JUDGMENT OF THE COURT

23 September 2003 *

In Case C-109/01,

REFERENCE to the Court under Article 234 EC by the Immigration Appeal Tribunal (United Kingdom) for a preliminary ruling in the proceedings pending before that court between

Secretary of State for the Home Department

and

Hacene Akrich,

on the interpretation of Community law on freedom of movement for persons and the right to remain of a national of a non-Member State who is the spouse of the national of a Member State,

* Language of the case: English.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P.- Puissochet, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), D.A.O. Edward, A. La Pergola, P. Jann, F. Macken, N. Colneric (Rapporteur) and S. von Bahr, Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Akrich, by T. Eicke, Barrister, instructed by D. Flynn, of the Joint Council for the Welfare of Immigrants and D. Betts, Solicitor,

— the United Kingdom Government, by J.E. Collins, acting as Agent, and E. Sharpston QC and T.R. Tam, Barrister,

— the Greek Government, by I. Galani-Maragkoudaki and S. Vodina, acting as Agents,

— the Commission of the European Communities, by C. O'Reilly, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr H. Akrich, represented by T. Eicke, the United Kingdom Government, represented by J.E. Collins, and by E. Sharpston QC, and the Greek Government, represented by I. Galani-Maragkoudaki and E.-M. Mamouna, acting as Agents, and the Commission, represented by C. O'Reilly, at the hearing on 5 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2003,

gives the following

Judgment

1 By order of 3 October 2000, which was received at the Court on 7 March 2001, the Immigration Appeal Tribunal referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Community law concerning freedom of movement for persons and the right to remain of a national of a non-Member State who is the spouse of a national of a Member State.

2 Those questions were raised in the course of proceedings between the Secretary of State for the Home Department ('the Secretary of State') and Mr Akrich, a Morrocan national concerning his right to enter and remain in the United Kingdom.

Legislation

Community law

3 Article 39(1) to (3) EC is worded as follows:

'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:

...

(b) to move freely within the territory of Member States for this purpose.

...'

4 Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117) provides in Articles 1, 2 and 3(1) and (2) thereof:

'Article 1

1. The provisions of this Directive shall apply to any national of a Member State who resides in or travels to another Member State of the Community, either in order to pursue an activity as an employed or self-employed person, or as a recipient of services.

2. These provisions shall apply also to the spouse and to members of the family who come within the provisions of the regulations and directives adopted in this field in pursuance of the Treaty.

Article 2

1. This Directive relates to all measures concerning entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken by Member States on grounds of public policy, public security or public health.

2. Such grounds shall not be invoked to service economic ends.

Article 3

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

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

5 Article 10(1) and (3) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ English Special Edition 1968(II), p. 475) provides:

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

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

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

...

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.'

6 At the same time as Regulation No 1612/68, the Community legislature adopted Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ English Special Edition 1968(II), p. 485). According to the first recital in the preamble thereto, that directive contemplates the adoption of measures which conform to the rights and privileges accorded by Regulation No 1612/68 to nationals of any Member State who move in order to pursue activities as employed persons and to members of their families. Under the terms of the second recital, the rules applicable to residence should, as far as possible, bring the position of workers from other Member States and members of their families into line with that of nationals.

7 Under Article 1 of Directive 68/360:

'Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of nationals of the said States and of members of their families to whom Regulation (EEC) No 1612/68 applies.'

8 Article 3 of Directive 68/360 is worded as follows:

'1. Member States shall allow the persons referred to in Article 1 to enter their territory simply on production of a valid identity card or passport.

2. No entry visa or equivalent document may be demanded save from members of the family who are not nationals of a Member State. Member States shall accord to such persons every facility for obtaining any necessary visas.'

9 Article 4 of Directive 63/360 provides:

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

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

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

— by the worker:

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

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

— by the members of the worker's family:

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

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

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

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

10 Self-employed persons and members of their families are covered by Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

National law

General

11 The immigration law of the United Kingdom is principally set out in the Immigration Act 1971 and the Immigration Rules (House of Commons Paper 395), enacted in 1994 by the United Kingdom Parliament and subsequently amended on several occasions ('the Immigration Rules').

12 Under sections 1(2) and 3(1) of the Immigration Act 1971, a person who is not a British citizen may not normally enter or stay in the United Kingdom unless he is granted permission to do so. Such permission is known as 'leave to enter' and 'leave to remain' respectively.

