Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers was adopted. [3] This regulation lays down rules governing the legal position of the members of the family of a worker, *inter alia*, in the following articles.

'*Article 10*

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;

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

(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.

Article 11

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

Article 12

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that States's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage all efforts to enable such children to attend these courses under the best possible conditions.'

5. Likewise protection is given to the members of the family of the (former) worker in Article 3 of Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed,[4] which article reads as follows:

'1. The members of a worker's family referred to in Article 1 of this Regulation

4 — OJ, English Special Edition (II), p. 402.

who are residing with him in the territory of a Member State shall be entitled to remain there permanently if the worker has acquired the right to remain in the territory of that State in accordance with Article 2, [5] and to do so even after his death.

2. If, however, the worker dies during his working life and before having acquired the right to remain in the territory of the State concerned, members of his family shall be entitled to remain there permanently on condition that:

— the worker, on the date of his decease, had resided continuously in the territory of that Member State for at least two years; or

— his death resulted from an accident at work or an occupational disease; or

— the surviving spouse is a national of the State of residence or lost the nationality of that State by marriage to that worker.'

6. I would also refer to two other directives which, though older, are still applicable and contain further provisions concerning freedom of movement for workers. Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health [6] lays down rules, *inter alia*, on the admission and refusal of persons on grounds of public policy, public security or public health. Council Directive 68/360/EEC [7] of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families contains a series of measures to facilitate the movement of persons on whom rights are conferred under Regulation No 1612/68. Those include the possibility of pursuing employment in another Member State and rules on travel documents including a prohibition on visa requirements.

7. In regard to the right of residence rules are laid down in Council Directive

5 — Under Article 2 of this regulation a worker may under certain conditions retain the right to remain after reaching pensionable age, in the event of incapacity for work and if he goes to work in another Member State but retains his residence in the State where he previously resided as a worker.

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

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

90/364/EEC of 28 June 1990 on the right of residence. [8] Article 1 thereof provides:

'1. Member States shall grant the right of residence to nationals of Member States who do not enjoy this right under other provisions of Community law and to members of their families as defined in paragraph 2, provided that they themselves and the members of their families are covered by sickness insurance in respect of all risks in the host Member State and have sufficient resources to avoid becoming a burden on the social assistance system of the host Member State during their period of residence.

The resources referred to in the first subparagraph shall be deemed sufficient where they are higher than the level of resources below which the host Member State may grant social assistance to its nationals, taking into account the personal circumstances of persons admitted pursuant to paragraph 2.

Where the second subparagraph cannot be applied in a Member State, the resources of the applicant shall be deemed sufficient if they are higher than the level of the minimum social security pension paid by the host Member State.

2. The following shall, irrespective of their nationality, have the right to install themselves in another Member State with the holder of the right of residence:

(a) his or her spouse and their descendants who are dependants;

(b) dependent relatives in the ascending line of the holder of the right of residence and of his or her spouse.'

Accordingly, Article 3 provides that the right of residence is to remain for as long as beneficiaries of that right fulfil the conditions laid down in Article 1 thereof.

III — Facts

'R'

8. In the 'R' case the facts are as follows. Mrs R is a United States citizen. In 1990 she came from the United States to live in the United Kingdom with her then husband/worker, who is a French national. She

8 — OJ 1990 L 180, p. 26.

obtained leave to reside until 1995 in her capacity as the spouse of a worker exercising rights under the EC Treaty. The couple had two children who have dual nationality (French and American). In September 1992 the marriage was dissolved. The mother was awarded primary care of the children. As part of the divorce settlement it was arranged that the children would have contact with their father residing in England. After the divorce the children maintained regular contact with their father who bore a shared responsibility for their upbringing and education. Whilst resident in the United Kingdom Mrs R established a business as an interior designer. In 1997 she married a British citizen.

9. The divorce in 1992 had no effect on Mrs R's leave to remain which was valid until 1995. In October 1995 an application was made under the relevant domestic legislation on behalf of Mrs R and her children for indefinite leave to remain. She invoked the particular family situation and relied upon the right to family life between the children and their parents. Indefinite leave to remain was granted to her children but not to her. She appealed against the refusal by the Secretary of State to grant her the indefinite leave sought. The appeal was based on the rights of the children under the EC Treaty and the right to family life. Moreover, in her view an issue of discrimination arose since spouses of UK nationals are granted indefinite leave to remain after one year. The appeal was refused on the ground that it was not based on one of the grounds under the National Immigration Rules. On 5 June 1997 the Secretary of State further stated that the family circumstances were not so unusual as to justify the use by him of his discretion to depart from the normal rules. He concluded, *inter alia*, that the children were young enough to adapt to life in America should they accompany their mother back there. Mrs R subsequently obtained indefinite leave to remain because in the meantime she had married a British national.

Baumbast

10. Mr and Mrs Baumbast — he is German and was a worker at the time of the marriage, and she is a Colombian — were married in 1990 in the United Kingdom. The family also comprises two daughters. Mrs Baumbast's eldest daughter Maria is from an earlier relationship and has Colombian nationality. The second daughter, Idanella has dual nationality (German and Colombian). The parties to the proceedings before the referring tribunal agreed that, for the purposes of the preliminary-reference proceedings, Maria was to be treated as a member of Mr Baumbast's family.

11. The family obtained a residence permit valid for five years until 1995. As from 1990 Mr Baumbast initially pursued an economic activity as an employed person and then for a period as a self-employed person. Following his company's failure, he

has since 1993 been engaged on temporary contracts by German companies, *inter alia*, in China and Lesotho. He has never lived in Germany again but has received medical treatment there. At different times Mr Baumbast has without success sought work in the United Kingdom. During the relevant period the couple owned a house in the United Kingdom on a mortgage and the children attended school there. The family had no recourse to public funds and, having comprehensive medical insurance in Germany, travelled there for medical treatment, if necessary.

12. In 1995 Mrs Baumbast applied for indefinite leave to remain in the UK for the whole family. In 1996 the Secretary of State refused leave for Mrs Baumbast and her children to remain indefinitely and — in respect of the whole family — refused to extend the leave to remain previously issued. On 12 January 1998 the case came at first instance before the adjudicator who established that Mr Baumbast was no longer a worker within the meaning of EC law since it was highly unlikely that he would take up a post in the United Kingdom. Nor could he (or his family) rely on Directive 90/364 on the right of residence since they were covered by the German sickness insurance scheme and consequently were not insured in the United Kingdom in such a way as to satisfy the requirements of Article 1 of Directive 90/364. Mr Baumbast accepted these findings of fact. On those grounds he is basing himself in the further proceedings on Article 18 EC. However, the children were recognised as having a right of residence under Article 12 of Regulation No 1612/68. Mrs Baumbast also obtained temporary leave to remain in the United Kingdom. Her rights in that regard are connected with the right of residence of her children under Article 12. In the adjudicator's view Mrs Baumbast's right to remain derives from the obligation imposed on the Member States by Article 12 of Regulation No 1612/68 to encourage all efforts to enable children of European Union citizens to attend educational courses in the host Member State under the best possible conditions. That view of the matter gave rise to the second preliminary question.

13. Moreover, during the national proceedings it was established that Mr Baumbast and his family are resident in the United Kingdom. Mrs Baumbast and the two children have in the meantime been granted indefinite leave to remain in the United Kingdom by decision of the Secretary of State of 23 June 1998, though leave was refused in Mr Baumbast's case.

IV — The preliminary questions

14. The particulars of the cases outlined above have given rise to the following four preliminary questions. I would observe in

that connection that the third and fourth questions are relevant only to the Baumbast case.

'*First Question*

(a) Are children of a citizen of the European Union who are themselves such citizens and who have installed themselves in primary education during the exercise by their father (or parent) of rights of residence as a worker in another Member State of which he is not a national ("the host State") entitled to reside in the host State in order to undergo general educational courses there, pursuant to Article 12 of Council Regulation No 1612/68?

(b) In so far as the answer to the preceding question may vary in circumstances where:

(i) their parents are divorced;

(ii) only one parent is a citizen of the European Union and that parent has ceased to be a worker within the host State;

(iii) the children are not themselves citizens of the European Union;

what criteria are to be applied by the national authorities?

Second Question

Where children have the right to reside in a host State in order to undergo general education courses pursuant to Article 12 of Council Regulation No 1612/68, is the obligation of the host State to "encourage all efforts to enable such children to attend these courses under the best possible conditions" to be interpreted as entitling their primary carer, whether or not a citizen of the European Union, to reside with them in order to facilitate such a right notwithstanding:

(i) their parents are divorced; or

(ii) the father who is a citizen of the European Union ceases to be a worker within the host State?

