OPINION OF ADVOCATE GENERAL LÉGER

delivered on 30 March 2000 *

1. When Ms Yiadom, a Netherlands national of Ghanaian origin, arrived in the United Kingdom, she was granted temporary admission to the United Kingdom whilst her claim to enter was investigated by the competent national authorities.

2. After inquiries, the Secretary of State for the Home Department told her that, on grounds of public policy, she was refused leave to enter, in the legal sense of the term, the United Kingdom. Ms Yiadom is alleged, in the past, to have facilitated the illegal entry of other persons into the United Kingdom. He stated that she was likely to commit that type of offence again, which justified the decision to refuse her leave to enter.

3. The legal remedies which national law allows her to exercise include an 'out-country right of appeal', the particular feature of which is that it may be exercised only on condition that the person concerned is not in the country.

* Original language: French.

4. Ms Yiadom wishes to exercise that right of appeal, but challenges the validity of the requirement to which it is subject.

5. It is thus the right for a Community national to remain on the territory of a Member State in order to exercise a legal remedy in respect of a decision refusing him entry which is at the heart of the questions referred by the national court. We shall see, however, that the answer to those questions is, in large measure, determined by *the nature of the decision taken in respect of the person concerned* in the main proceedings.

I — The legislation applicable

Directive 64/221/EEC

6. The purpose of the Council Directive of 25 February 1964 is 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. [1]

7. The Directive relates to all measures concerning entry into their territory, issue or renewal of residence permits, or expulsion from their territory, taken on those grounds by Member States. [2]

8. One of the principal objectives of the Directive is '... in each Member State, [for] nationals of other Member States [to]... have adequate legal remedies available to them in respect of the decisions of the administration in such matters'. [3]

9. Article 8 provides: 'The person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.'

10. Article 9 states:

'1. Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of the residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been obtained from a competent authority of the host country before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

This authority shall not be the same as that empowered to take the decision refusing renewal of the residence permit or ordering expulsion.

2. Any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit shall, where that person so requests, be referred for consideration to the authority whose prior opinion is required under paragraph 1. The person concerned shall then be entitled to submit his defence in person, except where this would be contrary to the interests of national security.'

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

2 — Article 2(1).

3 — The third recital in the preamble.

National law

11. Article 3(1) of the Immigration (European Economic Area) Order 1994 states:

'Subject to Article 15(1), an EEA national shall be admitted to the United Kingdom if he produces, on arrival, a valid national identity card or passport issued by another EEA State.'

12. Article 15(1) of the same order provides:

'A person shall not be entitled to be admitted to the United Kingdom by virtue of Article 3 if his exclusion is justified on grounds of public policy, public security or public health... such a person may appeal against the refusal of admission as if he were a person refused leave to enter and entitled to appeal by virtue of s. 13(1) of the 1971 Act, but he may not appeal so long as he is in the United Kingdom.'

13. Under section 13 of the Immigration Act 1971, a person refused leave to enter the United Kingdom has a right of appeal to an adjudicator.[4] His right of appeal is termed 'out of country', meaning that it is exercisable only once he has left the United Kingdom, unless he held a current entry clearance or a current work permit.[5]

14. In addition, paragraphs 16 and 21 of Schedule 2 to the Immigration Act 1971 provide that a person who may be required to submit to examination may be detained under the authority of an immigration officer pending his examination and pending the decision to give or refuse him leave to enter. As an alternative to detention, a person liable to be so detained may, with the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention. Such temporary admission may include restrictions on, *inter alia*, his employment or occupation.

4 — Section 13(1).

5 — Section 13(3). Under section 20 of the Immigration Act 1971, an appeal lies to the Immigration Appeal Tribunal against the decision of the adjudicator. A further appeal may then be brought, only on a question of law and with the leave of the Tribunal, before the Court of Appeal (section 9 of the Asylum and Immigration Appeals Act 1993).

15. Under section 11(1) of the Immigration Act 1971, a person who has not otherwise entered the United Kingdom shall, in particular, be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to that Act.

16. The legal remedies described above must be distinguished, in the United Kingdom, from applications for judicial review, whereby the legality of decisions of public authorities is subject to review by the ordinary courts, that is to say, in England, Wales and Northern Ireland, the High Court of Justice. [6]

II — Facts and procedure

17. Ms Yiadom arrived in the United Kingdom on 7 August 1995. [7] She was accompanied by a Ghanaian national whom she falsely claimed to be her daughter. That woman was returned to Ghana, while Ms Yiadom was temporarily admitted subject to a restriction against her obtaining employment. The decision to refuse leave to enter was taken by the Secretary of State on 3 March 1996.

