

ECJ

JUDGMENT OF THE COURT

25 July 2002 (endnote: 1)

(Third country nationals who are the spouse of a Member State national - Requirement for a visa - Right of entry for spouses not in possession of identity documents or a visa - Right of residence for spouses who have entered unlawfully - Right of residence for spouses who have entered lawfully but whose visa has expired when they apply for a residence permit - Directives 64/221/EEC, 68/360/EEC and 73/148/EEC and Regulation (EC) No 2317/95)

In Case C-459/99,

REFERENCE to the Court under Article 234 EC by the Conseil d'État (Belgium) for a preliminary ruling in the proceedings pending before that court between

Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX)

and

État belge,

on the interpretation of Articles 1(2), 3(3) and 9(2) of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), Articles 3 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), Articles 3 and 6 of 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) and Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1995 L 234, p. 1),

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:

- Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX), by I. de Viron, avocat;
- the État belge, by E. Matteredne and E. Derriks, avocats;
- the Austrian Government, by A. Längle, acting as Agent;
- the Commission of the European Communities, by H. Michard, C. O'Reilly and N. Yerrell, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX), the État belge and the Commission 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 judgment of 23 November 1999, received at the Court on 2 December 1999, the Belgian Conseil d'État (Council of State) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Articles 1(2), 3(3) and 9(2) of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117), Articles 3 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), Articles 3 and 6 of 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) and Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1995 L 234, p. 1).

2.

Those questions were raised in proceedings between Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (Movement to combat racism, anti-Semitism and xenophobia; 'MRAX) and the Belgian State for annulment of the Circular of the Ministers for the Interior and for Justice of 28 August 1997 concerning the procedure for publication of bans of marriage and the documents which must be produced in order to obtain a visa for the purpose of contracting a marriage in the Kingdom of Belgium or to obtain a visa for the purpose of reuniting a family on the basis of a

marriage contracted abroad (Moniteur belge of 1 October 1997, p. 25905; 'the Circular of 28 August 1997).

Legal framework

Community legislation

3.

Article 1(1) 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:

'Any national of a Member State shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State.

4.

Article 10 of Regulation No 1612/68 states:

'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.

2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

3. For the purposes of paragraphs 1 and 2, the worker must have available for his family housing considered as normal for national workers in the region where he is employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States.

5.

Under Article 1 of Directive 68/360, the Member States, acting as provided in that directive, are to abolish restrictions on the movement and residence of nationals of the Member States and of members of their families to whom Regulation No 1612/68 applies.

6.

Article 3 of Directive 68/360 states:

'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.

7.

Article 4(1) of Directive 68/360 provides that the Member States are to 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 Article 4(3).

8.

As set out in the second indent of Article 4(3), for members of a worker's family those documents are:

'(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.

9.

Article 10 of Directive 68/360 provides:

'Member States shall not derogate from the provisions of this Directive save on grounds of public policy, public security or public health.

10.

Under Article 1(1) of Directive 73/148, '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.

11.

Article 3 of Directive 73/148 is in essentially the same terms as Article 3 of Directive 68/360.

12.

Article 4(1) of Directive 73/148 states:

'Each Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory in order to pursue activities as self-employed persons, when the restrictions on these activities have been abolished pursuant to the Treaty.

As proof of the right of residence, a document entitled Residence Permit for a National of a Member State of the European Communities shall be issued. This document shall be valid for not less than five years from the date of issue and shall be automatically renewable.

...

13.

Article 6 of Directive 73/148 provides:

'An applicant for a residence permit or right of abode shall not be required by a Member State to produce anything other than the following, namely:

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4.

14.

Article 8 of Directive 73/148 is in the same terms as Article 10 of Directive 68/360.

15.

Article 1 of Directive 64/221 states:

'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.

16.

Article 2 of Directive 64/221 provides:

'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 [serve] economic ends.

17.

Article 3 of Directive 64/221 states:

'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.

3. Expiry of the identity card or passport used by the person concerned to enter the host country and to obtain a residence permit shall not justify expulsion from the territory.

4. The State which issued the identity card or passport shall allow the holder of such document to re-enter its territory without any formality even if the document is no longer valid or the nationality of the holder is in dispute.

18.

Article 8 of Directive 64/221 states:

'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.

19.

Article 9 provides:

'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 a 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.

20.

Regulation No 2317/95 was annulled by judgment of 10 June 1997 in Case C-392/95 Parliament v Council [1997] ECR I-3213. However, the Court held that the effects of the annulled regulation should be maintained until the Council of the European Union adopted new legislation in the matter.

21.

Article 5 of Regulation No 2317/95 states:

'For the purposes of this Regulation, visa shall mean an authorisation given or a decision taken by a Member State which is required for entry into its territory with a view to:

- an intended stay in that Member State or in several Member States of no more than three months in all,

- transit through the territory of that Member State or several Member States, except for transit through the international zones of airports and transfers between airports in a Member State.