13 Under Rule 24 of the Immigration Rules a prior 'entry clearance' must be obtained before arrival in the United Kingdom by the nationals of certain countries including Morocco. Entry clearance is similar to a visa. For persons required to obtain a visa, entry clearance is in the form of a visa.

14 Under section 7(1) of the Immigration Act 1988, leave to enter or remain in the United Kingdom is not required by a person entitled to do so by virtue of a directly 'enforceable Community right'.

Discretionary power of the Secretary of State

15 The Secretary of State has a discretionary power to allow persons to be admitted to the United Kingdom or to remain, even if they do not satisfy the specific provisions of the Immigration Rules.

Deportation

16 Under sections 3(5) and 3(6) of the Immigration Act 1971, a person who is not a British citizen may be liable to deportation in certain circumstances, including where he is convicted of an offence punishable by imprisonment and a criminal court has recommended his deportation.

17 Once a deportation order is signed by the Secretary of State, it has the effect, by virtue of section 5(1) of the Immigration Act 1971, of requiring the person concerned to leave the United Kingdom and of prohibiting him from entering the United Kingdom, and of invalidating any leave to enter or leave to remain granted to him, whether it was granted before or after signature of the order. Deportation orders provide for means of removal of persons from the United Kingdom.

18 A person who applies for leave to enter the United Kingdom whilst a deportation order is in force against him must be refused leave to enter (Rule 320(2) of the Immigration Rules), even if he might otherwise qualify for leave to enter in some capacity. A person who enters the United Kingdom when a deportation order is in force against him is an illegal entrant (section 33(1) of the Immigration Act 1971) and is liable to be removed from the United Kingdom as an illegal entrant under section 4(2)(c) of the Immigration Act 1971 and paragraph 9 of Schedule 2 thereto.

19 Deportation orders are of indefinite duration. However, under section 5(2) of the Immigration Act 1971, the Secretary of State may revoke a deportation order at any time. Under Rule 390 of the Immigration Rules any application for revocation of a deportation order must be considered in light of all the circumstances, including the grounds on which the deportation order was made, any representations made in support of revocation, the interests of the community including the maintenance of an effective immigration control, and the interests of the applicant including any compassionate circumstances. Marital and family circumstances are normally considered under the heading of compassionate circumstances.

20 Rule 391 of the Immigration Rules provides that a deportation order will not normally be revoked unless there has been a material change of circumstances, or if the passage of time warrants revocation. However, save in the most exceptional

circumstances, a deportation order will not be revoked unless the person has been absent from the United Kingdom for a period of at least three years since the order was made.

21 Rule 392 of the Immigration Rules makes it clear that revocation of a deportation order does not itself entitle the person to enter the United Kingdom. It simply makes it possible for him to apply to enter the United Kingdom in accordance with the Immigration Rules or other provisions of the immigration law.

Marriage to a British citizen or a national of the European Economic Area (EEA)

22 A person who requires leave to enter the United Kingdom may apply for leave to enter on the basis of marriage to a person, including a national of the United Kingdom, who is present and settled in the United Kingdom. The requirements for the grant of such leave are set out in Rule 281 of the Immigration Rules. Under subparagraph (vi) thereof the applicant must hold a valid United Kingdom entry clearance for entry in the capacity of a spouse.

23 A person who satisfies all the requirements set out in Rule 281 of the Immigration Rules may be issued with an entry clearance and, if that entry clearance is granted, may then apply for leave to enter on arrival at a port of entry. Rule 282 of the Immigration Rules provides that a person seeking leave to enter the United

Kingdom in this capacity may be admitted to the United Kingdom by an initial grant of leave to enter for a period of up to 12 months if he holds such an entry clearance.

24 However, pursuant to Rules 320(2) and 321(3) of the Immigration Rules, if a person against whom a deportation order is in force applies to enter the United Kingdom in his capacity as a spouse, he must be refused leave to enter and/or entry clearance, even if he might otherwise satisfy the requirements for entry in this capacity. Such a person must secure the revocation of his deportation order before he will be granted either entry clearance or leave to enter the United Kingdom. He may apply for revocation of the deportation order either prior to or at the same time as his application for entry clearance.