18. Following the refusal of leave to enter, the grant of temporary admission was extended, and on 31 May 1996 the restriction against employment was lifted, pending judgment in the proceedings brought by Ms Yiadom.

19. On 17 May 1996, Ms Yiadom had been given leave to move for judicial review of the Secretary of State's decision before the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office). When that application was dismissed on 8 July 1997, she appealed to the Court of Appeal of England and Wales. She claimed, first, that her presence did not constitute a genuine or sufficiently serious threat to one of the fundamental interests of the United Kingdom and, second, that there was a procedural irregularity in that national law does not recognise her right under Articles 8 and 9 of the Directive to appeal to the adjudicator whilst remaining in the United Kingdom (an 'in-country right of appeal'). She submits that a right of appeal which a person refused entry to a Member State can exercise only from outside the country (an 'out-country right of appeal') is contrary to those provisions.

6 — See Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, paragraph 6, and page 6 of the Commission's written observations.

7 — According to the national court, in 1985, Ms Yiadom held a UK residence permit valid for five years (page 13 of the order for reference). Since her situation has changed, the national court considers to have been established the fact that the person concerned did not have a residence permit at the time when she arrived in the United Kingdom (Question 3).

III — The questions referred

20. Since the Court of Appeal of England and Wales took the view that the resolution of the dispute before it depended upon an interpretation of the Directive, it decided to stay proceedings and to refer the following six questions to the Court of Justice for a preliminary ruling:

'(1) Do both Article 8 and Article 9 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117) apply to decisions concerning entry into the territory of a Member State, or are decisions concerning entry covered solely by the provisions of Article 8?

(2) If the answer to the first question is that Article 8, but not Article 9, of Directive 64/221 applies to decisions concerning entry into the territory of a Member State, are the requirements of Article 8 satisfied by provisions of national law which grant to the national of a Member State who is refused entry to another Member State on grounds of public policy a right of appeal to a court of law which may only be exercised once that person is no longer physically present in the Member State concerned?

(3) For the purposes of Article 8 and/or 9 of Directive 64/221, where national law:

— permits the competent authorities, as an alternative to detention, to grant "temporary admission" to a national of another Member State who does not hold a current residence permit onto the territory of the host Member State, without granting that person "entry" under national law into the Member State concerned; and

— permits the competent authorities to keep the person concerned on temporary admission until they have completed their inquiries as to whether or not the facts justify measures to exclude that person from the Member State on grounds of public policy,

is a subsequent decision to "refuse entry" to that person and to exclude

her from the territory of the Member State on grounds of public policy a decision concerning entry into the territory of a Member State, or a decision concerning expulsion from the territory of a Member State?

(4) Is the answer to Question 3 different if national law permits the competent national authorities to lift employment restrictions initially imposed as a condition of such temporary admission, and those authorities do so after the decision is taken to refuse admission to the national territory, pending the determination of judicial review proceedings to set aside that refusal?

(5) Is the answer to Question 3 capable of being affected by the length of time taken (a) to "refuse entry" and/or (b) to implement such decision by actually removing the person concerned from the territory of the Member State, and if so in what way?

(6) Is the answer to Question 5 in turn capable of being affected by whether the delay in implementing a decision to "refuse entry" is due to a challenge to its legality, and if so in what way?'

IV — The subject-matter of the questions referred

21. In order to clear up any ambiguity which might stem from the complexity of certain elements of the case, it is helpful to note that two points are deemed to have been established in the main proceedings.

22. First, Ms Yiadom is a Community national, since she has Netherlands nationality. That matter is not disputed and is confirmed by the fact that the questions referred by the national court seek the interpretation of Directive 64/221, whose application is restricted by Article 1 thereof to nationals of Member States.

23. Second, in the part of the order for reference which deals with what it calls 'the conventional [judicial review] challenge', as opposed to the challenge under Articles 8 and 9 of the Directive, the Court of Appeal states that it sees no reason to doubt the validity of the decision taken against Ms Yiadom on grounds of public policy. [8]

8 — Pages 18 and 19 of the order for reference.

