

Free Movement of Non-EC Nationals A Review of the Case-Law of the Court of Justice

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I. Introduction

This article will examine the case-law of the Court of Justice regarding the legal status of nationals of third countries.¹

An analysis of the judgments must take account of the fact that non-EC nationals may have rights or benefits either directly under an EC instrument or indirectly as a result of their relationship with an EC national. Because of the fundamental nature of this distinction I have divided this report into two parts. I deal first with the rights and benefits that non-EC nationals derive from their relationship with an EC national; and subsequently with direct rights under an EC instrument.

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1 This issue has been the subject of the following 13 judgments (I have added the nationality of the persons concerned):

1. Case 40/76, *Karmaschek*, [1976] ECR 1669 (Yugoslavia)
2. Case 65/77, *Razanatzimba*, [1977] ECR 2235 (Madagascar)
3. Joined Cases 62 and 63/81, *Seco*, [1982] ECR 223 (not mentioned)
4. Joined Cases 35 and 36/82, *Morson and Jhanjan*, [1982] ECR 3723 (Suriname)
5. Case 283/83, *Meade*, [1984] ECR 2631 (USA)
6. Case 267/83, *Diatta*, [1985] ECR 567 (Senegal)
7. Case 94/84, *Deak*, [1985] ECR 1873 (Hungary)
8. Case 131/85, *Gül*, [1986] ECR 1573 (Cypriot national of Turkish origin)
9. Case 12/86, *Demirel*, [1987] ECR 1573 (Turkey)
10. Case C-113, *Rush Portuguesa*, (judgment of 27 March 1990, not yet reported) Although this case dealt with EC nationals (Portuguese employees), it is included in this list because at the time of the ruling, the persons involved did not enjoy the full rights of EC nationals.
11. Case C-192/82, *Sevinc*, (judgment of 8 October 1990, not yet reported) (Turkey)
12. Joined Cases C-297/88 and C-197/89, *Dzodzi*, (judgment of 18 October 1990, not yet reported).
13. Case C-18/90, *Kziber*, (judgment of 31 January 1991, not yet reported) (Morocco). Although various EEC regulations and directives grant rights to stateless persons and refugees, there is no case-law dealing with this matter. Therefore, it will not be discussed in this report.

II. Derived Rights and Benefits

A large number of regulations and directives grant certain rights to members of the family of EC nationals, *irrespective of their own nationality*. In addition, it appears from two of the cases listed above that non-EC nationals may derive certain benefits from the fact that they are employed by an EC firm exercising its freedom to provide services.

A. Relatives of EC Nationals

Freedom of movement of EC nationals requires that obstacles to their mobility shall be eliminated, in particular as regards their right to be joined by their family and the conditions for the integration of that family into the host country.² Consequently, there are numerous regulations³ and directives⁴ which seek to facilitate the free movement of employees, self-employed persons, students and EC nationals who wish to reside in a Member State other than their own, and these measures grant rights to their relatives as well.

• The circle of beneficiaries of derived rights is not always exactly the same. In most cases, it comprises the spouse of the holder of the original right and their descendants who are dependants. Often it also includes the dependent relatives in the ascending line of the holder of the original right and his spouse. The term 'spouse', contained in these regulations and directives, refers to a marital relationship only; however, if a Member

2 Preamble to Regulation No. 1612/68.

3 Council Regulations 1612/68 on freedom of movement for workers within the Community, OJ (1968) L 257/2; Commission Regulation 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that state, OJ (1970) L 142/24; Council Regulation 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, last consolidated text in OJ (1983) L 230/8.