22.

On 12 March 1999 the Council adopted Regulation (EC) No 574/1999 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1999 L 72, p. 2). That regulation was replaced by Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ 2001 L 81, p. 1).

National legislation

23.

The Law on access to the territory, residence, establishment and expulsion of foreign nationals of 15 December 1980 (Moniteur belge of 31 December 1980), as amended by the Law of 15 July 1996 (Moniteur belge of 12 October 1996) ('the Law of 15 December 1980'), provides in the first paragraph of Article 2:

'Foreign nationals shall be permitted to enter the Kingdom where they are in possession of:

...

(ii) or a valid passport or travel document in lieu of a passport, bearing a visa or equivalent authorisation valid for Belgium affixed by a Belgian diplomatic or consular representative or by such a representative of a State party to an international Convention concerning the crossing of external borders which is binding on Belgium.

24.

Under subparagraph (ii) of the first paragraph of Article 3 of the Law of 15 December 1980, the 'authorities responsible for border controls may send back

foreign nationals who attempt to enter the Kingdom without being in possession of the documents required by Article 2.

25.

Under subparagraphs (i) and (ii) of the first paragraph of Article 7, a foreign national who is not authorised or allowed to reside for more than three months or to establish himself in the Kingdom may be ordered by the competent minister or a person delegated by him to leave national territory before a specified date:

(i) if he is staying in the Kingdom without being in possession of the documents required by Article 2;

(ii) if he remains in the Kingdom beyond the time-limit set in accordance with Article 6 or cannot prove that that time-limit has not been exceeded.

26.

Article 40(2) to (6) of the Law of 15 December 1980 states:

'2. For the purposes of this Law, EC foreign national shall mean any national of a Member State of the European Communities who resides in or travels to the Kingdom and who:

(i) pursues or intends to pursue there an activity as an employed or self-employed person;

(ii) receives or intends to receive services there;

(iii) enjoys or intends to enjoy there a right to remain;

(iv) enjoys or intends to enjoy there a right of residence after ceasing a professional activity or occupation pursued in the Community;

(v) undergoes or intends to undergo there, as a principal pursuit, vocational training in an approved educational establishment; or

(vi) belongs to none of the categories under (i) to (v) above.

3. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(i), (ii) and (iii) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

...

4. Subject to any contrary provisions of this Law, the following persons shall, whatever their nationality, be treated in the same way as an EC foreign national covered by paragraph 2(iv) and (vi) above, provided that they come in order to settle, or do settle, with him:

(i) the spouse of that national;

...

5. Subject to any contrary provisions of this Law, the spouse of an EC foreign national covered by paragraph 2(v) above and his children or those of his spouse who are dependent on them shall, whatever their nationality, be treated in the same way as the EC foreign national provided that they come in order to settle, or do settle, with him.

6. The spouse of a Belgian who comes in order to settle, or does settle, with him, and also their descendants who are under 21 years of age or dependent on them, their ascendants who are dependent on them and any spouse of those descendants or ascendants, who come to settle, or do settle, with them, shall also be treated in the same way as an EC foreign national.

27.

Article 41 of the Law of 15 December 1980 provides:

'The right to enter the Kingdom shall be granted to an EC foreign national upon production of a valid identity card or national passport.

Spouses and family members referred to in Article 40 who are not nationals of a Member State of the European Communities must be in possession of the document required under Article 2.

A person holding a document issued by the Belgian authorities which he has used to enter and reside in a Member State of the Communities shall be accepted without formality on Belgian territory even if his nationality is disputed or if the document has expired.

28.

Article 42 of the Law of 15 December 1980 provides:

'A right of residence shall be granted to EC foreign nationals under the conditions and for the period determined by the King in accordance with the regulations and directives of the European Communities.

Such right of residence shall be proved by a permit issued in the cases and under the detailed rules laid down by the King, in accordance with the said regulations and directives.

The decision concerning issue of a residence permit shall be taken as quickly as possible and no later than six months from the application.

29.

Article 43 of the Law of 15 December 1980 states:

'Entry and residence may not be denied to EC foreign nationals except on grounds of public policy, public security or public health, and then only subject to the following limitations:

...

(iii) expiry of a document used for entry into and residence in Belgian territory cannot by itself justify expulsion from the territory;

....

30.

Subparagraph (i) of the first paragraph of Article 44 states:

'An application for review, as provided for by Article 64, may be made in respect of:

(i) any refusal to issue a residence permit to an EC foreign national to whom a right of residence is granted under Article 42 and any decision ordering expulsion from the territory before such a permit is issued.

31.

Article 64 of the Law of 15 December 1980 states:

'Apart from the decisions referred to in Articles 44 and 44a, an application for review by the minister conducted in accordance with the following provisions may be made in respect of:

(i) a decision refusing under Article 11 to grant a right of residence;

(ii) a requirement to return to the country of origin;

(iii) refusal of an application for authorisation for establishment;

...