By the questions it asks, as is clear from their wording, the national court is not therefore seeking to be enlightened about the criteria used to characterise the conduct of the person concerned on which the decision refusing entry is based. The Court of Appeal seeks merely to obtain guidance on the interpretation of Articles 8 and 9 of the Directive, which restricts the subject-matter of the reference to the *legal remedies* available in respect of a decision taken concerning a Community national who goes to another Member State.

24. The first question referred seeks to determine whether *decisions concerning the entry* of Community nationals into the territory of a Member State are covered by Articles 8 and 9 of the Directive or solely by Article 8, the only one of the two provisions which refers to 'any decision concerning entry'.

25. Questions 3, 4, 5 and 6 all describe the circumstances surrounding the decision to refuse Ms Yiadom entry, such as the fact of her having been granted temporary admission to the United Kingdom or the time which elapsed between her arrival in the United Kingdom and the decision.

In formulating those questions the United Kingdom court seeks to know whether, in the light of those factors, the classification 'decision concerning entry' is justified or whether it would not be more precise to speak of a decision concerning expulsion.

26. A change in classification would have implications for the legal remedies available in respect of the contested decision. Article 9 does not mention 'decisions concerning entry', so it can reasonably be inferred that the procedure it establishes does not apply to them. On the other hand, if one of the classifications in Article 9 were to be applied to the contested decision, that decision would be subject to the provisions of national law which fall within the scope of that article and to the procedural safeguards which it provides for.

27. The first and the last four questions must therefore be looked at together in order to determine whether, in the light of the circumstances of the case, a decision such as that taken against Ms Yiadom may be regarded as a 'decision concerning entry'.

28. In other words, it is necessary to examine whether Article 8 of the Directive must be interpreted as meaning that a decision to refuse to a Community national who does not hold a residence permit leave

to enter into the territory of a Member State in a case such as that in question in the main proceedings where:

— the person concerned was granted temporary admission to that territory pending the decision on entry,

— several months elapsed between her arrival and the decision refusing entry,

— once the decision refusing entry had been taken, the person concerned was authorised to obtain employment on that territory pending the determination of judicial review proceedings to set aside that decision,

— the decision refusing entry has still not been implemented,

— the delay in implementing the decision to refuse entry is due to the application for judicial review,

constitutes a 'decision concerning entry' within the meaning of Article 8 which would, consequently, fall outside the scope of Article 9.

29. Question 2 relates to the question whether Article 8 of the Directive must be interpreted as meaning that a Member State is entitled to make the exercise of a legal remedy in respect of a 'decision concerning entry' taken against a Community national conditional on the requirement that that person must already have left its territory.

According to the terms used in the order for reference, the question must be examined if a 'decision concerning entry', within the meaning of Article 8, falls only within the scope of Article 8, but not Article 9.

30. Consequently, the first and the last four questions must be examined and then, if necessary, Question 2.

V — The notion of 'decision concerning entry' within the meaning of Article 8 of the Directive (Questions 1 and 3 to 6)

31. It is clear from Article 8 of the Directive that every Community national is to

have the same legal remedies in respect of decisions taken against him as are available to nationals of the State concerned in respect of acts of the administration.

A Member State cannot therefore organise, for that category of nationals, legal remedies governed by special procedures affording fewer safeguards than those pertaining to remedies available to nationals in respect of acts of the administration. [9]

32. The provisions of Article 9 of the Directive complement those of Article 8. Their purpose is to provide minimum procedural guarantees for persons affected by one of the measures referred to in the three cases defined in Article 9(1): 'Where there is no right of appeal to a court of law, or where such appeal may be only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect'. [10]

33. The measures referred to in Article 9 are refusal to renew a residence permit, expulsion of the holder of a residence permit from the territory (paragraph 1), refusal to issue a first residence permit, expulsion before the issue of the permit (paragraph 2).

34. Where a legal remedy covered by Article 8 and exercised in respect of one of those decisions falls into one of the three categories listed in Article 9(1), Article 9 requires the intervention of an independent authority empowered to give an opinion on the contested decision in the presence of the person concerned.

35. However, as has been indicated, the machinery to ensure procedural fairness thus put in place does not relate to appeals brought against all measures concerning entry and residence. The intervention of the independent authority is provided for in respect of the appeals available against the decisions listed above, *which do not include 'decisions concerning entry'*. [11]

36. Accordingly, a 'decision concerning entry' within the meaning of Article 8 falls outside the scope of the provisions of Article 9, even though there might be no right of appeal to a court of law, or such appeal might be limited to the examination of legal validity, or the appeal might extend

9 — See, in particular, *Shingara and Radiom*, cited above, paragraph 25.