4 Council Directive 64/221 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on the grounds of public policy, public security and public health, OJ 1964/850; Council Directive 68/360 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families, OJ (1968) L 257/13; Council Directive 72/194 extending to workers exercising the right to remain in the territory of a Member State after having been employed in that state the scope of Directive 64/221, OJ (1972) L 121/32; Council Directive 73/148 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 172/14; Council Directive 75/34 concerning the right of nationals of a Member State to remain in the territory of another Member State after having pursued therein an activity in a self-employed capacity, OJ (1975) L 14/10; Council Directive 75/35 extending the scope of Directive 64/221 to include nationals of a Member State who exercise the right to remain in the territory of another Member State after having pursued an activity in a self-employed capacity, OJ (1975) L 14/14; Council Directive 77/486 on the education of children of migrant workers, OJ (1977) L 199/32; Council Directive 90/364 on the right of residence, OJ (1990) L 180/26; Council Directive 90/365 on the right of residence for employees and self-employed persons who have ceased their occupational activity, OJ (1990) L 180/28; Council Directive 90/366 on the right of residence for students, OJ (1990) L 180/30.

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State grants certain advantages to unmarried companions of its nationals, it cannot refuse to grant them to those workers who are nationals of other Member States without being guilty of discrimination on grounds of nationality, contrary to Articles 7 and 48 of the EEC Treaty.⁵

Where there is no holder of an original right, there cannot be a beneficiary of a derived right. This has been the core of the rulings in Joined Cases 35 and 36/82 *Morson and Jhanjan*, in Case 283/83 *Meade* and in Joined Cases C-297/88 and C-197/89 *Dzodzi*.

Mrs Morson and Mrs Jhanjan had applied for permission to reside in the Netherlands in order to install themselves with their daughter and son respectively. Since these were Dutch nationals who were employed in their own country and who had never exercised their right to freedom of movement within the Community, the cases had, as the Court said, no factor linking them with any of the situations governed by Community law. Accordingly, the Treaty provisions on freedom of movement and the rules adopted to implement them did not apply.⁶

Mr Meade, a US national, Mrs Meade, a UK national who was not an employed person, and their two children, UK nationals, had been resident in France where Mr Meade was self-employed. The Court ruled that in these circumstances neither Regulation 1408/71 nor Article 48 of the Treaty prevented family allowances from being withdrawn pursuant to French legislation on the ground that one of the children was pursuing studies in the United Kingdom.⁷

On the same ground as in the *Morson and Jhanjan* case, the Court held that Mrs Dzodzi, widow of a Belgian national, could not rely on Regulation 1612/68, Directive 68/360, Regulation 1251/70 and Directive 64/221⁸ for her application to remain in Belgium.⁹ However, under Article 40 of the Belgian Law on access to the territory of the State (for aliens) and the residence, establishment and expulsion of aliens, the foreign spouse of a Belgian national is treated as a Community national irrespective of his or her nationality. The Court of Justice held that if the national court considers that, as a result of this reference, a provision of Community law is applicable to a purely domestic situation, the Court of Justice has jurisdiction to give a preliminary ruling on the interpretation of that provision of Community law.¹⁰ Acting on this basis, the Court of Justice defined, in its *Dzodzi* judgment, the right of residence and the right to remain in the territory which Directive 68/360 and Regulations 1612/68 and 1251/70 confer upon the spouse of a worker who is a national of a Member State, employed or previously

5 Case 59/85, *Reed*, [1986] ECR 1283, at 1300 and 1303.

6 [1982] ECR, at 3734-3738.

7 [1984] ECR, at 2637-2639.

8 *Supra*, notes 3 and 4.

9 Joined Cases C-297/88 and C-197/89, *Dzodzi*, (judgment of 18 October 1990, not yet reported) at paras. 20-28.

10 *Ibid.* at paras. 29-43.

employed in the territory of another Member State; and the scope of the legal protection required by Articles 8 and 9 of Directive 64/221.¹¹

These derived rights include the right of non-EC nationals to install themselves with the holder of the original right,¹² a conditional right to remain permanently in the host state,¹³ admission to normal education on the same conditions as the nationals of that state,¹⁴ the right to take up work,¹⁵ and access to benefits under the social security system of that state.¹⁶