(vii) a decision requiring a foreign national, pursuant to Article 22, to leave specified premises, to stay away from them or to reside at a specified location;

(viii) a decision refusing authorisation to reside to a foreign national who wishes to study in Belgium.

32.

Article 69 of the Law of 15 December 1980 provides:

'An action for annulment, governed by Article 14 of the Laws on the Conseil d'État, consolidated on 12 January 1973, may be brought against a decision refusing entitlement to a right envisaged by this Law.

The lodging of an application for review shall not preclude an action being brought directly for annulment of the decision whose review is sought.

In that case, consideration of the action for annulment shall be suspended until the minister has ruled on the admissibility of the application for review.

33.

The Circular of 28 August 1997 is worded as follows:

'The aim of this circular is to resolve certain problems relating to the procedure for publication of banns ... which have recently given rise to controversy. In addition, it provides clarification with regard to the documents which must be produced in order to obtain a visa for the purpose of contracting a marriage in the Kingdom or to obtain a visa for the purpose of reuniting a family on the basis of a marriage contracted abroad.

...

4. Lodging an application for residence after celebration of a marriage.

...

However, as regards residence, it is to be remembered that the documents required for entry into the Kingdom must be produced in support of the application for residence submitted under subparagraphs (i) or (iv) of the first paragraph of Article 10 or Article 40(3) to (6) of the Law of 15 December 1980 on access to the territory, residence, establishment and expulsion of foreign nationals.

That means specifically that the foreign national must be in possession of a valid national passport or travel document in lieu of a passport, bearing if necessary a visa or equivalent authorisation valid for Belgium affixed by a Belgian diplomatic or consular representative or by such a representative of a State party to an international Convention concerning the crossing of external borders which is binding on Belgium (Article 2 of the Law of 15 December 1980).

Where a foreign national fails to produce the abovementioned entry documents, his application for residence shall in principle be declared inadmissible.

...

34.

The Circular of the Minister for the Interior of 12 October 1998 relating to applications for residence or establishment in the Kingdom submitted, following contraction of marriage, on the basis of Article 10 or 40 of the Law of 15 December 1980 on access to the territory, residence, establishment and expulsion of foreign nationals (Moniteur belge of 6 November 1998, p. 36360; the Circular of 12 October 1998) was adopted in order to define more precisely the rule set out in paragraph 4 of the Circular of 28 August 1997. Paragraphs 1 and 2 of the Circular of 12 October 1998 provide:

'1. The general rule that an application for residence or establishment in the Kingdom in order to reunite a family will not be considered where the foreign national is not in possession of valid entry documents, that is to say a national passport or a travel document in lieu of a passport which is valid when the application is made and bears, if necessary, a valid visa, continues to apply.

2. In derogation from that general rule, an application for establishment submitted on the basis of Article 40 of the Law of 15 December 1980 by a foreign national (requiring a visa) married to a Belgian national or a national of a Member State of the EEA, who produces only a national passport, or a travel document in lieu of a passport, which is valid but bears an expired visa will however be considered in so far as the documents concerning his ties of kinship or marriage to the Belgian national or the national of a Member State of the EEA are produced at the time of the application for establishment.

...

The main proceedings and the questions referred for a preliminary ruling

35.

By application of 28 November 1997 to the Conseil d'État, MRAX sought annulment of the Circular of 28 August 1997.

36.

It submitted in support of its action that the circular, in particular paragraph 4, was incompatible with the Community directives on movement and residence within the Community.

37.

Since the Conseil d'État found that an interpretation of Community law was required in order to dispose of the case before it, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 3 of Directive 68/360 of 15 October 1968, Article 3 of Directive 73/148 of 21 May 1973 and Regulation No 2317/95 of 25 September 1995, read in the light of the principles of proportionality and non-discrimination and the right to respect for family life, be interpreted as meaning that the Member States may, at the border, send back foreign nationals subject to a visa requirement and married to a Community national who attempt to enter the territory of a Member State without being in possession of an identity document or visa?

2. Must Article 4 of Directive 68/360 and Article 6 of Directive 73/148, read in the light of Article 3 of each of those directives and of the principles of proportionality and non-discrimination and the right to respect for family life, be interpreted as meaning that Member States may refuse to issue a residence permit to the spouse of a Community national who has entered their territory unlawfully and issue an expulsion order against him?

3. Do Articles 3 and 4(3) of Directive 68/360, Article 3 of Directive 73/148 and Article 3(3) of Directive 64/221 of 25 February 1964 mean that the Member States

may neither withhold a residence permit nor expel a foreign spouse of a Community national who has entered national territory lawfully but whose visa has expired when application is made for the issue of that permit?

4. Must Articles 1 and 9(2) of Directive 64/221 of 25 February 1964 be interpreted as meaning that foreign spouses of Community nationals who are not in possession of identity documents or a visa or whose visa has expired have the right to refer the matter to the competent authority mentioned in Article 9(1) when applying for the issue of a first residence permit or when they have an expulsion order made against them before the issue thereof?