10 — Ibid., paragraphs 33 and 34.

11 — It must be made clear that the expression 'décision d'entrée', as used in the French version of the Directive, must be understood to mean any decision 'concerning entry', in the sense that it is not restricted to decisions authorising entry into the national territory, but also covers decisions refusing entry. That interpretation is clear from the other language versions which, like the English, Spanish, Finnish and Swedish versions, refer to any 'decision concerning entry' or, like the German, Danish, Greek, Italian, Dutch and Portuguese versions, refer to any 'decision refusing entry'.

to the merits but not have suspensory effect. [12] The minimum procedural safeguard which it establishes includes the right for the person concerned to enjoy 'such rights of defence and of assistance or representation as the domestic law of that country provides for' [13] or 'to submit his defence in person, except where this would be contrary to the interests of national security'. [14]

37. According to the terms of the national law applicable in the present case, the contested decision is a decision refusing entry. Ms Yiadom's position in the United Kingdom is classified as 'temporary admission', which means, according to the Immigration Act 1971, [15] that she is deemed to be outside the territory of the United Kingdom for as long as she is on temporary admission.

38. Ms Yiadom was thus given leave to reside physically in the United Kingdom for several months whilst, from a legal standpoint, being forbidden to enter that territory.

39. However surprising that situation may be, it is based on reasons which are entirely understandable. A Member State cannot be criticised for conducting as full an investigation as possible before taking a decision which might lead it to expel a Community national, thereby infringing the principle of the free movement of persons, even if in doing so it avails itself of a possibility offered by the Treaty. Admittedly, such precautions, which are taken in the interest of the person concerned, may demand a certain length of time.

40. I would add that measures which enable an individual to remain in a country, pending a decision on his right of entry, and then to take up employment there, pending an appeal to a court of law, cannot in themselves be suspected of infringing the principle of free movement.

41. The fact remains that, for the purposes of applying Articles 8 and 9, the fact that the contested decision was taken after the

12 — As Advocate General Ruiz-Jarabo Colomer rightly pointed out in points 67 to 103 of his Opinion in *Shingara and Radiom*, cited above, it is not permissible, from the Community law standpoint, that administrative decisions affecting the free movement of persons may be excluded from review by the courts or that a court hearing an appeal against such decisions may not be able to examine the substance of those measures or even that the court does not have power to suspend the implementation of the decisions, the possibility of which is accepted by the very terms of Article 9. That is why it is all the more regrettable that, by virtue of a distinction drawn between 'decisions concerning entry' and other administrative decisions concerning the entry and residence of foreigners, Community nationals are denied not only the safeguards afforded by the exercise of a right of appeal to a court of law, where the 'legal remedies... available to nationals of the State concerned in respect of acts of the administration', within the meaning of Article 8, are not of such a kind, but also those provided for, by default, in Article 9. We would add, however, that those inadequacies, which are largely due to the age of the Directive, are usually compensated for by the national legal systems, which provide greater protection than is required in this respect by the Directive.

13 — The first subparagraph of Article 9(1). Nor should the limits to the procedural fairness established by Article 9 be overlooked. The opinion given by the independent authority referred to in that provision is not binding on the competent authorities.

14 — Article 9(2).

15 — Section 11(1).

person concerned had enjoyed a prolonged stay in conditions similar to those of a Community national who had lawfully entered into the national territory leads us to wonder about the real nature of that decision, in the light of the notion of 'decision concerning entry' within the meaning of Article 8.

42. Let us be clear at the outset that that notion cannot depend on the classifications applied by national laws.

43. It is clear from the settled case-law of the Court that 'the Community legal order does not... aim in principle to define its concepts on the basis of one or more national legal systems without express provision to that effect'. [16]

44. That principle applies not only to the provisions of the Treaty and to regulations, but also to directives. [17] The interpretation of a term used in a provision of a directive 'which does not refer to the law of the Member States for the determining of its meaning and its scope... cannot be left to the discretion of each Member State'. [18] The Directive makes to the law of the Member States no reference which would argue in favour of different interpretations according to national laws.