Moreover, Article 7(2) of Regulation 1612/68 provides that a worker, who is a national of a Member State, shall enjoy in the territory of another Member State the same social and tax advantages as national workers. The Court of Justice has held that this principle of equal treatment is also intended to prevent discrimination against the worker's widow and against his dependent relatives in the descending and in the ascending line.¹⁷ As a result, this provision bestows a wide range of benefits upon the worker's relatives, including reduced railway fares for large families,¹⁸ interest free loans on the birth of a child,¹⁹ a guaranteed income for old persons²⁰ and unemployment benefits for school leavers.²¹ In Case 94/98 *Deak* the Court has stated that this principle applied without regard to the nationality of those family members.²²

In Case 267/83 *Diatta*, the Court has ruled that a member of a migrant worker's family is not required to live permanently with him in order to qualify for a right of residence under Article 10 of Regulation 1612/68. Mrs Diatta was married to a French national working in Berlin. After some time she had separated from him with the intention of divorcing. The Court held that Article 10 must not be interpreted restrictively. Its interpretation of that provision corresponds to the spirit of Article 11 of the same Regulation, which gives the member of the family the right to take up any activity as an employed person throughout the territory of the Member State. Moreover, the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority.²³

Article 11 of Regulation 1612/68, under which the spouse and the children of a

11 Ibid. at paras. 44-69.

12 Art. 10(1) Reg. 1612/68; Art. 1 Dir. 73/148; Art. 1 Dir. 75/34; Art. 1 of Directives 90/364, 365 and 366.

13 Art. 3 Reg. 1251/70.

14 Art. 12 Reg. 1612/68; Art. 2 Dir. 77/486.

15 Art. 11 Reg. 1612/68.

16 Art. 3 Reg. 1408/71.

17 Case 32/75, *Cristini*, [1975] ECR 1085, at 1095; Case 63/76, *Inzirillo*, [1976] ECR 2057, at 2068; Case 261/83, *Castelli*, [1984] ECR 3199, at 3213; Case 256/86, *Frascogna*, [1987] ECR 3431, at 3443.

18 Case 32/75, *Cristini*, [1975] ECR 1085.

19 Case 65/81, *Reina*, [1982] ECR 33.

20 Case 261/83, *Castelli*, [1984] ECR 3199.

21 Case 94/84, *Deak*, [1985] ECR 1873.

22 [1985] ECR 1873, at 1887.

23 [1985] ECR 567, at 589-591.

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national of a Member State, who is pursuing an activity as an employed or self-employed person in another Member State, are entitled to take up any activity as an employed person throughout the territory of that same state, even if they are not nationals of any Member State, was the subject matter of Case 131/85 *Gül*. The Court held that, in order to pursue an occupation such as the medical profession, the spouse of a migrant worker who is a national of a non-member country must meet the same requirements as those imposed by the host Member State on its own nationals. He may rely on the principle of non-discriminatory treatment, provided for in Article 3(1), first indent, of Regulation 1612/68. It was held to be immaterial whether his medical qualifications are recognized under the legislation of the host Member State alone or pursuant to Directive 75/363.²⁴

In respect of social security, the Court has stressed, in Case 40/76 *Kermaschek*, that Regulation 1408/71 refers to two clearly distinct categories: the workers on the one hand, and the members of their families and their survivors on the other. The persons belonging to the second category can only claim derived rights of social security, acquired through their status as a member of the family or a survivor of the holder of the original right. As a result, the spouse of a worker cannot claim, under Article 67 et seq., unemployment benefits on account of her own unemployment; she is only entitled to the benefits provided by the national legislation for the members of the family of unemployed workers. The Court added expressly that the nationality of the members of the family does not matter for this purpose.²⁵ This principle has been confirmed in Case 94/84 *Deak*. A national of a non-member country who is the member of a family of a national of a Member State cannot rely on Regulation 1408/71 in order to claim unemployment benefits granted, under the legislation of the host state, to young persons seeking employment.²⁶ However, as has been mentioned above, such benefits constitute a social advantage to which he is entitled under Article 7(2) of Regulation 1612/68.

B. Employees of a Firm Providing Services in another Member State

Under Articles 59 and 60 of the EEC Treaty, a firm established in a Member State is allowed to provide services in another Member State under the same conditions as are imposed by that state on its own nationals. The Court has made it clear that this freedom carries with it the right for such a firm to use its own staff, regardless of their nationality, for that purpose.

