JUDGMENT OF THE COURT

11 July 2002 *

In Case C-60/00,

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

Mary Carpenter

and

Secretary of State for the Home Department,

on the interpretation of Article 49 EC and 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),

* Language of the case: English.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, N. Colneric and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, J.-P. Puissochet, M. Wathelet, R. Schintgen and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: C. Stix-Hackl,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mrs Carpenter, by J. Walsh, Barrister, instructed by J. Wyman, Solicitor,

— the United Kingdom Government, by G. Amodeo, acting as Agent, and by D. Wyatt QC,

— the Commission of the European Communities, by N. Yerrell, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Carpenter, represented by J. Walsh, of the United Kingdom Government, represented by R. Magrill, acting as Agent, and by D. Wyatt QC, and of the Commission, represented by N. Yerrell and H. Michard, acting as Agent, at the hearing on 29 May 2001,

after hearing the Opinion of the Advocate General at the sitting on 13 September 2001,

gives the following

Judgment

1 By order of 16 December 1999, received at the Court on 21 February 2000, the Immigration Appeal Tribunal referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 49 EC and 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, hereinafter 'the Directive').

2 The question was raised in proceedings between Mrs Carpenter, a national of the Philippines, and the Secretary of State for the Home Department (hereinafter 'the Secretary of State') concerning her right to reside in the United Kingdom.

Legislative framework

Community legislation

3 The first paragraph of Article 49 EC provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

4 The first recital of the preamble to the Directive states as follows:

'Whereas freedom of movement of persons as provided for in the Treaty and the General Programmes for the abolition of restrictions on freedom of establishment and on freedom to provide services entails the abolition of restrictions on movement and residence within the Community for nationals of Member States wishing to establish themselves or to provide services within the territory of another Member State'.

5 Article 1(1) of the Directive provides:

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

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

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

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

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

6 The first subparagraph of Article 4(2) of the Directive provides:

'The right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.'

United Kingdom legislation

7 In terms of the Immigration Act 1971 and the 1994 United Kingdom Immigration Rules (House of Commons Paper 395, hereinafter 'the Immigration Rules'), a person who is not a British citizen may not, as a general rule, enter or remain in the United Kingdom unless he has obtained permission to do so. Such permission is called respectively 'leave to enter' and 'leave to remain'.

8 Section 7(1) of the Immigration Act 1988 provides:

'A person shall not under the [Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.'

9 Paragraph 281 of the Immigration Rules lists the requirements for leave to enter the United Kingdom as the spouse of a person present and settled in the United Kingdom. Paragraph 281(vi) states that the applicant must hold a valid United Kingdom entry clearance for entry as a spouse. However, a person present in the United Kingdom with leave to enter or remain in another capacity may switch into the spouse category if he or she satisfies the requirements of paragraph 284 of the Immigration Rules.

10 Paragraph 284 of the Immigration Rules lays down the requirements for an extension of stay in the United Kingdom as the spouse of a person present and settled in the United Kingdom. Paragraph 284(i) provides that the applicant must have limited leave to remain in the United Kingdom (this would include leave to enter) and Paragraph 284(iv) states that the applicant must not have remained in breach of the immigration laws.

11 Section 3(5)(a) of the Immigration Act 1971 lays down the general rules relating to deportation from the United Kingdom. It provides:

'A person who is not a British Citizen shall be liable to deportation from the United Kingdom —

(a) if, having only a limited leave to enter or remain, he does not observe a condition attached to the leave or remains beyond the time limited by the leave...'.

12 As regards, more particularly, the deportation of spouses of UK nationals, the Secretary of State is required, under paragraph 364 of the Immigration Rules, to consider the particular circumstances of each case before deciding whether or not to order deportation. However, a published policy concession, DP 3/96, sets out the circumstances in which the Secretary of State will normally grant leave to remain to spouses who are liable to deportation or who are in the United Kingdom illegally. Paragraph 5 of the concession states that, as a general rule, deportation action should not normally be initiated where the person concerned

has a genuine and subsisting marriage with someone settled in the United Kingdom and the couple have lived together in the United Kingdom continuously since their marriage for at least two years before the commencement of enforcement action, and it is unreasonable to expect the settled spouse to accompany his/her spouse on removal.