Third Question

(a) On the facts of Mr Baumbast's case, does he, as an EU citizen, enjoy a directly effective right of residence in another EU Member State pursuant to Article 18 EC (ex Article 8(a) of the EC Treaty) in circumstances where he no longer enjoys rights of residence as a worker under Article 39 EC (ex Article 48 of the EC Treaty), and does not qualify for residence in the host State under any other provision of EU law?

(b) If so, are his wife and children consequently able to enjoy derivative residence, employment and other rights?

(c) If so, do they do so on the basis of Articles 11 and 12 of Regulation No 1612/68 or some other (and if so, which) provision of EU law?

Fourth Question

(a) Assuming that the preceding question is answered in the EU citizen's disfavour, do that person's family members retain the derivative rights that they, as such members, originally acquired upon being installed in the UK with a worker?

(b) If so, what are the conditions that apply?'

V — Preliminary: relevance of the questions to the main proceedings

15. The question arises as to the extent to which a reply by the Court to the questions retains relevance to the main proceedings. In the 'R' case Mrs R has by her marriage to a British citizen in the meantime obtained indefinite leave to remain in the United Kingdom. Her children had already

previously been granted indefinite leave to remain. In the Baumbast case indefinite leave to remain has been granted to Mrs Baumbast and the two children. Only Mr Baumbast has not been granted such leave.

16. Under the second paragraph of Article 234 EC it is within the discretion of the referring court to determine the questions to be submitted to the Court. I would recall the Court's settled case-law, as restated in the *Giloy* judgment: [9]

'20. According to settled case-law, the procedure provided for in Article 177 of the Treaty [now Article 234 EC] is a means of cooperation between the Court of Justice and national courts. It follows that it is for the national courts alone which are seised of the case and are responsible for the judgment to be delivered to determine, in view of the special features of each case, both the need for a preliminary ruling in order to enable them to give their judgment and the relevance of the questions which they put to the Court...

21. Consequently, where questions submitted by national courts concern the interpretation of a provision of Community law, the Court is, in principle, obliged to give a ruling... Neither the wording of Article 177 nor the aim of the procedure established by that article indicates that the Treaty makers intended to exclude from the jurisdiction of the Court requests for a preliminary ruling on a Community provision where the domestic law of a Member State refers to that Community provision in order to determine the rules applicable to a situation which is purely internal to that State...

22. A reference by a national court can be rejected only if it appears that the procedure laid down by Article 177 of the Treaty has been misused and a ruling from the Court elicited by means of a contrived dispute, or it is obvious that Community law cannot apply, either directly or indirectly, to the circumstances of the case referred to the Court...'

17. My view is that it is sufficiently clear that there is no question of a contrived dispute in the present case. The questions arise from proceedings before national adjudicating bodies concerning the rights of residence of the 'R' and Baumbast families. It is also clear that Community law can apply to the circumstances of both cases for the disputes are both based on freedom of movement for persons. It is

9 — Case C-130/95 [1997] ECR I-4291.

another question whether the questions raised still have relevance to the proceedings before the national tribunal since, except in the case of Mr Baumbast, the leave sought had already been granted at the time when the preliminary questions were submitted.

18. In my view it is appropriate in this case to rely on the discretion of the referring court. The national tribunal may have its reasons for seeking greater clarity concerning the Community-law context of the right of residence granted on the basis of national law. Moreover, I would also point out that the questions raised are of direct relevance to Mr Baumbast's position.

VI — Context of the cases

Introduction

19. In substance both cases concern the scope of freedom of movement for persons within the European Union. In the original EEC Treaty freedom of movement was as a matter of principle linked to the pursuit of economic activities by employees or undertakings. I refer to Articles 48, 52 and 59 of the EC Treaty (now Articles 39, 43 and 49 EC). In order to facilitate the exercise of those Treaty rights, the Community legislature established more detailed rules. In that context Regulation No 1612/68 was adopted in 1968. That regulation establishes, *inter alia*, a right of residence in favour of the spouse and other members of the family of a migrant worker.

20. Since the adoption of Regulation No 1612/68 considerable social developments have occurred which are likely to have considerable influence on the view to be formed as to the nature and scope of the provisions of that regulation. In addition, over the years Community law on freedom of movement for persons has undergone further development. I am of the view that, in replying to the questions submitted to it by the referring tribunal, the Court must have regard to both social and Community-law developments. If no account were taken of those developments the relevant rules of law would risk losing their effectiveness.

21. In that connection I would also mention that the applicants ('R' and Baumbast) state in their written observations to the Court that Community law must be inter-

preted in the light of the social and legal developments which have occurred since the adoption of Regulation No 1612/68.

Social developments

22. As regards the social developments which have occurred since the 1960s and which are of significance to the interpretation and application of Regulation No 1612/68 I have in mind one social/cultural trend and two economic trends.

23. Regulation No 1612/68 dates back to a time when family relationships were relatively stable. The social legislation of the 1950s and 1960s — like the regulation — makes provision for the traditional family in which the husband is the breadwinner and the wife takes care of the household and the children. The traditional family of course continues to exist but has become much less dominant amongst the forms of cohabitation in the Western world. Family relationships and forms of cohabitation have become less stable and more varied. Both the 'R' family — after the divorce — and the Baumbast family — where the father lives only a part of the time with his family — are examples of these trends. An additional factor is that families in which the spouses are of different nationalities or where children of other nationalities are present are occurring more and more frequently, precisely as a result of the increasing mobility of persons. These families may include nationals of non-Member States such as Mrs R and Mrs Baumbast. For those reasons those persons have on their own account no right under Community law to reside in the United Kingdom.

24. Regulation No 1612/68 was adopted at the high-water mark of industrial mass production when employment conditions were relatively stable. The Community legislature was able to assume that the working cycle had a certain permanence. In the current economic climate rapid changes in the work cycle — and also of the workplace have become much more common. Those changes can happen so quickly, as in the case of the Baumbast family, that the choice is made not to move the family continuously.

25. The second economic trend is that of globalisation. In the global village the organisation and activities of undertakings take on an increasingly international dimension, both within the European Union and outside it. Situations, such as that of Mr Baumbast, in which a worker resident in Member State A is employed in a non-Member State by a company in

Member State B are occurring more and more frequently.

26. I note that Regulation No 1612/68 is silent as to the consequences of the developments which I have described above. In that connection, I have in mind the following: the consequences of a divorce, the presence of children from a previous relationship or of families with different nationalities, including nationals of non-Member States, professional mobility and the separation of the place of residence and the place of work. However, none of these phenomena are really new; it is merely that the intensity with which and the scale on which they now occur have become so considerable that the Community legislature must take account of them.

27. A wholly different development of relevance to the freedom of movement for persons is the increased significance of the issue of the immigration of nationals from non-Member States. Strictly speaking I know that this development plays no role in the present case; nor is reliance placed on Title IV of Part Three of the EC Treaty. None the less, it is as well to be aware of the fact that developments in freedom of movement for persons within the European Union frequently have a close link with immigration from non-Member States. Thus, both Mrs R and Mrs Baumbast entered the European Union from a non-Member State, availing themselves of the provisions concerning freedom of movement for persons within the European Union.

Developments in EC legislation

28. As regards developments in European law, I consider it to be relevant that, at the time when the regulation was adopted, the free movement of persons only related to freedom of movement for persons for the purpose of pursuing an economic activity. Only persons carrying on an economic activity in a Member State other than that of which they were nationals came within the scope of the EEC Treaty. These two cases concern rights originating in the protection of a migrant worker under Article 39 EC (ex Article 48 EC Treaty). Within the scheme of the EC Treaty that protection is enshrined in Article 39 EC itself and in secondary legislation based on Article 40 EC, and in particular Regulation No 1612/68.

29. At the time of its adoption, at the end of the 1960s, the regulation merely had to concern itself with how the rights of residence of family members are established and not with when they are terminated: in normal cases the social situation was stable. To that end Article 40 EC provides that the Council is to issue directives or make regulations setting out the measures required to bring about freedom of movement for workers. Already at the end of the 1960s the Council established the rules which continue to form the basis of freedom of movement for workers. Those rules are laid down in Regulation No 1612/68 and Directive 68/360/EEC. Article 1 of Regulation No 1612/68 further

implements Article 39 EC and gives to every national of a Member State, irrespective of his place of residence, the right to accept and perform paid employment in the territory of another Member State. Under Article 1 of Directive 68/360 the Member States are to lift the restrictions on movement and residence of migrant workers and members of their families. Thus they may work in another Member State and neither an entry visa nor an exit visa may be required.