Joined Cases 62 and 63/81 *Seco* was concerned with a Luxembourg legislation governing contributions to old-age and invalidity insurance. By virtue of the Social Insurance Code, workers employed in Luxembourg are in principle compulsorily

24 Case 131/85, *Gül*, [1986] ECR 1513, at 1588-1594.

25 [1976] ECR 1669, at 1676-1678.

26 [1985] ECR 1873, at 1884-1885.

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insured. Half of the contributions must be paid by the employer and half by the worker. However, the Government may exempt from insurance foreigners who are temporarily resident in the Grand Duchy. In that case the employer is nevertheless liable for his share of contributions, although they do not entitle the worker concerned to any social benefit. It appeared from the papers before the Court that the reason for this was, on the one hand, that it would be unfair to collect contributions from workers residing in Luxembourg only temporarily, whilst, on the other hand, the temptation for employers to use foreign labour in order to alleviate the burden of paying their share of social security contributions must be avoided. However, practice revealed that the employer's share is no longer required to be paid in respect of workers who are temporarily in Luxembourg, if they are nationals of a Member State.

Seco and Dequenne were French undertakings carrying out work in the Grand Duchy, employing for that purpose workers who were not nationals of a Member State and who remained compulsorily affiliated to the French social security scheme during the entire duration of the work carried out in Luxembourg. The Court held that the extension of the obligation to pay the employer's share of social security contribution to employers established in another Member State, who are already liable under the legislation of that state for similar contributions in respect of the same workers and the same periods of employment, constituted a discrimination prohibited under Articles 59 and 60(3) of the Treaty. As a consequence of this legislation employers established in another Member State in fact have to bear a heavier burden than those established within the national territory. It added that a Member State's power to control the employment of nationals of non-member countries may not be used to impose a discriminatory burden on an undertaking from another Member State enjoying the freedom to provide services.²⁷

The problem in Case C-113/89 *Rush Portuguesa*, resulted from the fact that, while the freedom of providing services was already fully applicable between Portugal and the older members of the Community, Article 216 of the Act of Accession of Spain and Portugal provided for a derogation from freedom of movement for workers until 1 January 1993. When a Portuguese undertaking arranged for Portuguese workers to come to France for the purpose of carrying out work which it had subcontracted in that country, the French immigration office claimed payment from it of the special contribution payable by an employer employing foreign workers in breach of the provisions of the labour code.

The Court declared that Articles 59 and 60 EEC preclude a Member State from prohibiting a provider of services established in another Member State from freely travelling within its territory with the whole of its staff, or from making the movement of the staff in question subject to restrictions such as a requirement to carry out on the spot recruitment or to obtain work permits. To impose such conditions on the provider of services of another Member State would be to discriminate against him in relation to

27 [1982] ECR 223, at 232-236.

his competitors established in the host country who are able to avail themselves of their own staff and would, moreover, affect his capacity to provide the services. However, the derogation of Article 216 of the Act of Accession applies whenever the access by Portuguese workers to the employment market of other Member States and the system governing the entry and residence of Portuguese workers requiring such access, were in issue. It would also preclude workers coming from Portugal from being made available through the intermediary of an undertaking providing services.²⁸

It appears from these two judgments that the freedom to provide services in another Member State implies the right to employ non-EC nationals for that purpose and that the host state may not make this freedom subject to restrictive conditions. It is too early to define the precise scope of this principle. It seems, however, that it can only be relied upon by the provider of services established in another Member State, even if it may result in benefits for non-EC nationals by facilitating their temporary employment elsewhere in the Community.

III. Direct Rights

Several agreements concluded, under Articles 228 and 238 of the Treaty, by the Community with third countries make provision for the way in which the EEC Member States shall treat nationals of those countries. These provisions may, moreover, be implemented by acts adopted by a joint council instituted by the agreement.