45. A uniform application of Community law and the principle of equality impose that conclusion. [19]

46. The Directive's objective of coordinating the special treatment organised by Member States for foreign nationals suggests the same conclusion. The coordination 'presupposes in particular an approximation of the procedures followed in each Member State when invoking grounds of public policy'. [20]

47. The purpose of the Directive is not, admittedly, to achieve absolute uniformisation of the national procedures in these matters. However, the legal remedies available in respect of decisions restricting the free movement of persons must have certain characteristics in common, for reasons both of equal treatment of the persons

16 — Case 64/81 *Corman* v *Hauptzollamt Gronau* [1982] ECR 13, paragraph 8. More recently, see Case C-360/90 *Bötel* [1992] ECR I-3589, paragraph 23.

17 — Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 30.

18 — Case 51/76 *Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraphs 10 and 11.

19 — Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] ECR 107, paragraph 11.

20 — Second recital in the preamble.

concerned and of safeguards associated with respect for the right to an effective judicial remedy.

48. Next, it is necessary to identify the reasons which led the Community legislature to establish different legal remedies according to the type of decision, in order to clarify the notion of 'decision concerning entry'.

49. The distinction is not easy to explain, since the Directive gives us no information which would enable us to understand the reasoning behind it.

50. The fact that decisions taken in respect of Community nationals in matters connected with entry or residence are coupled with legal remedies which are appreciably less protective of their rights than those which are available in respect of other decisions of the same type, but based on identical grounds of public policy, can be justified only by objective differences.

Thus it is necessary to identify what distinguishes a Community national, against whom a decision refusing entry has been taken, from one who, for example, is faced with a decision refusing the issue of a first residence permit or a decision ordering his expulsion before the issue of the permit.

51. In principle, the addressee of a decision refusing entry is at the Member State's frontier when he learns of the decision. Similarly, if he has entered into that territory he is at least under the direct control of the competent authorities of that State, during the period required for taking a decision, so that his access to the territory is in fact restricted.

52. That is why I think that the boundary between Article 8 and Article 9 takes account of *the physical location of the Community national* and, if he has in fact entered into the territory of the Member State of destination, of *the time he has stayed there and of the conditions of his stay*, at the moment when the refusal is made known to him and when the issue of legal remedies arises.

53. The physical entry of an individual into the territory of a Member State constitutes the first stage of the dealings which a foreign national may have with a Member State other than his own. A prolonged stay, which is lawful from an administrative standpoint, in that State constitutes a more advanced stage in that process. As early as the first stage, the person present on the national territory, including when he is waiting for his situation to be made lawful, has objectively more opportunities to form social links, whether personal or profes-

sional, than a person who has not yet crossed the frontier. He is, all in all, more integrated into the host State.

54. That may explain why any challenge to the situation of a Community national, whether he is lawfully present on the territory of a Member State (refusal to renew a residence permit, expulsion from the territory of the holder of a residence permit), or whether he in fact entered into the territory in the hope of remaining there (refusal to issue a first residence permit, expulsion before the issue of the permit), is surrounded by minimum safeguards which reserve to the person concerned the right to challenge the contested decision by way of effective legal remedies.

55. The means of challenging decisions taken on these matters must strike a balance between the necessary protection of public policy, on which the contested decision is based, and the legitimate protection of the individual's right to invoke the free movement of persons throughout the Community.

56. The limited nature of the legal remedies reserved to persons who are turned back at the frontier on grounds of public policy is explained, consequently, by the fact that their interest in entering and in residing in the Member State of destination is not, in principle, as marked as if they had already resided there.

57. Accordingly, the concept of 'decision concerning entry' is difficult to apply without taking account of the fact that, in the present case, the person concerned actually entered into the national territory and that she stayed there for several months.

58. A Community national who has been granted 'temporary admission' to the national territory is not in a different position, from the standpoint of his physical presence on that territory, from that of a Community national waiting for the issue or renewal of a residence permit. Although provisional, by definition, the physical presence of the person concerned is the consequence of the fact that he has crossed the frontier and is, in fact, on the territory of the Member State of destination.

59. Ms Yiadom did not, admittedly, engage in any occupational activity before the decision refusing entry was taken. However, the material organisation of her stay, which was made necessary by her actual and prolonged presence in the United Kingdom, place her in a more difficult

position than if she had been merely faced with a decision refusing entry made at a border checkpoint. In this respect, a decision such as that taken in her case resembles more closely a decision ordering her expulsion from the national territory.