30. In order to ensure that freedom of movement for workers can genuinely be exercised, Regulation No 1612/68 also confers certain rights on the members of a worker's family. Those are the rights contained in Articles 10, 11 and 12 of the regulation whose scope forms the subject-matter of the present case. The first and second questions submitted by the referring tribunal are concerned with those provisions. It is true that Regulation No 1251/70 makes additional provision for the rights of residence of the members of the family of the worker after his death, yet Regulation No 1612/68 itself has never been amended, notwithstanding the social changes which have supervened since it came into existence. However, in 1998 the Commission did submit a proposal for amendment. [10] However, that has not been discussed within the Council. At the hearing the Commission announced that a new proposal to amend Regulation No 1612/68 was circulating in its departments. These proposals are of no relevance to the assessment of the questions in the present case.

31. The meaning and scope of freedom of movement for persons has considerably increased in the course of the years. Initially, in the 1980s the meaning of the provisions on freedom of movement for persons was widely interpreted in the Court's case-law. Thus the freedom to provide services was declared applicable to persons for whose benefit a service is provided. [11] Those are, *inter alios*, tourists and persons requiring medical treatment. In order to receive that service they could travel to another Member State. The scope *ratione personae* of freedom of movement for persons has since 1990 been substantially widened following the adoption of three directives governing the rights of residence of persons who are not or are no longer economically active. First, there is Directive 90/364 on the right of residence, which I have already mentioned in point 5 hereof. Then Directives 90/365/EEC [12] and Directive 93/96/EEC [13] govern rights of residence of pensioners and students respectively. These directives recognise a right of residence where two criteria are satisfied. The migrant must

10 — Proposal for a European Parliament and Council Regulation amending Council Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community (OJ 1998 C 344, p. 7).

11 — See in particular Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

12 — Council Directive of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28).

13 — Council Directive of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59).

have sickness insurance for himself and the members of his family which covers all risks in the host Member State and must have sufficient financial resources.

32. Finally, the Maastricht Treaty inserted into the EC Treaty a new section concerning citizenship of the Union. Article 18 EC provides that every citizen has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty.

33. At this juncture I come to the following conclusion which underpins the subsequent reasoning of this Opinion.

34. Community legislation on the free movement of persons is twofold. The first and earliest relating to the pursuit of an economic activity, contains rules on freedom of movement for workers, freedom of establishment and the freedom to provide services. The secondary legislation which is necessary in order to facilitate the exercise of these economic rights (of particular relevance in this case is Regulation No 1612/68) has not kept pace with the social, cultural and economic developments which have occurred since the 1960s. In regard to the (derivative) rights of members of workers' families European legislation merely lays down the manner in which those rights are established. No specific provision is made for changes in circumstances, which in my view may be accounted for by the fact that at the time when the rules were enacted at the end of the 1960s it was appropriate to assume that working and family relationships were stable. Only in Regulation No 1251/70 is provision made for a specific change of circumstances — and one which is foreseeable at any period of time, namely the death of the worker. The first two questions submitted to the Court are essentially concerned with changed circumstances.

35. In addition, a further series of secondary legislation, namely Directives 90/364, 90/365 and 93/96, establishes rights of residence for persons who are not or are no longer economically active. Those rights are, in those directives, subject to the requirement of sufficient financial resources. That is to prevent a migrant from having to have recourse to the social security benefits of a host Member State.

36. The Maastricht Treaty inserted into the EC Treaty a right couched in general terms in favour of all citizens of the European Union. The third question submitted by the referring tribunal essentially asks whether that provision has direct effect, in particular in favour of a person (Mr Baumbast) who cannot claim the right to move and reside under any other provisions of Community law. Mr Baumbast does not satisfy the specific conditions of Directive 90/364.

VII — The current state of EC law by reference, *inter alia*, to the Court's case-law

37. In the preceding points I have outlined certain fundamental developments in the area relevant to this case. In order to be able to provide an adequate reply to the questions submitted by the referring tribunal, a more thorough treatment of the current state of EC Law is called for at this particular juncture.

Articles 10, 11 and 12 of Regulation No 1612/68

38. Articles 10 and 12 of Regulation No 1612/68 are central to the first and second questions submitted by the referring tribunal. Article 11 is very closely connected to those articles. As discussed above, the regulation seeks to eliminate restrictions on workers' mobility, in particular by giving them the right to bring their families with them and by creating the conditions for the integration of their families in the host country.

39. Article 10 determines which family members may accompany the migrant worker. In the first place the right to do so is granted to the migrant worker and his spouse. The term 'spouse' is interpreted literally by the Court. Thus, the Court has held that a person continues to be a spouse within the meaning of the regulation, as long as the marriage has not been formally dissolved, even if the spouses have already separated. [14] Secondly, dependants in the descendant line under the age of 21 years and also other dependent relatives in both the descendant and ascendant lines may install themselves with the migrant worker. For other blood relatives the condition applies that they must be dependants. [15] Under the Court's case-law, the status of dependent member of a worker's family is the result of a factual situation. The person having that status is a member of the family who is supported by the worker and there is no need to determine the reasons for recourse to the worker's support or to raise the question whether the person concerned is able to support himself by taking up paid employment. [16] It follows from the judgment in *Diatta* [17] that family members are not required to be living permanently with the worker.

40. Under Article 11 the spouse of a national of a Member State who is pursuing an activity as an employed or self-employed person in the territory of a Member State, and the children under the age of 21 years or dependent on him, have the right to take up any activity as an employed person throughout the territory of that same State, even if they are not nationals of any Member State. In my view that article is of limited value since (notwithstanding the confusing words 'even if')

14 — Case 267/83 *Diatta* [1985] ECR 567.
15 — Case 63/76 *Inzirillo* [1976] ECR 2057.
16 — Case 315/85 *Lebon* [1987] ECR 2811.
17 — Cited above at footnote 14.

it only has effect in the case of children who are not EC nationals: children who have the nationality of a Member State enjoy a self-standing right to freedom of movement for workers under Article 39 EC.

41. Article 12 relates to admission to general educational, apprenticeship and vocational training courses. [18] The connecting factor for the right of children to access to education is not the status of worker of one of the two parents but the broader criterion of whether one of them works or has worked. Even if the parent concerned is not pursuing an activity as an employed person or no longer works, the children still have a right to access to education. In its judgment in *Echternach and Moritz* [19] the Court held that the child of a Community worker who was employed in another Member State retains the status of member of a worker's family within the meaning of Regulation No 1612/68, when the family returns to the Member State of origin and the child of such a worker — possibly after a certain period of interruption — remains in the host State in order to pursue his studies there which he was unable to continue in the Member State of origin. The Court expressly upheld the view of the Commission and the Portuguese Government in that case according to which 'the principle of equal treatment enshrined in Community law must ensure as complete an integration as possible of workers and members of their families in the host country'. [20] The Court therefore adopts a broad interpretation of children's rights under Article 12 of Regulation No 1612/68. Even after a period of temporary residence in the country of origin they may return to the host country in order to continue their studies. In its judgment in *Di Leo* [21] the Court ruled that a Member State must treat children covered by Article 12 in the same way as its own nationals for the purposes of study grants, even where the studies are pursued in the Member State of which the children concerned are nationals.

42. In sum, access to education is under the terms of Article 12 limited to the children belonging to the family of the migrant worker and his spouse. It is not a requirement that the worker should live in a family relationship with the children concerned. Furthermore, it follows from the judgment in *Gaal* [22] that Article 12 is applicable to financial assistance to students who are already at an advanced stage in their education, even if they are 21 years of age or are no longer dependants of their parents. 'Accordingly, to make the application of Article 12 subject to an age-limit or to the status of dependent child would conflict not only with the letter of that provision, but also with its spirit.' However, no rights are granted to a child born

18 — See, for example, Hans von der Groeben and others, Ulrich Wolker, *Kommentar zum EU/EG-Vertrag* [Commentary on EC Treaty], 5th Ed., Nomos, Baden-Baden, 1997, p. 1-1148.

19 — Joined Cases 389/87 and 390/87 [1989] ECR 723.

20 — See paragraphs 19 and 20 of the judgment.

21 — C-308/89 [1990] ECR I-4185.

22 — Case C-7/94 [1995] ECR I-1031.

after the worker has ceased to work and live in the host Member State. [23]

The concept of worker and social advantages

43. In determining the scope of Articles 10, 11 and 12 of Regulation No 1612/68 it is also important to consider who is a worker and when the status of worker comes to an end. Furthermore, the Court has also had occasion, independently of Articles 10, 11 and 12, to examine the social advantages to which the worker and members of his family are entitled.

44. In *Martínez Sala* [24] the Court was called upon to provide a definition in Community law of the concept of worker in the context of freedom of movement and social security. The Court ruled as follows: 'In the context of Article 48 of the Treaty [now Article 39 EC] and Regulation No 1612/68, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended...'

45. In his Opinion in that case Advocate General La Pergola states that it is clear from the Treaty and from secondary legislation that a person can lose the status of Community 'worker'. In theory, an individual loses that status once the conditions required for its acquisition cease to be fulfilled. As the Advocate General stated, Community law provides otherwise only in specific circumstances and only with regard to certain effects.