The Court has always held that such agreements and acts adopted for their implementation are, as far as the Community is concerned, an act of one of its institutions within the meaning of Article 177(1)(b) of the Treaty and that their provisions form, from their entry into force, an integral part of the Community legal system. On this ground it has accepted jurisdiction to give preliminary ruling concerning the interpretation of such provisions.²⁹

The Court had further admitted that such rules of Community law, resulting from agreements with non-member countries, can be directly applicable and, consequently, relied upon by nationals of these countries. A provision in such an agreement or in an act adopted for its implementation must be regarded as being directly applicable when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.³⁰

28 Ibid, at paras. 12-16.

29 See, as regards the rights of non-EC nationals: for agreements: Case 12/86, *Demirel*, [1987] ECR, at 3750; for implementing acts see Case C-192/89, *Sevince*, (judgment of 8 October 1990, not yet reported) at para. 10.

30 For agreements: Case 12/86, *Demirel*, [1987] ECR, at 3752; for implementing acts: Case C-192/89, *Sevince*, ibid. at para. 15 of the judgment.

These principles have been applied in respect of the 1963 Association Agreement concluded with Turkey and its implementation, the 1975 Lomé Convention and the 1976 Cooperation agreement concluded with Morocco.

A. The Association Agreement Concluded with Turkey³¹

This Association Agreement and its implementation by the Council of Association were at issue in Case 12/86 *Demirel* and in Case C-192/89 *Sevince*.

Mrs Demirel, a Turkish national, had entered the Federal Republic of Germany to join her husband, who had the same nationality and who had been living and working in Germany since entering that country in 1979. She was ordered to leave the country because her husband did not fulfil the German conditions for family reunification in the case of nationals of non-member countries. These conditions had been tightened between 1982 and 1984, by raising from three to eight years the period during which the foreign national was required to have resided continuously and lawfully on German territory.

According to Article 12 of the Agreement, the contracting parties agreed to be guided by Articles 48, 49 and 50 of the EEC Treaty for the purpose of progressively securing freedom of movement for workers between them. Article 36 of the Additional Protocol gives the Council of Association exclusive powers to lay down detailed rules for the progressive attainment of freedom of movement for workers. Decision No. 1/80 of this Council prohibits, with regard to Turkish workers who are already duly integrated in the labour force of a Member State, any further restrictions on the conditions governing access to employment. In the sphere of family reunification no decision of that kind had been adopted. Article 7 of the Agreement provides that the contracting parties are to refrain from any measures liable to jeopardize the attainment of the objectives of the Agreement.

The question was whether the provisions quoted above conferred rights on individuals like the spouse and the minor children of a Turkish worker established within the Community. The Court's reply was negative. Article 12 of the Agreement and Article 36 of the Protocol are not sufficiently precise and unconditional for that purpose. The Court added that it was not possible to infer from Article 7 of the Agreement a prohibition on the introduction of further restrictions on family reunification.³²

On the other hand, in Case C-192/89 *Sevince* the Court ruled that certain provisions of Decisions Nos. 2/76 and 1/80 of the Association Council have direct effect in the Member States. That ruling applies to Article 2(1)(b) of Decision No. 2/76 and Article 6(1), third indent, of Decision No. 1/80, under which, after five and four years respectively of legal employment in an EEC Member State, a Turkish worker is to enjoy

31 OJ (1963) C 113/2. The Additional Protocol of 1970 has been published in OJ (1973) C 113/18.

32 Case 12/86, *Demirel*, [1987] ECR, at 3752-3754.

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free access to any paid employment of his choice in that state. It also applies to Article 7 of Decision No. 2/76 and Article 13 of Decision No. 1/80 which contain a stand-still clause for new restrictions on the access to employment on behalf of workers having legal right of residence and employment within the territory of the contracting states. Neither the fact that the Decisions make provision for the adoption of implementing measures, nor the non-publication of these Decisions, nor certain narrow safeguard clauses were considered to affect the ruling on direct effect.³³

The two Decisions are confined to regulating the right of access to employment of the Turkish worker, without referring to his right of residence. However, the Court declared that these two aspects of his personal situation are so closely interrelated that, by acknowledging the right of a Turkish worker to free access to any employment of his choice, after a certain period of legal employment in that Member State, these provisions necessarily imply the existence, at least as from that moment, of a right of residence for that person.³⁴