Preliminary point

38.

The Belgian State contends that the national legislature has placed spouses of Belgian nationals on the same footing as nationals of the Member States so that they are not treated less favourably than a spouse or family member of a national of another Member State. However, according to the Belgian State the Court of Justice has no jurisdiction where the situation of a third country national married to a Belgian national is at issue.

39.

As to that submission, Community legislation concerning freedom of movement for workers, freedom to provide services and freedom of establishment is not applicable to situations not presenting any link to any of the situations envisaged by Community law. Consequently, that legislation cannot be applied to the situation of persons who have never exercised those freedoms (see, in particular, Case C-206/91 Koua Poirrez [1992] ECR I-6685, paragraphs 10, 11 and 12, and Case C-60/00 Carpenter [2002] ECR I-0000, paragraph 28).

40.

It is in that light that the Court will answer the questions inviting it to rule on the effect of a number of provisions of Directives 64/221, 68/360 and 73/148 and Regulation No 2317/95 with regard to third country nationals married to a Member State national.

Question 1

Observations submitted to the Court

41.

MRAX submits that to send back at the border of a Member State a third country national married to a Member State national on the ground that he does not have a visa issued by that Member State infringes Article 3 of Directive 68/360, Article 3 of Directive 73/148, Regulation No 2317/95 and Article 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention').

42.

In addition MRAX argues that, in the case of third country nationals married to a Member State national, examination of the conditions for obtaining a visa should take place in Belgium and not in their country of origin.

43.

With regard to the requirement for an identity document, the Belgian State contends that the Member States have the task of checking whether or not third country nationals who wish to enter their territory or, having already entered, claim a right of residence, may rely on Community law. The obligation to produce a valid passport at the point of entry to the Member State is thus justified by the need for a third country national to prove his identity or his family ties with a national of a Member State.

44.

With regard to the requirement for a visa, the Belgian State submits that the obligation to apply for a visa before entering the territory of a Member State provides the Member States with means of checking both whether a third country national who wishes to enter their territory as the spouse of a Member State national fulfils the requisite conditions and whether he does not fall within the category of persons liable to be refused entry on grounds of public policy, public security or public health in accordance with Directive 64/221. Accordingly, Article 3 of Directive 68/360 and Article 3 of Directive 73/148, which authorise the Member States to demand a visa from third country nationals who are a member of the family of a Member State national, should be interpreted as entitling the Member States to send back such persons at their borders if they have no visa. The opposite interpretation would render those provisions nugatory.

45.

The Belgian State adds that many matters relating to a third country national can be clarified only by the Belgian representation in his country of origin. For that reason it is appropriate to issue the visa in the third country rather than at the Belgian border.

46.

The Austrian Government submits that the obligation on third country nationals married to a Member State national to obtain a visa is not discriminatory in so far as both Belgian law and Community law prescribe such an obligation.

47.

On the other hand, to allow third country nationals who have not complied with the requirement for a visa to enter Belgian territory would infringe the principle of equality to the disadvantage of third country nationals who have complied with that requirement. However, in light of the principles of freedom of movement for persons and proportionality, a Member State is permitted to create exemptions from the general requirement for a visa in exceptional circumstances, as provided for in particular by Article 4 of Regulation No 574/1999.

48.

The Commission underlines the particular position of a third country national who is a member of the family of a Member State national vis-à-vis other third country

nationals who arrive at the external border of the Community. He derives from Community law the right to settle in the Community with the Member State national.

49.

According to the Commission, a Member State national can be refused entry into a Member State if he cannot prove his nationality. The same must accordingly hold for a third country national who is unable to prove his family ties with a Member State national.

50.

If, on the other hand, a third country national is able to establish those family ties and, therefore, rights which he derives from Community law, the lack of a visa is not to affect those rights and cannot in any event justify refusal of entry at the border. Such a measure would amount to negation of the rights and appears disproportionate.

51.

The Commission submits that, where a person establishes family ties with a migrant Community worker, the visa has a merely formal character and must be issued virtually automatically by the Member State through which he enters the Community. His right to enter the Community is not founded in any way on the visa but derives, pursuant to Community law, from the family ties alone.

52.

The Commission adds that issue of visas by consulates of a Member State located in third country nationals' States of origin is merely an organisational measure which cannot restrict the exercise of rights arising from Community law.

The Court's answer

53.

It is apparent in particular from the Council regulations and directives on freedom of movement for employed and self-employed persons within the Community that the Community legislature has recognised the importance of ensuring protection for 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 (Carpenter, cited above, paragraph 38).

54.

Thus, Article 10 of Regulation No 1612/68, Article 1 of Directive 68/360 and Article 1 of Directive 73/148 extend in identical terms the application of Community law relating to entry into and residence in the territory of the Member States to the spouse of a Member State national who is covered by those provisions (Case 48/75 Royer [1976] ECR 497, paragraph 13).