46. Under Article 7 of Regulation No 1612/68 a worker who is a national of one Member State may claim a social advantage in another Member State. According to the Court's case-law study finance granted to children of migrant workers is to be regarded as a social advantage in favour of a migrant worker within the meaning of Article 7(2) of Regulation No 1612/68. [25] In *Bernini* the Court held in that connection that 'study finance granted by a Member State to the children of workers constitutes for a migrant worker a social advantage within the meaning of Article 7(2) of Regulation (EEC) No 1612/68, where the worker continues to support the child. In such a case, the child may rely upon Article 7(2) in order to obtain study finance under the same conditions as are applicable to the children of national workers, and no addi-

23 — Case 197/86 *Brown* [1988] ECR 3205.

24 — Case C-85/96 [1998] ECR I-2691, paragraph 32.

25 — Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 24 et seq., and Case C-337/97 *Meeusen* [1999] ECR I-3289, paragraph 19.

tional residence requirement may be imposed upon him.'[26]

47. In *Christini*[27] the Court, in ruling that the reference to social advantages in Article 7(2) was not to be interpreted restrictively, stated that: 'It therefore follows that, in view of the equality of treatment which the provision seeks to achieve, the substantive area of application must be delineated so as to include all social and tax advantages, whether or not attached to the contract of employment...'

To the question whether such an advantage was to be granted to the widow and children after the death of the migrant worker, the Court replied that 'it would be contrary to the purpose and the spirit of the Community rules on freedom of movement for workers to deprive the survivors of such a benefit following the death of the worker whilst granting the same benefit to the survivors of a national'. The Court went on to refer to the provisions of Regulation No 1251/70, in particular Article 3(1) thereof, which provides that, if a worker has acquired the right to remain in the territory of a Member State, the members of his family who are residing with him are entitled to remain there after his death, and to Article 7 which provides that: 'the right to equality of treatment, established by Council Regulation (EEC) No 1612/68, shall apply also to persons coming under the provisions of this Regulation'.

Article 18 EC

48. In *Martínez Sala*[28] the Court considered the question of citizenship of the European Union. However, it did not express a view on the scope of Article 18 EC, notwithstanding a detailed exposition on that point in the Opinion of the Advocate General. In *Kaba*[29] the Court addresses Article 18 EC without expressly forming a view as to whether it has direct effect. The Court says that, as Community law currently stands, there is no unconditional right in favour of nationals of one Member State to remain in the territory of another Member State. That is to be inferred, *inter alia*, from Article 18 EC which, though recognising that citizens of the Union have the right to move and reside within the territory of the Member States, expressly refers to the limitations and conditions laid down in the Treaty and to the measures adopted to give effect to it.

49. In his Opinion in *Martínez Sala* Advocate General La Pergola stated: 'Now, however, we have Article 8a of the Treaty

26 — See also *Meeusen*, cited above at footnote 25.
27 — Case 32/75 [1975] ECR 1085.
28 — Cited at footnote 24.
29 — Case C-356/98 [2000] ECR I-2623.

[now Article 18 EC]. The right to move and reside freely throughout the whole of the Union is enshrined in an act of primary law... The limitations provided for in Article 8a itself concern the actual exercise but not the existence of the right. Directive 90/364 continues to regulate, if at all, the conditions governing enjoyment of the freedom of movement laid down in the Treaty.' [30]

50. The Advocate General points to the schematic context in which the right enshrined in Article 18 EC is placed by the Maastricht Treaty. He has this to say on it: 'Article 8a extracted the kernel from the other freedoms of movement — the freedom which we now find characterised as the right, not only to move, but also to reside in every Member State: a primary right, in the sense that it appears as the first of the rights ascribed to citizenship of the Union.... It is not simply a derived right, but a right inseparable from citizenship of the Union... Citizenship of the Union comes through the fiat of the primary norm, being conferred directly on the individual, who is henceforth formally recognised as a subject of law who acquires and loses it together with citizenship of the national State to which he belongs... Let us say that it is the fundamental legal status guaranteed to the citizen of every Member State by the legal order of the Community and now of the Union....' [31]

30 — Opinion in *Martínez Sala*, cited at footnote 24, paragraph 18.

31 — Cited above at footnote 30.

51. Some critics take the view that the Court ought to have examined the issue of the effect of Article 18 EC. The Court's reasoning in *Martínez Sala* that it was not necessary in that case to inquire whether the person concerned could under Article 18 EC claim a new right to remain in the territory of the Member State in question since the person's right to reside there had already been conceded did not, according to some commentators, reveal evidence of a considered approach. [32]

52. Advocate General Cosmas has also stated his views on the effect of Article 18 EC. In his Opinion in the *Wijsenbeek* [33] case he showed himself to be an advocate of the direct effect of that article. First, the literal formulation of Article 18 EC militated in favour of direct effect. The right of every citizen of the Union to move and reside freely within the territory of the Member States was expressly recognised. He further pointed to the particular feature of Article 18 EC which introduces into the Community legal order a purely individual right mirrored in the right to freedom of movement which is constitutionally guaranteed in the legal systems of the Member States. On those grounds it produced direct effect by obliging Community and national

32 — See Christian Tomuschat, 'Commentary on Case C-85/96 Maria Martínez Sala v Freistaat Bayern', *Common Market Law Review*, 37, Kluwer Law International, Netherlands, 2000, p. 453.

33 — Case C-378/97 [1999] ECR I-6207.

authorities to observe the rights of European citizens to move and reside freely and to refrain from adopting restrictive rules which would substantively impinge on those rights.

53. According to Advocate General Cosmas, the condition in Article 18(1) EC to which the right to move and reside freely is subject is not sufficient ground for denying direct effect to Article 18 EC because the wording of that condition does not detract from the direct nature of the right created. In other words, it does not detract from the precise and unconditional form of the terms of the provision. The significance of both those factors, in the Advocate General's view, is that Article 18 EC introduces a fundamental individual right with direct effect enabling citizens of the Union to move and reside freely within the Community. The exercise of that right may be made subject to restrictions and conditions so long as they are justified and do not impinge on the very essence of the right. However, in its judgment in that case the Court did not express a view on the direct effect of Article 18 EC.

54. Finally, I would refer to the Opinion of Advocate General Léger in the *Kaur*[34] case in which it was stated that there must be a cross-border element. Article 18 EC governs freedom of movement within the Community. For the Advocate General in that case it is clear that there must be at least some elements of the main dispute which lend it a Community dimension. In that connection he recalled that: 'The Court has consistently held that the rules governing the free movement of persons... apply only to a national of a Member State of the Community who seeks to establish himself in the territory of another Member State or to a national of the Member State in question who finds himself in a situation which is connected with any of the situations contemplated by Community law.'

Discrimination

55. In the last section of its judgment in *Martínez Sala* the Court examined whether a citizen who is lawfully residing in the territory of a host Member State can rely on the principle of non-discrimination enshrined in Article 12 EC. The Court stated that such a citizen may rely on that article in all situations falling within the substantive scope of Community law. Equal treatment for migrant workers and members of their families constitutes an important means of giving effect to free-

34 — Paragraph 28 of the Opinion in Case C-192/99 *Kaur* [2001] ECR I-1237.

dom of movement for workers, as may be inferred, inter alia, from Article 39(2) EC.

56. The judgment in *Kaba*[35] makes clear that reliance on discrimination by women from non-Member States who are married to a national of another Member State in contrast to women married to a national of the host country itself is to no avail. The latter category may obtain indefinite leave to remain after only one year (at least in the United Kingdom). According to the Court, the Member States are entitled to rely on any objective difference there may be between their own nationals and nationals of the other Member States in laying down the conditions under which the spouses of such persons are granted indefinite leave to remain in their territory. More particularly a Member State may, in the case of the spouse of a person who does not enjoy an unlimited right to remain, require a longer period of residence for the grant of a right to remain than in the case of the spouse of a person already enjoying that right. Once leave to remain indefinitely has been granted no condition can be imposed on the person to whom such leave has been granted. Therefore the authorities of the host Member State must be able, when the application is made, to require the applicant to have established sufficiently enduring links with that State. Such links may result, in particular, from the fact that the spouse has indefinite leave to remain in the national territory or that the person applying has already been resident for a considerable period.

57. Another rationale is also conceivable.[36] The objective difference in legal status as between a Member State's own nationals and the nationals of other Member States does not necessarily mean that the members of families of the latter nationals may be treated differently from a Member State's own nationals. Although the United Kingdom legislation on the right to remain distinguishes between members of the family of persons who are permanently resident in the United Kingdom and nationals of the Member States and members of their families who do not satisfy that condition, the Court could have compared the respective situations of those family members.

Article 8 of the European Convention for the Protection of Human Rights

58. Under Article 6 of the Treaty on European Union, the Union is to respect funda-

35 — Cited above at footnote 29.