60. What distinguishes a person granted temporary admission from other Community nationals faced with a decision challenging their right of residence relates more to the length of time he has spent on the territory of the Member State of destination. A person asking for his residence permit to be renewed has, by definition, been present since he was granted his first permit. He has thus been on the territory of the Member State of destination for longer than a person who was admitted subject to an inquiry into his situation in the light of the requirements of national public policy.

61. A person who has applied for a first residence permit is, on the other hand, not always in such a position. His application does not necessarily show that he has already spent a prolonged period or one which is longer than the average duration of 'temporary admission' in the Member State in question.

62. That is evident from the fact that Ms Yiadom remained in the United Kingdom from 7 August 1995, the date of her arrival, until 3 March 1996, the date of the decision refusing entry, namely seven months, whereas the first subparagraph of Article 5(1) of the Directive states that '[a] decision to grant or to refuse a first residence permit shall be taken as soon as possible and *in any event not later than six months from the date of application for the permit*'. [21]

63. Accordingly, the time prescribed for a decision concerning a residence permit is not, by its nature, greater than that taken for a decision refusing entry. From the standpoint of the right to effective judicial protection, there is nothing to distinguish the addressee of a decision refusing entry who has been physically present on the national territory for several months from an applicant for a residence permit in the same situation. [22]

64. The same reasoning applies to 'any decision ordering expulsion... before the issue of the permit' within the meaning of Article 9(2). It is possible to conceive, in principle, of a situation in which an undesirable Community national is expelled, on grounds of public policy, at the end of a

21 — Emphasis added.

22 — As the national court rightly suggests, the system of 'temporary admission', in allowing the competent authorities to prolong a Community national's stay on the national territory while at the same time deeming him not to have entered it, frees them from the time-limit under Article 5(1) and from observing the safeguards under Article 9 (pages 15 and 16 of the order for reference).

very brief stay, which would place him in the same position as a person granted temporary admission.

65. In each of those cases, the decision taken in respect of the person concerned has the effect of excluding him from the territory of the Member State where he had been for some time and where he had enjoyed the right of residence in conditions of freedom similar, if not identical, to those of a Community national, or even a national of the State concerned. [23]

66. There is therefore no reason to apply different legal remedies to him, thereby depriving him of the procedural safeguards in Article 9, in the event that national legislation does not guarantee him a right of appeal to a court of law, which extends to the merits and has suspensory effect.

67. In the present case, the permission to take up employment, granted after the decision refusing entry, pending the appeal to a court of law, and the delay in implementing the decision of refusal, caused by that appeal, should not, in my opinion, be relevant to the classification of the contested decision.

68. Like granting temporary admission before refusing entry, lifting the restrictions on employment is designed to make more bearable the wait necessitated by the preparation or examination of the grounds of the decision. Consequently, that flexibility introduced in the conditions of residence in the national territory is also such as to tighten the links between the Community national and the host State.

69. However, those circumstances, *which postdate the contested decision*, cannot, once that decision has been adopted, affect the classification applied to it. In taking a decision refusing entry the competent authorities made an express ruling on the right of the person concerned to enter the national territory. Thus since she was clearly informed of the prohibition on entry, the Member State is at greater liberty to organise the provisional stay of the person refused entry by granting her permission to take up employment until all legal remedies have been exhausted.

Furthermore, the legal classification applied to the decision in question determines the system of appeals, since a 'decision concerning entry' is treated differently, from that standpoint, by the Directive. It would be illogical if that classification

23 — The file does not show that Ms Yiadom was subject to particular conditions restricting her liberty. Even if she was required to inform the competent authorities of her place of residence and of any change of address, that factor does not seem to me such as to constitute a serious obstacle to the *de facto* integration resulting from a prolonged stay in the Member State of destination.

could be amended after the decision had been adopted, by reason of a change in circumstances, at the time when, indeed, a ruling must be made on the appeal brought against it.