55.

In addition, under Article 3(1) of Directive 68/360 and Article 3(1) of Directive 73/148, which are worded in almost identical terms, the Member States are to allow nationals of the Member States and members of their family who are covered by those directives to enter the territory of the Member States simply on production of a valid identity card or passport.

56.

Nevertheless, in accordance with Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148, when a national of a Member State moves within the Community with a view to exercising the rights conferred upon him by the Treaty and those directives, the Member States may demand an entry visa or equivalent document from members of his family who are not nationals of a Member State. The list of third countries whose nationals must be in possession of a visa when crossing the external borders of the Member States was determined by Regulation No 2317/95, which was replaced by Regulation No 574/1999, itself since replaced by Regulation No 539/2001.

57.

As Community legislation does not specify the measures which a Member State may take should a third country national married to a Member State national wish to enter Community territory without being in possession of a valid identity card or passport or, if necessary, a visa, sending him back at the border does not appear to be precluded (see in particular, to that effect, with regard to Article 3(1) of Directive 68/360 and Article 3(1) of Directive 73/148, Case C-68/89 Commission v Netherlands [1991] ECR I-2637, paragraph 11).

58.

First, in the absence of a valid identity card or passport, documents which are intended to enable their holder to provide proof of his identity and nationality (see, to that effect, in particular Case C-376/89 Giagounidis [1991] ECR I-1069, paragraphs 14 and 15), the person concerned cannot as a rule properly prove his identity or, consequently, his family ties.

59.

Second, while, as the Commission correctly points out, the right of a third country national married to a Member State national to enter the territory of the Member States derives under Community law from the family ties alone, the fact remains that, according to the very wording of Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148, exercise of that right may be conditional on possession of a visa. Indeed, Article 5 of Regulation No 2317/95 defines a visa as an authorisation given or a decision taken by a Member State which is required for entry into its territory.

60.

However, Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148 state that the Member States are to accord to such persons every facility for obtaining any necessary visas. This means that, if those provisions of Directives 68/360 and 73/148 are not to be denied their full effect, a visa must be issued without delay and, as far as possible, at the place of entry into national territory.

61.

In view of the importance which the Community legislature has attached to the protection of family life (see paragraph 53 of this judgment), it is in any event disproportionate and, therefore, prohibited to send back a third country national married to a national of a Member State where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the

requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148.

62.

The answer to the first question referred for a preliminary ruling must therefore be that, on a proper construction of Article 3 of Directive 68/360, Article 3 of Directive 73/148 and Regulation No 2317/95, read in the light of the principle of proportionality, a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148.

Question 2

Observations submitted to the Court

63.

MRAX states that in order for a third country national who has got married in Belgium while resident there unlawfully to claim a right of residence, he is obliged to return to his country of origin to obtain a visa. However, the Belgian State sometimes agrees, in its discretion, to regularise the residence of a spouse of a Member State national.

64.

Accordingly, in MRAX's submission, the Belgian State's administrative practice does not provide spouses of Member State nationals with any legal certainty and may be perceived as discriminatory.

65.

MRAX observes that the Court has never ruled on the sanction to be imposed on a third country national who has entered the territory of a Member State unlawfully; however, it has held that a national of a Member State who is not in possession of the document required (a passport) in order to be able to reside in another Member State cannot have an expulsion order issued against him but may be sentenced to payment of a fine in criminal proceedings (see Case 8/77 *Sagulo and Others* [1977] ECR 1495). MRAX wonders whether the measures which may be taken against a national of a Member State should not be transposed to the spouse of such a national and whether infringements in respect of entry into and residence in the territory of a Member State could not be punished by a fine, whether administrative or imposed in criminal proceedings, a sanction which would be more in keeping with the principle of freedom of movement and the right to respect for private life.

66.

The Belgian State contends that Article 4 of Directive 68/360 and Article 6 of Directive 73/148 must be interpreted as allowing a Member State to refuse to grant a residence permit to a third country national who is married to a Member State national and has entered its territory unlawfully and to issue an expulsion order against him.

To decide otherwise would render Article 3 of Directive 68/360 and Article 3 of Directive 73/148 meaningless and entirely redundant.

67.

The Belgian State maintains that, in a situation such as that envisaged in the second question referred for a preliminary ruling, an expulsion order cannot be regarded as disproportionate, having regard to the competing interests, namely public policy requirements and the requirements of respect for private and family life. In its submission, the interference with family life would be extremely limited if the third country national were refused entry or requested to leave national territory: the spouses would be separated for a brief period if the person concerned were able to establish entitlement to the benefit of the Community law provisions since, in that case, it should be possible to grant him a visa within a short time.

68.

The Austrian Government observes that if both primary and secondary law provide that the Member States may terminate the right of nationals of other Member States to reside in their territory if the conditions for further residence are not, or are no longer fulfilled, a Member State must a fortiori be able to expel a third country national who is a member of the family of a Member State national (see Article 10 of Directive 68/360 and Article 8 of Directive 73/148).