36 — See, for example, Steve Peers, 'Dazed and confused: family members' residence rights and the Court of Justice', *European Law Review*, 26, Sweet & Maxwell, United Kingdom, 2001, p. 76.

mental rights, as guaranteed, *inter alia*, by the European Convention for the Protection of Human Rights, as general principles of Community law. The Court has consistently held that the fundamental rights laid down in the ECHR 'form an integral part of the general principles of law with which the law must ensure compliance' but only if the area to which the case pending before the Court relates falls within the scope of Community law. [37] For the present case the judgment in *Commission* v *Germany* [38] is of specific relevance; in that case the Court held that 'Regulation No 1612/68 must also be interpreted in the light of the requirement of respect for family life set out in Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms'.

59. Article 8 of the ECHR provides that every person has the right to respect for family life. As a general principle there is family life where there is a lawful and genuine marriage. Other relationships of sufficient permanence stand on the same footing as such a marriage. Moreover the family link may only be broken in exceptional circumstances by subsequent events. I would also point out that Article 7 of the European Union's Charter of Fundamental Rights [39] enshrines respect for family life. However, as Community law currently stands, that Charter has no binding force.

60. In that connection principles concerning migration have also been established. [40] One of those principles is that the extent of a State's obligation to admit to its territory relatives of immigrants already established there depends on the specific circumstances of the persons concerned and the general interest. In accordance with generally accepted rules of international law, a State, having regard to its Treaty obligations, has the right to monitor access by foreigners to its territory. As far as immigration is concerned, Article 8 of the ECHR cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory.

Summary

61. In light of the foregoing I would summarise the state of EC law in its main outlines as set out below.

37 — See, *inter alia*, footnote 16 in the Opinion of Advocate General Léger in Case C-192/99, cited in footnote 34 above, in which he refers, *inter alia*, to the judgment in Case C-260/89 *ERT* [1991] ECR I-2925.

38 — Case 249/86 [1989] ECR 1263, paragraph 10.

39 — OJ 2000 C 364, p. 1.

40 — Eur. Court HR, Ahmut judgment of 28 November 1996, *Reports of Judgments and Decisions* 1996-VI.

62. Freedom of movement for workers is in principle applicable only during the period in which the worker is engaged in active employment. The social advantages accruing to family members on the basis of Regulation No 1612/68 from freedom of movement for workers may none the less continue to subsist after the end of the employment relationship. That is for example expressly provided for in the case of the death of the worker. More particularly, Article 10 of the Regulation confers a social advantage — in the form of a right to remain — in favour of children who live in a family relationship with the worker. Article 12 gives children the right to continue their studies even after their parents' employment relationship comes to an end. Moreover, Article 12 does not require the (continued) existence of a family relationship. In *Echternach and Moritz* [41] the Court applied a wide interpretation to that right in favour of children by permitting them to return to the host country after a temporary period of residence in their country of origin. I also deduce from the case-law on Article 7 of Regulation No 1612/68 that the Court applies a broad interpretation to the rights of members of the workers' family.

63. The Court has not hitherto ruled on the possible direct effect of Article 18 EC, notwithstanding a number of submissions on that point, notably in Opinions of Advocates General. In my view, it is, however, clear that Article 18 EC has definite legal consequences, whose extent and scope are as yet unclear.

64. The prohibition on discrimination is an important means of attaining freedom of movement for workers but is not so far-reaching that members of the families of persons from another Member State must be granted the same right to remain as the family members of a national of the host country itself. Finally, the right to respect for family life under the ECHR forms part of Community law at issue in the present case. However, that is not so far-reaching that a Member State must authorise family reunion in its own territory.

VIII — Appraisal

Introduction

65. Written observations were lodged with the Court on behalf of the appellants in the

41 — See point 41 hereof.

main proceedings before the referring tribunal ('R' and Baumbast, hereinafter 'the appellants'), the Commission and the United Kingdom and German Governments. At the hearing on 6 March 2001 the appellants, the Commission and the United Kingdom and German Governments made further submissions. In view of the extent of the various submissions, I shall merely reproduce the salient points thereof, and then express my view. The point of departure of my views is, on the one hand, the developments described in Part VI of my Opinion and, on the other, the state of EC law, as described in Part VII.

The first two questions

The observations

67. In the 'R' case the appellants submit that the children entered the United Kingdom as members of a migrant worker's family and that they retain a right of installation under Article 10(1) of Regulation No 1612/68. The fact that their parents have in the meantime divorced is of no significance.

66. In replying to the questions I will make a division between the first two questions which relate to Regulation No 1612/68 and the third question which concerns the interpretation of Article 18(1) EC. In the reply to the first two questions the overdue review of Community legislation is of considerable significance. The rules relating to freedom of movement for workers — see also point 34 above — have not kept pace with social changes. In my view the Court is therefore compelled, in interpreting the specific legislation in this area, in particular Articles 10, 11 and 12 of Regulation No 1612/68, to take into consideration not only the wording of the provisions themselves but also the changed circumstances.

68. In the Baumbast case the appellants concede that Mr Baumbast can no longer claim protection as a worker in the United Kingdom, inasmuch as he is no longer seeking work there. None the less he remains a worker within the meaning of Article 39 EC since he is employed by a German undertaking established in the European Union which sends him on contracts outside the European Union, whilst at the same time he maintains his family in the host country where he previously worked and where he is still ordinarily resident. Whenever this worker makes his regular journey to the place in which he and his family are ordinarily resident, he is exercising the rights conferred on him by the EC Treaty. The appellants conclude therefrom that the Baumbast children also retain the right to install themselves under Article 10(1) of Regulation No 1612/68.

69. The appellants go on to observe that Article 12 of Regulation No 1612/68 is linked to Article 10. Article 12 relates solely to children who had the right under Article 10 to install themselves. The appellants state that in both cases the children meet the criteria under Article 12 whereby they recognise that the right to install oneself and to follow educational courses in the host country is not unlimited. In the 'R' case the children continue to be members of the family of the migrant worker who remains resident in the host country. In the Baumbast case the situation is comparable, albeit that the children's father is no longer employed in the United Kingdom. However, in *Echternach and Moritz,*[42] that fact was held to be irrelevant to the continued existence of children's rights under Article 12. The appellants further observe that in both cases the children could not move to the countries of which they are nationals. They have no family member there and also do not speak French (the 'R' children) or German (the Baumbast children). A move would jeopardize continuity of their education.

70. The appellants infer a right to remain in favour of the mother in both cases from the following considerations. Article 12 of Regulation No 1612/68 requires the Member States to secure admission to educational courses 'under the same conditions as nationals' and to encourage all efforts to enable such children to attend such courses 'under the best possible conditions'. For young children of a split family who are residing in the care and control of their mother, the only feasible condition for attendance at school is to enjoy continued residence with their mother.

71. The appellants go on to point out that the Baumbast and 'R' children are materially disadvantaged by comparison with children of a marriage between a British citizen and a foreign woman. The mother of those children would receive indefinite leave after 12 months, irrespective of the fate of the family links thereafter. This is a benefit of advantage to the worker who knows that his family life will not be adversely affected by immigration considerations in the event of divorce.

72. The adjudicator in the Baumbast case recognised the absurdity of granting children residence rights and then depriving them of any possibility of effectively exercising them by refusing residence to their mother. Community law is to be interpreted broadly particularly where the enjoyment of fundamental rights, such as the right to family life is concerned. Refusal of a right of residence to the mother is, according to the appellants, a disproportionate interference in family life and conflicts with the ECHR.

42 — Cited in footnote 19.

73. As I stated at points 34 and 66 of my Opinion the appellants state that Community law must be interpreted in the light of social changes and legal developments occurring since the adoption of Regulation No 1612/68.

74. More generally, the appellants dwell on the continued right to remain in favour of persons who had the right under Article 10 to install themselves in a host country. Article 10 of Regulation No 1612/68 deals with dependants having the right 'to install themselves' with the worker. 'Installation' is to be regarded as a once-for-all action rather than as a continuous action. Accordingly they do not need to be permanently installed with the worker. Nor do they after installation have to continue to satisfy the criteria of Article 10. In *Gaal*[43] the Court upheld the right to access to education of a worker's child of over 21 who was no longer dependent on the worker. As a further example the appellants mention the case where a worker dies. In a number of circumstances Community law acknowledges a right to remain in favour of the surviving spouse (see Article 3(2) of Regulation No 1612/68 and the judgment in *Christini*[44]).

75. In summary the appellants submit as follows: where family members have installed themselves with a worker in a host State and have resided there lawfully for a number of years, changes in circumstances do not deprive the family members of a right of continuing residence if there are sufficient and effective links between the family members and the exercise of Treaty rights by the worker.