25 United Kingdom immigration law did not initially make specific provision for the situation considered by the Court in Case C-370/90 *Singh* [1992] ECR I-4265, namely the admission to the United Kingdom of a person who would normally require leave to enter the United Kingdom, and who wishes to enter the United Kingdom as the spouse of a United Kingdom national returning or wishing to return to the United Kingdom after exercising Treaty rights as a worker in another Member State.

26 However, in light of the judgment in *Singh*, cited above, such a person enjoys an 'enforceable Community right' within the meaning of section 7(1) of the Immigration Act 1988 and of section 2 of the European Communities Act 1972 and, in that capacity, was not required to obtain leave to enter the United Kingdom.

27 In practice, where such a person is a person required to obtain prior entry clearance, he or she requires such clearance for entry into the United Kingdom. Such an entry clearance will normally be granted to such a person, but may be refused on grounds of public policy, public security or public health. If such an entry clearance is granted, then on arrival in the United Kingdom the person is entitled to be admitted and to remain in the United Kingdom, on the same basis as the family member of a non-UK EEA national (Article 3(2) and (3) of the Immigration (European Economic Area) Order 1994).

28 Under Regulation 11(1) of the EEA Regulations 2000, those regulations apply to a family member of a United Kingdom national as if he were the family member of an EEA national if the conditions laid down in Regulation 11(2) are met, namely that:

(a) after leaving the United Kingdom, the United Kingdom national resided in an EEA State and:

(i) was employed there (other than on a transient or casual basis); or

(ii) established himself there as a self-employed person;

(b) the United Kingdom national did not leave the United Kingdom in order to enable his family member to acquire rights under those regulations and thereby to evade the application of United Kingdom immigration law;

(c) on his return to the United Kingdom, the United Kingdom national would, if he were an EEA national, be a qualified person; and

(d) if the family member of the United Kingdom national is the spouse of the United Kingdom national, the marriage took place, and the parties lived together in an EEA State, before the United Kingdom national returned to the United Kingdom.

The dispute in the main proceedings

29 In February 1989, Mr Akrich, a Moroccan citizen born in 1967, was granted leave to enter the United Kingdom on a one month's tourist visa. His application for leave to remain as a student was refused in July 1989 and his subsequent appeal was dismissed in August 1990.

30 In June 1990, he was convicted of attempted theft and use of a stolen identity card. On the basis of a deportation order by the Secretary of State, he was deported to Algeria on 2 January 1991.

31 In January 1992, he returned to the United Kingdom by using a false French identity card. He was arrested and again deported in June 1992. He clandestinely returned to the United Kingdom, having remained outside the United Kingdom for less than a month.

32 On 8 June 1996, whilst he was residing unlawfully in the United Kingdom, he married Mrs Helina Jazdzewska, a British citizen, and, at the end of that month, he applied for leave to remain as the spouse of a British citizen.

33 Mr Akrich was detained under the Immigration Act 1971 at the beginning of 1997 and deported in August 1997, in accordance with his wishes, to Dublin (Ireland) where his spouse had been established since June 1997.

34 In January 1998, Mr Akrich applied for revocation of the deportation order and, the following month, for entry clearance as the spouse of a person settled in the United Kingdom.

35 At the time of that application, Mr and Mrs Akrich were interviewed by a British official at the embassy in Dublin about their stay in Ireland and their intentions. It appeared, first, that Mr Akrich's wife had worked in Dublin since August 1997, and full-time in a bank since January 1998, initially being asked to work until May or June 1998 but with the possibility of an extension. Mr Akrich himself worked as a catering assistant through an agency, doing whatever work was available. Mrs Akrich's brother made an offer of accommodation for them in the United Kingdom if they returned and Mrs Akrich was offered employment in the United Kingdom commencing in August 1998.

36 Second, it appears from those interviews that Mr and Mrs Akrich were applying for entry clearance on the basis of the decision of the Court in *Singh*. Thus, in reply to one question, Mrs Akrich said that they intended to return to the United Kingdom 'because we had heard about EU rights, staying six months and then

going back to the UK'. She said that she had been given that information by 'solicitors and others in same situation'.

37 On 21 September 1998, the Secretary of State refused to revoke the deportation order. On the instructions of the Secretary of State the application for entry clearance on the basis of *Singh* was also refused, on 29 September 1998. The Secretary of State considered that Mr and Mrs Akrich's move to Ireland was no more than a temporary absence deliberately designed to manufacture a right of residence for Mr Akrich on his return to the United Kingdom and thereby to evade the provisions of the United Kingdom's national legislation, and that Mrs Akrich had not been genuinely exercising rights under the EC Treaty as a worker in another Member State.