69.

The Commission maintains that if a third country national who is married to a Member State national furnishes proof of those family ties when he submits an application for a residence permit in accordance with Article 4(1) of Directive 68/360, he should not be refused a residence permit on the sole ground that he entered the Member State concerned unlawfully.

70.

The Commission points out in this connection that the Court ruled in *Royer*, cited above, that the mere failure by a national of a Member State to comply with the formalities concerning the entry, movement and residence of aliens is not of such a nature as to constitute in itself conduct threatening the requirements of public policy and public security and cannot therefore, by itself, justify a measure ordering expulsion or temporary imprisonment for that purpose. According to the Commission, there is nothing to prevent that case-law from applying by analogy to a third country national who is covered by Community law because of his family ties with a migrant Community worker.

71.

The Commission submits that under Directive 64/221 a residence permit can be refused, or expulsion from national territory ordered, only on grounds of public policy, public security or public health and that such measures must be based exclusively on the personal conduct of the individual concerned. Unlawful entry into the territory of a Member State cannot systematically constitute a threat to the requirements of public policy calling into question the very right of residence.

72.

The Commission adds that in Case 118/75 *Watson and Belmann* [1976] ECR 1185 the Court defined its position with regard to the sanctions which the Member States may impose in the event of a failure to comply with certain formalities provided for by Community legislation. Having regard to that case-law, the Member States may prescribe proportionate sanctions if their territory is entered unlawfully, such as a fine (*Sagulo*, cited above, paragraph 6). However, the imposition of such sanctions must not affect issue of the residence permit.

The Court's answer

73.

The second question must be understood as referring to the position of a third country national who has entered the territory of a Member State unlawfully and is able to furnish proof of his identity and of his marriage to a Member State national falling within the provisions of Directives 68/360 or 73/148.

74.

As the Court has stated on several occasions, issue of a residence permit to a national of a Member State (see, in particular, Case C-363/89 *Roux* [1991] ECR I-273, paragraph 12) is to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of Community law. The same finding must be made with regard to a third country national married to a national of a Member State, whose right of residence derives directly from Article 4 of Directive 68/360 or Article 4 of Directive 73/148, irrespective of issue of a residence permit by the competent authority of a Member State.

75.

The detailed rules governing issue of residence permits are determined for employed persons and members of their families by Directive 68/360 and for self-employed persons and members of their families by Directive 73/148.

76.

Under Article 4(3) of Directive 68/360 and Article 6 of Directive 73/148, a Member State may make issue of a residence permit conditional upon production of the document with which the person concerned entered its territory (see *Roux*, cited above, paragraphs 14 and 15).

77.

Furthermore, Community law does not prevent the Member States from prescribing, for breaches of national provisions concerning the control of aliens, any appropriate sanctions necessary in order to ensure the efficacy of those provisions (*Royer*, cited above, paragraph 42), provided that those sanctions are proportionate (see, in particular, Case 157/79 *Pieck* [1980] ECR 2171, paragraph 19).

78.

On the other hand, refusal of a residence permit, and a fortiori an expulsion order, based solely on the failure of the person concerned to comply with legal formalities concerning the control of aliens would impair the very substance of the right of residence directly conferred by Community law and would be manifestly

disproportionate to the gravity of the infringement (see, by analogy, in particular Royer, paragraph 40).

79.

It is true that Article 10 of Directive 68/360 and Article 8 of Directive 73/148 do not prevent the Member States from derogating from those directives on grounds of public policy, public security or public health, while Article 3(1) of Directive 64/221 lays down that measures taken on grounds of public policy or of public security are to be based exclusively on the personal conduct of the individual concerned. However, failure to comply with the legal formalities concerning the entry, movement and residence of aliens cannot in itself give rise to application of the measures referred to in Article 3 of Directive 64/221 (Royer, paragraphs 47 and 48).

80.

The answer to the second question referred for a preliminary ruling must therefore be that, on a proper construction of Article 4 of Directive 68/360 and Article 6 of Directive 73/148, a Member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully.

Question 3

Observations submitted to the Court

81.

MRAX argues that Article 4 of Directive 68/360 does not require that the document with which members of the family of a Community worker have lawfully entered the territory of a Member State must still be valid when they apply for issue of a residence permit. Therefore, paragraph 4 of the Circular of 28 August 1997, according to which an application for residence by a spouse of a Member State national is inadmissible where it is submitted after the document has expired, infringes Community law.

82.

The Belgian State submits that, under Article 3(3) of Directive 64/221, expiry of the identity card or passport used by the person concerned to enter the host Member State and to obtain a residence permit is not to justify expulsion from the territory. It follows a contrario that, where the document expires before a residence permit is applied for, the Member State is entitled to refuse the application and expel the third country national married to a Member State national. Thus, the document with which the former entered the territory of a Member State that is envisaged by Article 4(3) of Directive 68/360 can only be a passport bearing a visa which is still valid.