76. The Commission observes that the right under Article 10 of Regulation No 1612/68 is a derived right dependent on the migrant worker. Article 12 — concerning the pursuit of studies — is not a self-standing right of residence but is merely intended to ensure that the worker's children have access to education under the same conditions as children who are nationals of the host country.

77. A distinction must be drawn, according to the Commission, between the case where one of the parents continues to be a worker in the host country ('R') and the case where the parent is no longer a worker (Baumbast). In the former case the children retain their right of residence on the basis of their relationship with the worker. That conclusion is not altered by the fact that the children do not live under the same roof as their father.[45] The second case is more complex. The essential requirement for a right of residence, that is to say the relationship with the worker, is not fulfilled. The more difficult question is whether

43 — Cited above in footnote 22.
44 — Cited above in footnote 27.
45 — The Commission refers here to *Diatta*, cited above in footnote 14.

Article 12 of Regulation 1612/68 can confer a right of residence. In *Echternach and Moritz*[46] the Court interpreted Article 12 broadly. The protection of the children under Article 12 is not dependent on the continued existence of the parent's status of migrant worker. According to the Commission, the effect of the judgment in *Echternach and Moritz* is that a child of a former worker may remain in the host Member State in order to be able to enjoy the rights conferred on it by Article 12. The Baumbast case is comparable to the situation which was before the Court in *Echternach and Moritz*. There is therefore no reason to exclude the Baumbast children from the rights upheld in that judgment. The Commission also points to the principle of equal treatment under which workers and members of their families must be integrated as fully as possible in the host Member State.

78. The Commission deals only briefly with the question of the mother's right of residence in both cases. Mrs R is no longer a member of the family of a migrant worker and cannot assert a right of residence on that ground. Nor may Mrs Baumbast do so, since the *conditio sine qua non* of her entitlement, namely her husband's status as a worker, has been lost. The Commission acknowledges the clear consequence of that conclusion for the children's right of residence.

46 — See also point 41 hereof.

79. The United Kingdom Government states that, although Mr Baumbast is no longer himself a worker within the meaning of Regulation No 1612/68, his children continue to enjoy the right to undertake educational courses in the United Kingdom under Article 12 of that regulation. In the case of 'R' the children retain their rights under Article 12 on the ground that their father continues to be a migrant worker in the United Kingdom. The matters mentioned in part (b) of Question 1 are not relevant to the reply to be given.

80. The United Kingdom Government goes on to state that the Member States' obligation under Article 12 of Regulation No 1612/68 to encourage all efforts to enable such children to attend these courses 'under the best possible conditions' does not entail an obligation on the host country also to admit the primary carer. It supports that submission on the following grounds:

— The wording 'best possible conditions' refers not to the domestic conditions of the child but to educational and training facilities.

— Under United Kingdom domestic law UK national children do not have the right to require the State to admit non-national parents or carers. To admit primary carers of children from

another Member State would not be to place such children on an equal footing but would be to place them in a more beneficial position than British children.

— To answer Question 2 in the affirmative would lead to the absurd result that persons such as Mr Baumbast would gain a derivative right to reside from what was in itself a derivative right which his children derived from him.

81. In the German Government's view the children of a migrant worker retain their rights under Article 12 of Regulation No 1612/68 after their parents leave the host Member State subject to the condition that their education cannot be continued in the State of origin. A reply to part (b) of Question 1 is not necessary because the other criteria mentioned therein are not determining factors for the national authorities. In the German Government's view the mother has no right to reside for Article 12 of Regulation No 1612/68 deals solely with the admission of the children of migrant workers.

Assessment

82. The first question submitted by the referring tribunal concerns the right of the 'R' and Baumbast children to remain in the United Kingdom.

83. In the case of the 'R' children the reply to that question is straightforward. Those children have a right to remain under Article 10 of Regulation No 1612/68. That right continues to subsist even after the divorce of their parents as long as the father continues to have the status of worker within the meaning of Article 39 EC. In *Diatta* [47] it was held not to be necessary for the children to be living under the same roof as their father.

84. In the case of the Baumbast children I come to the same conclusion. Their right to remain also remains intact. However, their right is founded not on Article 10 but on Article 12. My reasoning in that connection is as follows. Under Article 10 the children had the right to install themselves in the United Kingdom on the basis of the status of worker of their father, Mr Baumbast. His status as a worker within the meaning of Article 39 EC no longer subsists. However, Article 12 of Regulation No 1612/68 provides that the children of a person who has been employed — as a migrant worker within the meaning of

47 — Cited above at footnote 14.

Article 39 EC — are to be admitted to educational courses if they are residing in the territory of the Member State concerned (in this case the United Kingdom). *Echternach and Moritz* establishes that children whose worker/parent has left the country have the right to continue in the host country studies already commenced there. As the Court further held in that judgment, in such cases children retain the status of member of a worker's family within the meaning of Regulation No 1612/68 and thus their right to remain.

85. In my view that reasoning applies equally to the 'R' children in the hypothetical event that their father should no longer continue to be a worker within the meaning of Article 39 EC in the United Kingdom. For the 'R' children's right to remain can also be founded on Article 12 of Regulation No 1612/68. For the purposes of Article 12 their situation is entirely identical to that of the Baumbast children.

86. The second question submitted by the referring tribunal is in brief whether a right to remain continues to subsist in favour of the mothers. They can no longer rely directly on Article 10 of Regulation No 1612/68 but would have to derive that right from their children's right to remain. This question is considerably more difficult to answer, which is borne out by the fact that the observations submitted to the Court reveal very divergent views.

87. In replying to this question it is not enough for me merely to analyse the wording of the regulation, as interpreted in the Court's case-law. As I already stated at point 34 above, the Community legislature has failed to have regard to cases where the family or working situation changes after entry into the host country, as in the case of the 'R' and Baumbast families. Only the case of the worker's death is provided for in Regulation No 1251/70. On this point European legislation on freedom of movement for workers no longer meets the needs of the time. In other words the legislation is in need of overhaul.

88. For those reasons Community law needs to be interpreted in such a way as to take account of changes in social conditions. In that way the *lacunae* which have appeared in Community legislation as a result of a failure to overhaul it can be prevented from resulting in undesired legal consequences.

89. A determinant factor in my view is that Article 12 of Regulation No 1612/68, as interpreted by the Court, unconditionally recognises the right for children to continue their education in the host Member State. From that recognition of the rights of the children I infer an albeit limited right to reside in favour of the mother(s). I am persuaded of that by two arguments which are closely interconnected.

90. First, the interpretation of Regulation No 1612/68 must do justice to the central objective of the regulation which I may summarise as being to facilitate the attainment of the objectives of Article 39 EC. Subsequent complications concerning the family's ability to reside must be precluded from deterring the worker from going to work in another Member State. In deciding whether or not to go and work in another Member State certainty or otherwise as to the children's education frequently plays an important role. In the furtherance of freedom of movement for workers it is therefore important that education be guaranteed as far as possible by Community law.

91. Secondly, the children's right to remain under Article 12 of Regulation No 1612/68 would be rendered nugatory if the parent carer were not allowed to remain in the host Member State. I would recall that the adjudicator in the national proceedings in the Baumbast case adverted to the possible consequence of an illusory right to remain in favour of the children. This consequence prompted him to grant Mrs Baumbast — temporary — leave to remain in the United Kingdom. [48] In other words what is at stake here is the efficacy of Article 12 of Regulation No 1612/68. The right of children to be able to continue their studies in the host Member State must also be capable of actually being exercised, in which connection the second paragraph of Article 12 encourages all efforts made to enable such children to attend those courses under the best possible conditions.

92. In that connection I would also draw attention to the prohibition of discrimination on the ground of nationality. In *Martínez Sala* [49] the Court established that a citizen of the European Union who is lawfully residing in the territory of another Member State may rely on that prohibition in all situations falling within the sphere of Community law. I would also recall the judgment in *Echternach and Moritz.* [50] The Court stated that treatment on the same footing as a country's own nationals encourages the integration of the children in the host Member State. It may be inferred from these two judgments, read in conjunction, that the parent carer's right to remain can be justified by the children's right to equal treatment.

93. Finally, recognition of a right to remain in favour of the parent carer is also of importance in connection with the ECHR and, in particular, Article 8 thereof which

48 — See point 12 hereof; and also the appellants' observations reproduced above.

49 — See point 55 hereof.

50 — In this connection see point 41 hereof.

guarantees the right to respect for family life. [51] In that regard I would point to the view expressed by the appellants that refusal to grant leave to remain to a mother of small children constitutes a disproportionate interference with family life and is thus incompatible with the ECHR. I am of the view that the Court does not need to express a view on whether refusal to grant leave to remain to the parent carer might constitute a disproportionate interference; I merely find that a decision to grant such leave does justice to Article 8 of the ECHR.