The dispute in the main proceedings

13 Mrs Carpenter, a national of the Philippines, was given leave to enter the United Kingdom as a visitor on 18 September 1994 for six months. She overstayed that leave and failed to apply for any extension of her stay. On 22 May 1996 she married Peter Carpenter, a United Kingdom national.

14 It appears from the order for reference that Mr Carpenter runs a business selling advertising space in medical and scientific journals and offering various administrative and publishing services to the editors of those journals. The business is established in the UK, where the publishers of the journals for which he sells advertising space are based. A significant proportion of the business is conducted with advertisers established in other Member States of the European Community. Mr Carpenter travels to other Member States for the purpose of his business.

15 On 15 July 1996 Mrs Carpenter applied to the Secretary of State for leave to remain in the UK as the spouse of a national of that Member State. Her application was refused by a decision of the Secretary of State of 21 July 1997.

16 The Secretary of State also decided to make a deportation order against Mrs Carpenter removing her to the Philippines. Under that decision it is open to Mrs Carpenter to leave the United Kingdom voluntarily. If she does not do so, the Secretary of State will sign the deportation order and Mrs Carpenter will have to obtain its revocation before she can seek leave to enter the United Kingdom as the spouse of a UK citizen.

17 Mrs Carpenter appealed against the decision to make a deportation order to an Immigration Adjudicator (United Kingdom), arguing that the Secretary of State was not entitled to deport her because she was entitled to a right to remain in the United Kingdom under Community law. She maintained that since her husband's business required him to travel around in other Member States, providing and receiving services, he could do so more easily as she was looking after his children from his first marriage, so that her deportation would restrict her husband's right to provide and receive services.

18 The Immigration Adjudicator was satisfied that Mrs Carpenter's marriage was genuine and that she played an important part in the upbringing of her stepchildren. He also accepted that she could be indirectly responsible for the increased success of her husband's business and that her husband was a provider of services for the purposes of Community law. According to the Immigration Adjudicator, Mr Carpenter has the right to travel to other Member States to provide services and to be accompanied for that purpose by his spouse. However, while he is resident in the United Kingdom, he cannot be considered to be exercising any freedom of movement within the meaning of Community law. The Immigration Adjudicator therefore dismissed Mrs Carpenter's appeal by decision of 10 June 1998.

19 On Mrs Carpenter's appeal to the Immigration Appeal Tribunal, it considered that the issue of Community law raised by the proceedings before it was whether it was contrary to Community law and, in particular, Article 49 EC and/or the Directive, for the Secretary of State to refuse to grant a right of residence to, and

to decide to deport Mrs Carpenter where, first, Mr Carpenter was exercising his freedom to provide services in other Member States, and second, the childcare and homemaking performed by Mrs Carpenter might indirectly assist and facilitate Mr Carpenter's exercise of his rights under Article 49 EC, by providing him with economic assistance which permitted him to spend greater time on his business.

20 Since it considered that the case turned on the interpretation of Community law, the Immigration Appeal Tribunal decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'In circumstances where:

(a) a national of a Member State, who is established in that Member State and who provides services to persons in other Member States; and

(b) has a spouse who is not a national of a Member State;

can the non-national spouse rely on

(i) Article 49 EC and/or

(ii) 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,

to provide the non-national spouse with the right to reside with his or her spouse in his or her spouse's Member State of origin?

Is the answer to the question referred different if the non-national spouse indirectly assists the national of a Member State in carrying on the provision of services in other Member States by carrying out childcare?'