70. As regards the delay in implementing the contested decision, the Commission rightly recalled the terms of the Court's judgment in *Sevince*, [24] according to which a person hoping for recognition of a right of residence cannot 'be recognised as being vested with that right, merely because, having been refused a valid residence permit by the national authorities during that period and having exercised the rights of appeal provided for by national law against such refusal, he benefited from the suspensory effect deriving from his appeal and was therefore able to obtain authorisation, on a provisional basis pending the outcome of the dispute, to reside and be employed in the Member State in question'. [25]

71. That principle must be applied to the present case. Although it was formulated within another legal framework, [26] it also concerns the relationship between the principle of the free movement of persons and the legal remedies designed to ensure the effectiveness of that principle. I would add that those remedies must not be diverted from their objective, which is to enable the legality of the contested decision to be re-examined or reviewed and not to derive from the suspensory effect which is associated with it an additional right to residence.

72. The contested decision must thus be classified, in the light of Articles 8 and 9 of the Directive, on the basis of the evidence which the competent authorities had at the time when they made their decision, so that the time which elapsed between that decision and the one on the appeal cannot be taken into account. The same is true of the conditions in which the person concerned, granted temporary admission, remains on the national territory pending a decision on his appeal. Permission to engage in an occupational activity is, in this respect, immaterial.

73. I conclude from the foregoing that a decision, such as that in the main proceedings, refusing entry to the national territory of a Member State to a Community national who does not hold a residence permit, where that person was admitted temporarily and stayed for several months on the territory of the Member State, pending that decision, does not constitute a 'decision concerning entry' within the meaning of Article 8 of the Directive.

74. On the other hand, such a decision bears the characteristics of a 'decision... ordering expulsion from the territory' within the meaning of Article 8 of the Directive.

24 — Pages 19 and 20 of the written observations.

25 — Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 31.

26 — The *Sevince* judgment, cited above, was given in response to questions referred for a preliminary ruling on the interpretation of decisions of the Council of Association established by the Agreement establishing an Association between the European Economic Community and Turkey, of 12 September 1963, concluded on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (English version published in OJ 1973 C 113, p. 1).

75. The time which elapsed between the contested decision and its implementation, the fact that that delay was due to the exercise of an appeal relating to the legality of the decision and the fact that, after the decision refusing entry, the person concerned was given permission to engage in an occupational activity do not constitute factors capable of affecting the classification conferred on the decision in question.

VI — Question 2

76. The question referred by the Court of Appeal relates to the principle of national law that a Community national who is refused entry into a Member State by a 'decision concerning entry', within the meaning of Article 8 of the Directive, may exercise a right of appeal to a court of law only if he has left that country.

77. It is clear from the terms of the question that the national court is asking the Court to give it guidance on the interpretation of Article 8, on that point, in the situation where a decision refusing entry, such as that taken in respect of Ms Yiadom, should be classified as a 'decision concerning entry' so that it falls within the scope of Article 8 and not Article 9.

78. We have seen that that is not the case and that the contested decision must be classified differently.

79. As is clear from the Commission's observations, the legal remedies put in place by the national legislation are not the same in the case of a decision refusing admisssion, within the meaning of Article 15(1) of the Immigration (European Economic Area) Order 1994, on the one hand, and, in the case of a decision ordering removal, within the meaning of Article 15(2) of that order, or of refusal or withdrawal of a residence permit, within the meaning of Article 18 of the same order, on the other hand.

80. According to the Commission, in those situations concerning removal or the residence permit of a Community national, the appeal which is available to him may be brought even if he is in the United Kingdom (in-country right of appeal). [27]

81. That evidence about the national legislation confirms the subject-matter of the second question referred, formulated only if the classification of the contested measure would make it subject to the exercise of a legal remedy conditional upon the absence of the applicant. In the light of the answer to the preceding questions, the present question has become devoid of purpose.

27 — Pages 7 and 8 of the written observations.

Conclusion

82. In the light of those considerations, I propose that the Court answer the questions referred by the Court of Appeal of England and Wales as follows:

Article 8 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health must be interpreted as meaning that a decision by which a Member State refuses entry into its territory to a national of another Member State who does not hold a residence permit, in a case such as that in point in the main proceedings, where a Community national was granted temporary admission into the Member State of destination, under rules of national law, which allowed her to enter into that territory and to stay there for a period of seven months without being subject to direct or continuous control by the competent national authorities, pending that decision, constitutes a 'decision... ordering expulsion from the territory' and not a 'decision concerning entry' within the meaning of that article.

The time which elapsed between the decision and its implementation, the fact that that delay is due to a challenge to the legality of the decision and the fact that, after the adoption of the decision, the person concerned was permitted to engage in an occupational activity do not constitute factors capable of affecting the classification conferred on the decision in question.