94. Those considerations lead me to conclude in favour of a right to remain for the parent carer which is derived from the right of children to continue their education in the host country. I am thereby giving further effect to the extensive interpretation applied by the Court in *Echternach and Moritz* to Article 12 of Regulation No 1612/68. In that connection it is established that the Court considers the right of children to continue their education to be an important means of advancing freedom of movement for workers. That right in favour of children must be capable of being fully utilised. Such an important means cannot be rendered nugatory (under certain circumstances) by a *lacuna* in the Community legislation. Yet since the right to remain in favour of the parent carer is derivative in nature, that means that a Member State may under its domestic law apply a temporal limitation on that right, for example until the education is completed or until the period of care of the children has come to an end.

95. I conclude that since EC law — on the furtherance of freedom of movement for workers — confers certain rights and privileges on the members of families of migrant workers, in this case the children of workers, the right in question must be interpreted in such a way to enable it actually to be exercised. That means that the parent carer must be able to remain if that is necessary for the exercise by the children of their rights.

Third Question

The observations

96. In the appellants' view Article 18 EC has direct effect. In that connection they refer to the Court's case-law and to academic writings. The fact that the right to

51 — At point 58 hereof I already discussed the significance for Community law of the fundamental rights laid down in the ECHR. In addition to Article 8 of the ECHR see also the comparable, but non-binding, Article 7 of the Charter of Fundamental Rights of the European Union.

remain applies 'subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect' does not deprive it of direct effect. The other provisions of the Treaty would merely define the content of the right. Nor does the fact that the right to remain is further to be read in the context of the measures adopted to facilitate the exercise of that right deprive it of direct effect. Article 18 EC is no less unconditional and unambiguous than Article 39 EC. Article 18 EC does not create an independent right which renders Article 39 EC and legislation adopted under it obsolete but is an addition to other provisions of the Treaty, such as those governing freedom of movement for workers.

97. The appellants state that Mr Baumbast is no longer exercising rights under Article 39 EC. In his case Article 18 EC must be interpreted in such a way that he retains his right to remain in the United Kingdom during the time that he is a worker outside the European Union. This Article 18 EC right of residence serves to bridge the gap during the period while he is physically absent from the United Kingdom, that is to say the period between his departure — as a worker within the meaning of Article 39 EC — and his permanent return to the United Kingdom. In that connection the appellants also point out that the difficulties faced by Mr Baumbast's family would not have arisen if the case had involved the members of the family of a British national. The refusal of residence rights to the spouse of Mr Baumbast constitutes discrimination contrary to Article 12 EC in connection with the right of residence in favour of Mr Baumbast which is based on Article 18 EC.

98. The Commission underlines the fundamental importance of Article 18 EC. However, the right to move and reside is not an absolute right but is subject to existing legal instruments. The right to remain is always linked either to an economic activity or to sufficient resources. The Commission concludes that Article 18 EC does not give Mr Baumbast a right to remain. In that connection it cites, *inter alia*, the judgment in *Wijsenbeek*. [52]

99. The United Kingdom Government points to the conditions laid down in Article 18(1) EC. That indicates that Article 18 EC does not create a universal and absolute right to free movement and residence going beyond the rights already conferred under the EC Treaty and secondary legislation. That does not mean that Article 18 EC is devoid of legal effect. It elevates the rights previously granted by secondary legislation to the status of rights granted by the EC Treaty and provides the Council with competence to adopt new

52 — See point 52 hereof.

measures to facilitate the exercise of rights of free movement. [53]

100. In the United Kingdom Government's view, Article 18 EC does not have direct effect because it is not unconditional in nature. The German Government is also of the view that a right of residence cannot be directly derived from Article 18 EC.

Assessment

101. The third question submitted by the referring tribunal primarily concerns the direct effect of Article 18 EC. At point 49 et seq. hereof I cited the Opinions of Advocate General La Pergola in *Martínez Sala* and of Advocate General Cosmas in the *Wijsenbeek* case; both expressed themselves in favour of direct effect. Advocate General La Pergola states that the right to move and to reside is inextricably linked with citizenship. The limitations mentioned in Article 18(1) EC concern in his view the actual exercise of the right and not the existence of the right itself. Advocate General Cosmas infers direct effect from, *inter alia*, the literal formulation of Article 18(1) EC. He goes on to state that exercise of that right may be made subject to restrictions and conditions so long as they are justified and do not impinge on the very essence of the right.

102. Hitherto the Court has not been required to rule on the issue of direct effect in this connection. It is apparent from the judgment in *Kaba* [54] that the Court takes the view that, by reference to the second part of Article 18(1) EC, that article does not in any event create an unconditional right to move and reside in favour of citizens of the European Union. I deduce from that judgment that, even if Article 18 EC has direct effect, the right to move and to reside under Article 18(1) EC is in any event not unlimited.

103. The central question as to the legal nature of Article 18(1) EC may in my view be formulated in these terms: does a citizen have a right under Article 18(1) EC to move and reside anywhere in the European Union or must Article 18(1) EC be characterised as a legal principle which requires to be given actual effect elsewhere in Community law? In view of the wording of Article 18(1) EC this question can be answered only in one way. This provision creates for citizens of the European Union a right to move and to reside. In my view the clear and unconditional wording of the first part of Article 18(1) EC cannot be interpreted in any other way. The activities to which that provision refers, namely to 'move' and to 'reside', do not require

53 — The United Kingdom Government refers, *inter alia*, to Case T-66/95 *Küchlenz-Winter* v *Commission* [1997] ECR II-637, paragraph 47.

54 — See point 52 hereof.

further particularisation. Thus, in my view, Article 18(1) EC has direct effect. That was also the reasoning of Advocate General Cosmas.

104. The scheme of the EC Treaty and the legislation adopted under it provide a second argument in favour of direct effect. Community legislation on freedom of movement for persons is addressed to two distinct categories of persons.[55] The first category concerns persons who move or reside within the European Union in the context of their economic activity. Their specific rights are provided for by or pursuant to Treaty provisions concerning freedom of movement for workers (Article 39 EC et seq.), freedom of establishment (Article 43 EC et seq.) and freedom to provide services (Article 49 EC et seq.). I shall refer to them as (economic) activities. The second category concerns persons who travel or reside within the European Union independently of any economic activity, that is to say economically non-active persons, such as, for example, students or pensioners. Their rights are based on secondary Community law, namely Directive 90/364 and Directives 90/365 and 93/96, which are related to the former. Thus, for both categories particular sets of rules, which are not directly interconnected, have come into being.

105. Article 18 EC adds to these two sets of rules a general right of residence in favour of citizens of the European Union. In the words of Advocate General La Pergola, that right is inseparable from citizenship. Article 18 EC — and these are my words — establishes a fundamental right in favour of citizens of the European Union to move and reside freely within it. It subsumes the rights to move and to reside in favour of both economically active and economically non-active citizens under a single denominator. For the economically non-active Article 18 EC has additional significance. Since the introduction of Article 18 EC — in the Maastricht Treaty — the right to move and reside in favour of economically non-active persons stems directly from the Treaty and is no longer fully subject to the assessment of those entrusted with the enactment of secondary legislation.

106. There is a third argument, of a teleological nature, in favour of direct effect. If the right to move and reside were wholly dependent on specific privileges established by or pursuant to the EC Treaty, that right would risk losing significance or, in other words, its efficacy. A provision couched in general terms, such as Article 18(1) EC, which does not distinguish between the various (sub)categories of addressees, fulfils a necessary function in securing the objective pursued by the

55 — See also point 34 hereof.

framers of the Treaty, namely freedom of movement for all citizens.

107. Thus far I have still said nothing concerning the substantive significance of Article 18 EC. It is true that the second part of Article 18(1) EC makes the right to move and reside subject to the limitations and conditions laid down elsewhere in Community law. Other provisions of Community law, such as for example Article 39 EC, therefore determine as a matter of principle the scope of the right laid down in Article 18 EC.

108. I therefore share the view of the matter formed by the Court in *Kaba* (cited in footnote 29) that the rights laid down in Article 18(1) EC are not unlimited. Precisely if, as I advocate, those provisions are recognised as having direct effect, the conditions and limitations to which exercise of the right to move and reside is subject are closely connected to them. For the conditions and limitations serve to protect obvious public concerns such as public order and security, public health and the financial interests of the Member States.

109. In light of the foregoing I conclude that Article 18(1) EC has substantive significance in two respects. In those two respects Article 18 EC has additional value alongside the other Community legislation on freedom of movement for persons.