38 In October 1998, Mr Akrich appealed against those two decisions to an Immigration Adjudicator (United Kingdom), who allowed the appeal in November 1999.

39 Having found as a fact, *inter alia*, that Mr and Mrs Akrich had moved to Ireland for the express purpose of subsequently exercising Community rights to enable them to return to the United Kingdom, the Immigration Adjudicator nevertheless concluded that, as a matter of law, there had been an effective exercise by Mrs Akrich of Community rights which had not been tainted by the intentions of the spouses, and that they had therefore not relied on Community law to evade the provisions of the United Kingdom's national legislation. He also found that Mr Akrich did not constitute such a genuine and sufficiently serious threat to public policy as to justify the continuation of the deportation order.

40 The Secretary of State appealed to the Immigration Appeal Tribunal against that determination.

Order for reference and questions referred

41 In its order for reference the Immigration Appeal Tribunal pointed out that, at paragraph 24 of the *Singh* judgment, cited above, the Court had formulated a proviso in the following terms:

'As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held..., the facilities created by the Treaty cannot have the effect of allowing persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking measures necessary to prevent such abuse.'

42 The Immigration Appeal Tribunal questions whether, in accepting Mr Akrich's submission that any measure taken to prevent abuse by a Member State must be compatible with EC law, the Immigration Adjudicator applied the proviso correctly.

43 The Secretary of State takes the view that the proviso must be taken into account at both stages of Mr Akrich's argument, so that it is not possible to determine whether Mr and Mrs Akrich are entitled to the rights conferred on 'workers', or the scope of the 'public policy' exemption permitting the exclusion of the spouse of a 'worker' from a Member State, without giving due weight to the fact that the

purpose of the putative exercise of Community law rights was precisely to avoid the ordinary operation of United Kingdom immigration law.

44 The referring tribunal considered that this was a matter not clearly resolved by the *Singh* judgment and that it was therefore appropriate for the Court to be asked to give further guidance on the issue.

45 In light of those considerations the Immigration Appeal Tribunal decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'Where a national of a Member State is married to a third-country national who does not qualify under national legislation to enter or reside in that Member State, and moves to another Member State with the non-national spouse, intending to exercise Community law rights by working there for only a limited period of time in order thereafter to claim the benefit of Community law rights when returning to the Member State of nationality together with the non-national spouse:

(1) is the Member State of nationality entitled to regard the intention of the couple, when moving to the other Member State, to claim the benefit of Community law rights when returning to the Member State of nationality, notwithstanding the non-national spouse's lack of qualification under national legislation, as a reliance on Community law in order to evade the application of national legislation; and

(2) if so, is the Member State of nationality entitled to refuse:

(a) to revoke any preliminary obstacle to the entry of the non-national spouse into that Member State (on the facts of this case an outstanding deportation order); and

(b) to accord the non-national spouse a right of entry into its territory?'

The questions referred

46 By its questions, which it is appropriate to examine together, the referring tribunal is essentially seeking to ascertain the scope of the judgment in *Singh* in regard to a situation such as that at issue in the main proceedings.

47 In that judgment the Court held that Article 52 of the EEC Treaty (which became Article 52 of the EC Treaty and is now, after amendment, Article 43 EC) and Council Directive 73/148 must be interpreted as requiring a Member State to grant leave to enter and remain in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the EEC Treaty (which became Article 48 of the EC Treaty and is now, after amendment, Article 39 EC) and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the State of which he or she is a national. Under the operative part of that judgment, the spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and remained in another Member State.

48 The same consequences flow from Article 39 EC if the national of the Member State concerned envisages a return to that Member State in order to work there as an employed person. Consequently, where the spouse is a national of a non-Member State he must enjoy at least the same rights as would be granted to him by Article 10 of Regulation No 1612/68 if his or her spouse entered and resided in another Member State.

49 However, Regulation No 1612/68 covers only freedom of movement within the Community. It is silent as to the rights of a national of a non-Member State, who is the spouse of a citizen of the Union, in regard to access to the territory of the Community.