The question referred

Observations submitted to the Court

21 Mrs Carpenter admits that she has no right of her own to reside in any Member State but claims that her rights derive from those enjoyed by Mr Carpenter to provide services and to travel within the European Union. Her husband is entitled to carry on his business throughout the internal market without being subjected to unlawful restrictions. Her deportation would require Mr Carpenter to go to live with her in the Philippines or separate the members of the family unit if he remained in the United Kingdom. In both cases Mr Carpenter's business would be

affected. Moreover it cannot be maintained that the restriction on the freedom to provide services, to which Mr Carpenter would be subjected if his spouse was deported, would be a purely internal matter, since he provides services throughout the internal market.

22 According to the United Kingdom Government the provisions of the Directive mean, for example, that a UK national wishing to provide services in another Member State is entitled to reside in that State for the period during which the services are provided, and that his or her spouse would be entitled to reside there for the same period. Those provisions do not, however, give any right of residence in the United Kingdom to UK nationals, who have such a right in any event under United Kingdom law, or to their spouses. The Court has confirmed that interpretation in its judgment in Case C-370/90 *Singh* [1992] ECR I-4265, paragraphs 17 and 18.

23 The United Kingdom Government points out that, in its judgment in Case C-107/94 *Asscher* [1996] ECR I-3089, the Court considered the question whether a national of a Member State pursuing an activity as a self-employed person in another Member State, in which he resides, may rely on Article 52 of the EC Treaty (now, after amendment, Article 43 EC) against his Member State of origin, on whose territory he pursues another activity as a self-employed person. The Court held, at paragraph 32 of that judgment, that, although the provisions of the Treaty relating to freedom of establishment cannot be applied to situations which are purely internal to a Member State, the scope of Article 52 of the Treaty nevertheless cannot be interpreted in such a way as to exclude a given Member State's own nationals from the benefit of Community law where by reason of their conduct they are, with regard to their Member State of origin, in a situation which may be regarded as equivalent to that of any other person enjoying the rights and liberties guaranteed by the Treaty.

24 However, since Mr Carpenter has not exercised his right to freedom of movement, his spouse cannot rely on *Singh* or *Asscher*, cited above. Therefore, a person in Mrs Carpenter's position is not entitled to derive from Community law any right to enter or remain in the United Kingdom.

25 According to the Commission, the situation of Mrs Carpenter must be clearly distinguished from that of a spouse of a national of a Member State who has exercised his right to freedom of movement and has left his Member State of origin and moved to another Member State in order to become established or to work there.

26 In that case the spouse, whatever his or her nationality, would undoubtedly be covered by Community law, and would be entitled to establish himself or herself, with the Community national in the host Member State, since otherwise that national might be deterred from exercising his or her right to freedom of movement. Also, as the Court held at paragraph 23 of its judgment in *Singh*, cited above, when that Community national returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law, if his or her spouse chose to enter and reside in another Member State.

27 On the other hand, the principle expressed in paragraph 23 of the judgment in *Singh*, cited above, cannot be applied to a situation such as that in issue in the main proceedings, in which a national of a Member State has never sought to establish himself with his spouse in another Member State but merely provides services from his State of origin. The Commission submits that such a situation is rather to be classified as an internal situation within the meaning of the judgment in Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, so that Mrs Carpenter's right to remain in the United Kingdom, if it exists, depends exclusively on United Kingdom law.

Findings of the Court

28 It is to be noted, at the outset, that the provisions of the Treaty relating to the freedom to provide services, and the rules adopted for their implementation, are

not applicable to situations which do not present any link to any of the situations envisaged by Community law (see, to that effect, among others, Case C-97/98 *Jägerskiöld* [1999] ECR I-7319, paragraphs 42 to 45).

29 As is apparent from paragraph 14 of this judgment, a significant proportion of Mr Carpenter's business consists of providing services, for remuneration, to advertisers established in other Member States. Such services come within the meaning of 'services' in Article 49 EC both in so far as the provider travels for that purpose to the Member State of the recipient and in so far as he provides cross-border services without leaving the Member State in which he is established (see, in respect of 'cold-calling', Case C-384/93 *Alpine Investments* [1995] ECR I-1141, paragraphs 15 and 20 to 22).