110. First, the unconditional nature of the first part of Article 18(1) EC entails that the right of residence must be a recognisable right of substance for citizens. In this respect Article 18 EC is in the nature of a guarantee provision. The article lays down requirements to be met by EC law in the area of freedom of movement for persons. The conditions laid down by EC law may not be arbitrary and may not deprive the right of residence of its substantive content. In that connection I refer to the requirements laid down by Advocate General Cosmas which are to be met by any conditions and limitations on the right of residence. I also find support for my view in the Charter of Fundamental Rights of the European Union. Article 45 of that charter which, as I have said, is non-binding recognises a right of residence in favour of citizens of the Union,[56] whereas Article 52(1) provides as follows in regard to restrictions on the exercise of rights recognised by the Charter. They must 'respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet

56 — That article is a literal replication of the first part of Article 18 EC.

objectives of general interest recognised by the Union...'.

111. Secondly, Article 18(1) EC imposes an obligation on the Community legislature to ensure that a citizen of the European Union can actually enjoy the rights conferred on him under Article 18 EC. That obligation is all the more substantive since Community law on freedom of movement for persons comprises two sets of rules and thus is to an extent disparate in nature. There is no single general and exhaustive set of rules.

112. The significance of these matters is this.

113. For the economically active citizen the Treaty itself and the rules adopted under it provide for a regime for freedom of movement which affords the citizen the requisite guarantees. In principle Article 18 EC adds nothing in that regard. It is true that the rules on freedom of movement for workers are not in all circumstances appropriately tailored to changed social conditions (see point 34 above). In interpreting the relevant provisions of Community law the Court must, in my view, have regard as far as possible to those changed circumstances. Article 18 EC plays no role in that connection.

114. For the economically non-active citizen the rules are laid down in Directive 90/364 and Directives 90/365 and 93/96 which are related thereto. The rights accruing to this group of citizens under these directives acquire the status of Treaty rights under Article 18 EC. For this group Article 18 EC acts in the nature of a guarantee. The Community legislature is obliged to create and maintain a right which has substance.

115. Finally, the unambiguous nature of Article 18(1) EC entails that a person not entitled to a right of residence under other provisions of Community law can none the less acquire such a right by reliance on Article 18 EC. Since there is no single general and all-embracing set of rules concerning the exercise of the right of residence in Community law recourse must be had in cases for which the Community legislature has made no provision to Article 18 EC. However, that does not mean that an unrestricted right of residence is recognised in those — special — cases. The conditions and limitations imposed on that right by EC law must be applied by analogy as far as possible to persons who derive their right to reside directly from

Article 18 EC. The wording of the second part of Article 18(1) EC forms the basis for that.

116. The referring tribunal directs its question to the particular situation of workers. Mr Baumbast is no longer a worker in the sense that he can no longer rely on Article 39 EC. It would be possible for his right to reside to be based on Directive 90/364 which makes provision for persons who are not or are no longer active. However, he does not satisfy the requirements to be met under Directive 90/364 for entitlement to a right to reside. He is compulsorily insured in Germany for sickness costs and thus does not have sickness insurance covering all risks in the host Member State, as required by the directive. On that view of the matter his right to remain would be refused since he does not satisfy one of the criteria of Directive 90/364.

117. However, there is a more important reason why Mr Baumbast has no right to reside under Directive 90/364. For he continues to be active as an employed person; only he is no longer employed in the United Kingdom. For those reasons it is logical that the rules concerning economically active persons be applied by analogy, and not those concerning non-economically active persons.

118. The requirement of sickness insurance in the host Member State does not apply to economically active persons. The reason for that requirement is to prevent migrant citizens of the European Union from becoming an unreasonable burden on the public finances of the host Member State. [57] That risk does not arise in the case of economically active persons since they may be deemed to have sufficient resources for subsistence from their economic activities. There is thus no ground for refusing Mr Baumbast a right of residence on the ground that he is not covered by sickness insurance in the host Member State.

119. The Court must therefore assess whether Mr Baumbast can derive a right of residence from Article 18 EC by application by analogy of the rules for economically active persons, in particular Article 39 EC and Regulation No 1612/68.

120. The reason why Mr Baumbast cannot derive any rights from Article 39 EC and Regulation No 1612/68 has to do with the fact that the rules on freedom of movement for persons have not kept up with the pace of developments. Those rules came into force at the end of the 1960s and have since then not been brought up to date to reflect changes in society. I discussed this situation in some detail above (point 22 et seq.). On

57 — See the fourth recital in the preamble to the directive.

adoption of the regulation manifestly no account was taken of a case in which a person is ordinarily resident in one Member State whilst working for short periods and in different places for an undertaking which is established in another Member State.

121. This is a case which was not provided for by the Community legislature. There is no regulatory framework within which the right to remain may be exercised. On those grounds I apply by analogy the regulatory framework applicable to economically active persons. Save for the circumstance not provided for by the Community legislature that Mr Baumbast is not employed in the host country, he satisfies all the other requirements for residence in the United Kingdom; he is the national of a Member State of the European Union, he is a worker, he is resident in another Member state of the European Union (United Kingdom) and his family has a right to remain under Regulation No 1612/68.

122. I therefore also conclude that Mr Baumbast has a right to remain in the United Kingdom based on Article 18 EC in conjunction with Article 39 EC.

123. In paragraphs (b) and (c) of its third question the referring tribunal also raises the question of the rights of members of Mr Baumbast's family. In my view the reply to be given in this regard can be brief. The right of residence to which Mr Baumbast is entitled under Article 18 EC also operates in favour of his spouse and their children. However, in the present case, that finding is of no significance to them since in my view they already have a right to remain under Regulation No 1612/68.

124. Finally, I refer to the right to respect for family life which is enshrined in Article 8 of the ECHR. [58] Community legislation on rights of residence, and in particular Regulation No 1612/68, adequately observes Article 8 of the ECHR since the worker's right of residence is also applicable to members of his family. Applied to the Baumbast case, that would not be otherwise if the Court were to form the view that under Community law Mr Baumbast has no right to remain in the United Kingdom.

58 — And also in the non-binding Charter on the Fundamental Rights of the European Union; see point 59 above.

125. I have said that, under certain specific conditions, Regulation No 1612/68 gives the parent carer the right to remain in the host Member State for the purpose of the children's education. In my view it would be going too far to infer such a right in favour of the parent who is not the primary carer. Nor can such a right be subsumed under the right to respect for family life, as safeguarded under Community law. There are real alternatives available to the Baumbast family in order to be able to live in a family relationship, for example by the family following the father in his various occupational activities or by establishing itself in Germany. I refer in that connection to case-law of the European Court of Human Rights to the effect that Article 8 of the ECHR cannot be considered to impose on a State a general obligation to respect immigrants' choice of the country of their matrimonial residence and to authorise family reunion in its territory.

126. I would summarise the foregoing as follows. Article 18(1) EC gives the citizen the right to move and reside freely within the European Union. The extent of that right is determined by the conditions and limitations laid down by or pursuant to the EC Treaty. However, those conditions and limitations may not result in the citizen's right being robbed of substantive content. The effect of the unambiguous nature of Article 18(1) EC can be that in special cases, such as that of Mr Baumbast, in which a right to move and reside does not exist under other provisions of Community law, a right to move and to reside is derived directly from Article 18(1) EC. The extent of Mr Baumbast's right is determined by application by analogy of the conditions and limitations imposed on freedom of movement for workers.

The fourth question

127. I am of the view that there is no need to give a reply to the fourth question. If the Court should share my conclusion concerning the third question, namely that Mr Baumbast has a right of residence as a citizen of the European Union, the fourth question does not arise. If however the Court should take the opposite view in its reply to the third question, a reply to the fourth question merely constitutes a repetition of the replies to the first and second questions.

IX — Conclusion

128. In light of the foregoing considerations I propose that the Court should reply as follows to the referring tribunal's questions:

On the first question: children who under Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community have installed themselves in a host Member State, as a result of the fact that one of their parents was employed in that Member State, retain under Article 12 of that regulation the right to continue in the host Member State education already commenced there and to remain for that purpose in that Member State. As long as one of the parents is employed as a worker their right to remain is at the same time founded on Article 10 of the regulation, even where the parents are divorced and the children do not live under the same roof as the parent/worker.

On the second question: In a situation such as that described in the reply to the first question where children have a right to remain for the purpose of continuing their education, the parent carer also has a right to remain if that is necessary for the exercise by the children of their rights.

On the third question: Article 18(1) EC gives the citizen the right to move and reside within the European Union. The extent of that right is determined by the

conditions and limitations laid down by or pursuant to the EC Treaty. However, those conditions and limitations may not result in the citizen's right being robbed of substantive content. The effect of the unambiguous nature of Article 18(1) EC can be that in special cases, such as that of Mr Baumbast, in which a right to move and reside does not exist under other provisions of Community law, a right to move and to reside is derived directly from Article 18(1) EC. The extent of Mr Baumbast's right is determined by application by analogy of the conditions and limitations imposed on freedom of movement for workers.

On the fourth question: there is no need to reply to this question.