50 In order to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.

51 That interpretation is consistent with the structure of the Community provisions seeking to secure freedom of movement for workers within the Community, whose exercise must not penalise the migrant worker and his family.

52 Where a citizen of the Union, established in a Member State and married to a national of a non-Member State with a right to remain in that Member State, moves to another Member State in order to work there as an employed person,

that move must not result in the loss of the opportunity lawfully to live together, which is the reason why Article 10 of Regulation No 1612/68 confers on such spouse the right to install himself in that other Member State.

53 Conversely, where a citizen of the Union, established in a Member State and married to a national of a non-Member State without the right to remain in that Member State, moves to another Member State in order to work there as an employed person, the fact that that person's spouse has no right under Article 10 of Regulation No 1612/68 to install himself with that person in the other Member State cannot constitute less favourable treatment than that which they enjoyed before the citizen made use of the opportunities afforded by the Treaty as regards movement of persons. Accordingly, the absence of such a right is not such as to deter the citizen of the Union from exercising the rights in regard to freedom of movement conferred by Article 39 EC.

54 The same applies where a citizen of the Union married to a national of a non-Member State returns to the Member State of which he or she is a national in order to work there as an employed person. If the citizen's spouse has a valid right to remain in another Member State, Article 10 of Regulation No 1612/68 applies so that the citizen of the Union is not deterred from exercising his or her right to freedom of movement on returning to the Member State of which he or she is a national. If, conversely, that citizen's spouse does not already have a valid right to remain in another Member State, the absence of any right of the spouse under Article 10 aforesaid to install himself or herself with the citizen of the Union does not have a dissuasive effect in that regard.

55 As regards the question of abuse mentioned at paragraph 24 of the *Singh* judgment, cited above, it should be mentioned that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an effective and genuine activity (Case 53/81 *Levin* [1982] ECR 1035, paragraph 23).

56 Nor are such motives relevant in assessing the legal situation of the couple at the time of their return to the Member State of which the worker is a national. Such conduct cannot constitute an abuse within the meaning of paragraph 24 of the *Singh* judgment even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national.

57 Conversely, there would be an abuse if the facilities afforded by Community law in favour of migrant workers and their spouses were invoked in the context of marriages of convenience entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.

58 That said, where the marriage is genuine and where, on the return of the citizen of the Union to the Member State of which he is a national, his spouse, who is a national of a non-Member State and with whom he was living in the Member State which he is leaving, is not lawfully resident on the territory of a Member State, regard must be had to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter 'the Convention'). That right is among the fundamental rights which, according to the Court's settled case-law, restated by the preamble to the Single European Act and by Article 6(2) EU, are protected in the Community legal order.

59 Even though the Convention does not as such guarantee the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of paragraph 2 of that article, that is unless it is in accordance with

the law, motivated by one or more of the legitimate aims under that paragraph and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42).

60 The limits of what is 'necessary in a democratic society' where the spouse has committed an offence have been highlighted by the European Court of Human Rights in *Boultif* v *Switzerland*, judgment of 2 August 2001, *Reports of Judgments and Decisions* 2001-IX §§ 46 to 56, and *Amrollahi* v *Denmark*, judgment of 11 July 2002, not yet published in the Reports of Judgments and Decisions, §§ 33 to 44.

61 In light of all the foregoing considerations, the reply to the questions raised should be that:

— In order to be able to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68, a national of a non-Member State married to a citizen of the Union must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.

— Article 10 of Regulation No 1612/68 is not applicable where the national of a Member State and the national of a non-Member State have entered into a marriage of convenience in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.

— Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State.

— Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation No 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the Convention, provided that the marriage is genuine.

Costs

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

On those grounds,

THE COURT,

in answer to the questions referred to it by the Immigration Appeal Tribunal by order of 3 October 2000, hereby rules:

1. In order to be able to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, a national of a non-Member State married to a citizen of the Union must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.

2. Article 10 of Regulation No 1612/68 is not applicable where the national of a Member State and the national of a non-Member State have entered into a marriage of convenience in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.

3. Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of

which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State.

4. Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation No 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, provided that the marriage is genuine.

Rodríguez Iglesias Puissochet Wathelet

Schintgen Timmermans Edward

La Pergola Jann Macken

Colneric von Bahr

Delivered in open court in Luxembourg on 23 September 2003.

R. Grass G. C. Rodríguez Iglesias

Registrar President