83.

The Austrian Government contends that expiry of the visa within the Member State justifies a refusal to issue a residence permit.

84.

The Commission submits that the third question referred for a preliminary ruling should be answered in the affirmative. Where the spouse of a Member State national establishes that family tie, Directives 68/360 and 73/148 apply and the Member States are under an obligation to issue a residence permit to him, as follows from Royer, cited above. The Commission takes this to mean that in principle a residence permit cannot be refused on the ground that the visa expired after entry into national territory. That formal defect is not such as to affect the validity of the passport for the purposes of issue of a residence permit. This analysis is confirmed by Article 3(3) of Directive 64/221, which demonstrates the intention of the Community legislature that the substance of an application for a residence permit should prevail over its purely formal aspects.

85.

The Commission adds that failure to submit an application for a residence permit before a visa expires cannot in itself constitute personal conduct liable to threaten the requirements of public policy and public security justifying, as such, refusal to issue a residence permit or, a fortiori, a measure ordering expulsion.

The Court's answer

86.

Where a third country national remains in the territory of a Member State after his visa has expired, he infringes the legislation of that Member State concerning residence of aliens.

87.

Article 3(3) of Directive 64/221, which has been referred to in the course of the proceedings before the Court, provides that expiry of the identity card or passport used by a national of a Member State or members of his family to enter the host Member State and to obtain a residence permit is not to justify expulsion from the territory.

88.

However, the third question submitted for a preliminary ruling concerns the situation of a person married to a national of a Member State and requiring a visa, who entered lawfully but did not apply for a residence permit before his visa expired.

89.

While Article 4(3) of Directive 68/360 and Article 6 of Directive 73/148 authorise the Member States to demand, for the purpose of issue of a residence permit, production of the document with which the person concerned entered their territory, they do not lay down that that document must still be valid. Accordingly, where a third country national requires a visa, issue of a residence permit to him cannot be made subject to the condition that his visa is still valid. That is all the more the case because, as the Court held in *Giagounidis*, cited above, at paragraphs 22 and 23, the Member States are obliged to grant the right of residence within their territory to the workers referred to in Article 1 of Directive 68/360 who can produce either a valid identity card or a valid passport, regardless of the document with which they entered their territory.

90.

Consequently, a Member State cannot make issue of a residence permit under Directives 68/360 and 73/148 conditional upon production of a valid visa. Furthermore, as follows from paragraph 78 of this judgment, an order of expulsion from national territory on the sole ground that a visa has expired would constitute a sanction manifestly disproportionate to the gravity of the breach of the national provisions concerning the control of aliens.

91.

The answer to the third question referred for a preliminary ruling must therefore be that, on a proper construction of Articles 3 and 4(3) of Directive 68/360, Articles 3 and 6 of Directive 73/148 and Article 3(3) of Directive 64/221, a Member State may neither refuse to issue a residence permit to a third country national who is married to a national of a Member State and entered the territory of that Member State lawfully, nor issue an order expelling him from the territory, on the sole ground that his visa expired before he applied for a residence permit.

Question 4

Observations submitted to the Court

92.

MRAX states that Articles 8 and 9 of Directive 64/221 have been transposed into Belgian law by Articles 44 and 64 of the Law of 15 December 1980. However, the Belgian State's current administrative practice denies third country nationals who are married to Member State nationals and are not in possession of a visa or whose visa has expired the right to make an application for review as provided for in Articles 44 and 64 of the Law of 15 December 1980 when a decision is made refusing them a residence permit or ordering their expulsion. They are permitted only to bring an action for suspension and annulment of the decision before the Conseil d'État, which merely reviews the decision's legality and cannot review whether the decision was appropriate in the light of the facts and circumstances of the case. Accordingly, Belgian administrative practice does not comply with the requirements of Community law.

93.

According to the Belgian State, Articles 8 and 9 of Directive 64/221, under which a third country national may refer the matter to the competent authority of the Member State, envisaged in Article 9(1), where he applies for issue of a first residence permit or his expulsion is ordered before such a permit is issued, do not apply where he has not entered the territory of that Member State lawfully.

94.

Article 1(2) of Directive 64/221 limits the directive's scope to members of the family of a Member State national who come within the provisions of the regulations and directives adopted in the field. A Member State national's spouse who is not in possession of an identity document or visa or whose visa has expired does not come within the conditions set out in Articles 3 and 4 of Directive 68/360 and in Regulation No 2317/95.

95.

The Austrian Government submits that, in the absence of absolute urgency, a decision to expel a person protected by Community law is not to be implemented until he has been able to exhaust the remedies which he is guaranteed by Articles 8 and 9 of Directive 64/221 (Royer, cited above, and Case 131/79 Santillo [1980] ECR 1585).

96.