30 Mr Carpenter is therefore availing himself of the right freely to provide services guaranteed by Article 49 EC. Moreover, as the Court has frequently held, that right may be relied on by a provider as against the State in which he is established if the services are provided for persons established in another Member State (see, among others, *Alpine Investments*, cited above, paragraph 30).

31 With regard to the right of establishment and the freedom to provide services, the Directive aims to abolish restrictions on the movement and residence of nationals of Member States within the Community.

32 It follows both from the objective of the Directive and the wording of Article 1(1)(a) and (b) thereof, that it applies to cases where nationals of Member States leave their Member State of origin and move to another Member State in order to establish themselves there, or to provide services in that State, or to receive services there.

33 That interpretation is borne out, in particular, by Article 2(1) of the Directive, whereby 'Member States shall grant the persons referred to in Article 1 the right to leave their territory'; Article 3(1), whereby 'Member States shall grant to the persons referred to in Article 1 the right to enter their territory merely on production of a valid identity card or passport'; Article 4(1), whereby '[e]ach Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory'; and Article 4(2) of the Directive, whereby, '[t]he right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided'.

34 It is true that Article 1(1)(c) of the Directive extends to the spouses of the Member States' nationals referred to in subparagraphs (a) and (b) of that article the right to enter and reside in another Member State, irrespective of their nationality. But, in so far as the Directive aims to facilitate the exercise by Member States' nationals of freedom of establishment and freedom to provide services, the rights were accorded to their spouses so that they can accompany them when they exercise, in the circumstances provided for by the Directive, the rights which they derive from the Treaty by moving to or residing in a Member State other than their Member State of origin.

35 Therefore, it follows from both its objectives and its content that the Directive governs the conditions under which a national of a Member State, and the other persons covered by Article 1(1)(c) and (d), may leave that national's Member State of origin and enter and reside in another Member State, for one of the purposes set out in Article 1(1)(a) and (b), for a period specified in Article 4(1) or (2).

36 Since the Directive does not govern the right of residence of members of the family of a provider of services in his Member State of origin, the answer to the

question referred to the Court therefore depends on whether, in circumstances such as those in the main proceedings, a right of residence in favour of the spouse may be inferred from the principles or other rules of Community law.

37 As has been held in paragraphs 29 and 30 of this judgment, Mr Carpenter is exercising the right freely to provide services guaranteed by Article 49 EC. The services provided by Mr Carpenter make up a significant proportion of his business, which is carried on both within his Member State of origin for the benefit of persons established in other Member States, and within those States.

38 In that context it should be remembered that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self-employed workers within the Community (see, for example, Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475); Articles 1 and 4 of 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), and Articles 1(1)(c) and 4 of the Directive).

39 It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse (see, to that effect, *Singh*, cited above, paragraph 23).

40 A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures (see, to that effect, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 43, and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 24).

41 The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter 'the Convention'), which 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 Community law.

42 Even though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, 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 (see, in particular, *Boultif* v *Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX).

43 A decision to deport Mrs Carpenter, taken in circumstances such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety.

44 Although, in the main proceedings, Mr Carpenter's spouse has infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her leave to remain as a visitor, her conduct, since her arrival in the United Kingdom in September 1994, has not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety. Moreover, it is clear that Mr and Mrs Carpenter's marriage, which was celebrated in the United Kingdom in 1996, is genuine and that Mrs Carpenter continues to lead a true family life there, in particular by looking after her husband's children from a previous marriage.

45 In those circumstances, the decision to deport Mrs Carpenter constitutes an infringement which is not proportionate to the objective pursued.

46 In view of all the foregoing, the answer to the question referred to the Court is that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

Costs

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

On those grounds,

THE COURT,

in answer to the question referred to it by the Immigration Appeal Tribunal by order of 16 December 1999, hereby rules:

Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

Rodríguez Iglesias	Colneric	von Bahr
Gulmann	Edward	Puissochet
Wathelet	Schintgen	Cunha Rodrigues

Delivered in open court in Luxembourg on 11 July 2002.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President