However, if under Belgian law entry and residence of third country nationals who are a member of the family of a Member State national is conditional upon production of a valid passport or identity card and of a visa, it is legitimate to deny such a family member who has entered Belgian territory unlawfully the right to bring the matter before the competent authority within the meaning of Article 9(1) of Directive 64/221.

97.

On the other hand, having regard to Article 3(3) of Directive 64/221, the family member is to enjoy the right of recourse provided for in Article 9 of the directive where he has entered the territory of the Member State lawfully but the identity card or passport used by him to enter and to obtain a residence permit has expired. In such a case expulsion from national territory is not justified.

98.

The Commission contends that Article 1(2) of Directive 64/221 applies to third country nationals who are a member of the family of a Member State national, even if they are not in possession of a visa or their visa has expired. Provided that the family ties are established, there is no doubt that they enjoy the rights of recourse provided for in Article 9(2) of Directive 64/221.

99.

On the other hand, if there are no identity documents the answer should be the same as that suggested for the first question. The status of spouse of a Member State national must be established in order for the Community law protection to apply.

The Court's answer

100.

The purpose of Article 9(2) of Directive 64/221 is to provide minimum procedural guarantees for persons refused a first residence permit, or whose expulsion is ordered before the issue of the permit, in any of the three cases defined in Article 9(1). Where the right of appeal against administrative measures is restricted to the legality of the decision, the purpose of the intervention of the competent authority is to enable an examination of the facts and circumstances, including factors demonstrating the appropriateness of the proposed measure, to be carried out before the decision is finally taken (see, to that effect, Joined Cases C-65/95 and C-111/95 Shingara and Radiom [1997] ECR I-3343, paragraphs 34 and 37).

101.

The provisions of Article 9 of Directive 64/221, which are complementary to those relating to the system of appeals to a court of law referred to in Article 8 and are intended to mitigate the effect of deficiencies in those remedies (see, in particular,

Case 98/79 Pecastaing [1980] ECR 691, paragraphs 15 and 20), call for a broad interpretation as regards the persons to whom they apply. In the field of Community law, the requirement for judicial review of any decision of a national authority reflects a general principle stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 of the Convention (Case 222/86 Unectef v Heylens and Others [1987] ECR 4097, paragraph 14, Case C-97/91 Oleificio Borelli v Commission [1992] ECR I-6313, paragraph 14, and Case C-226/99 Siples [2001] ECR I-277, paragraph 17).

102.

Accordingly, contrary to the argument put forward by the Belgian State, any foreign national married to a Member State national claiming to meet the conditions necessary to qualify for the protection afforded by Directive 64/221 benefits from the minimum procedural guarantees laid down in Article 9 of the directive, even if he is not in possession of an identity document or, requiring a visa, he has entered the territory of a Member State without one or has remained there after its expiry.

103.

Moreover, those procedural guarantees would be rendered largely ineffective if entitlement to them were excluded in the absence of an identity document or visa or where one of those documents has expired.

104.

The answer to the fourth question referred for a preliminary ruling must therefore be that, on a proper construction of Articles 1(2) and 9(2) of Directive 64/221, a foreign national married to a national of a Member State has the right to refer to the competent authority envisaged in Article 9(1) of that directive a decision refusing to issue a first residence permit or ordering his expulsion before the issue of the permit, including where he is not in possession of an identity document or where, requiring a visa, he has entered the territory of a Member State without one or has remained there after its expiry.

Costs

105.

The costs incurred by the Austrian Government and 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 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 Conseil d'État by judgment of 23 November 1999, hereby rules:

1. On a proper construction of Article 3 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, Article 3 of 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 and Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States, read in the light of the principle of proportionality, a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health within the meaning of Article 10 of Directive 68/360 and Article 8 of Directive 73/148.

2. On a proper construction of Article 4 of Directive 68/360 and Article 6 of Directive 73/148, a Member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully.

3. On a proper construction of Articles 3 and 4(3) of Directive 68/360, Articles 3 and 6 of Directive 73/148 and Article 3(3) of Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, a Member State may neither refuse to issue a residence permit to a third country national who is married to a national of a Member State and entered the territory of that Member State lawfully, nor issue an order expelling him from the territory, on the sole ground that his visa expired before he applied for a residence permit.

4. On a proper construction of Articles 1(2) and 9(2) of Directive 64/221, a foreign national married to a national of a Member State has the right to refer to the competent authority envisaged in Article 9(1) of that directive a decision refusing to issue a first residence permit or ordering his expulsion before the issue of the permit, including where he is not in possession of an identity document or where, requiring a visa, he has entered the territory of a Member State without one or has remained there after its expiry.

Rodríguez Iglesias
Colneric
von Bahr

Gulmann
Edward
Puissochet

Wathelet
Schintgen
Cunha Rodrigues

Delivered in open court in Luxembourg on 25 July 2002.

R. Grass
G.C. Rodríguez Iglesias

Registrar
President

1: Language of the case: French.