It was, however, of no avail to Mr Sevinç because he was not deemed to have 'legal employment' within the meaning of Article 2(1)(b) of Decision No. 2/76 and Article 6(1), third indent, of Decision 1/80. This is so because that term does not apply to the circumstances of a worker who is authorized to engage in employment until his challenge to the decision refusing the right of residence has been completed.³⁵

B. The Lomé Convention

Case 65/77 *Razanatsimba* concerned the interpretation of Article 62 of the Lomé Convention of 1975.³⁶ This article provided that, as regards the arrangements that may be applied in matters of establishment and provision of services, the ACP States on the one hand and the Member States on the other shall treat nationals and companies or firms of Member States and nationals and companies of the ACP States respectively on a non-discriminatory basis.

Razanatsimba had the professional qualifications enabling him to seek admission to the French bar. The question was whether the legal condition that he must be French, in so far as international agreements do not provide otherwise, formed an impediment to his admission. Razanatsimba argued that that would be contrary to the principle of non-discrimination laid down in Article 62 of the Lomé Convention.

According to the Court of Justice, the interpretation of that provision raised two questions:

33 Case C-192/89, *Sevinç*, *supra* note 30, at paras. 16-26.

34 Case 12/86, *Demirel*, *supra* note 32, at paras. 28-29.

35 Case C-192/89, *Sevinç*, *supra* note 30, at paras. 30-33.

36 OJ (1976) L 25/2.

(i) Does it oblige either the ACP States or the EEC Member States to give to the nationals of a state belonging to the other group treatment identical to that reserved to their own nationals? The reply to that question was negative. The wording of the Article referred to the two groups of states bound by the Lomé Convention and provided that any state belonging to one of the groups shall treat nationals of any state belonging to the other group on a non-discriminatory basis.

(ii) Is a national of one ACP State (in this case: Madagascar) entitled under it to invoke the particular advantages accorded in matters of establishment by a Member State (France) to another ACP State (the Malagasy Republic)? The Court declared that it is not contrary to the rule of non-discrimination laid down in Article 62 for a Member State to reserve more favourable treatment to the nationals of one ACP State, provided that such treatment results from the provisions of an international agreement comprising reciprocal rights and advantages.³⁷

C. Cooperation Agreements

The EEC has concluded cooperation agreements, *inter alia*, with Algeria,³⁸ Morocco,³⁹ Tunisia⁴⁰ and Yugoslavia.⁴¹ These agreements provide *inter alia* that workers holding the nationality of one of these countries and any members of their families living with them shall enjoy, in the field of social security, the same treatment as nationals of Member States in which they are employed. This clause, as contained in Article 41(1) of the Agreement concluded with Morocco, was addressed in Case C-18/90 *Kziber*.

Mrs Kziber, a Moroccan national, lived with her father who had the same nationality and who had retired in Belgium after having been employed in that country. She appealed against a refusal of the Belgian authority to grant her the special unemployment benefits provided for school leavers which the Court of Justice had already defined as a social advantage within the meaning of Article 7(2) of Regulation 1612/68.⁴²

The Court held, in the first place, that the prohibition on discrimination contained in Article 41(1) was capable of direct application.⁴³ It further declared that the concept of 'social security' contained in that Article has a meaning analogous to that found in Regulation 1408/71, and that Article 4 of this Regulation mentions, among the branches of social security, unemployment benefits, which include those at issue in the present case.⁴⁴ It then stated that the concept of 'worker' encompasses both workers in active

37 [1977] ECR, at 2238-2239.

38 OJ (1978) L 263/2.

39 OJ (1978) L 264/2.

40 OJ (1978) L 265/2.

41 OJ (1983) L 41/2.

42 Case 94/98, *Deak*, *supra* note 21.

43 Case C-18/90, *Kziber*, (judgment of 31 January 1991, not yet reported) at paras. 17-23.

44 *Ibid.* at para. 25.

employment and those who have withdrawn from the employment market because of age or of a work accident.⁴⁵ All this led to the conclusion that the principle of freedom from any discrimination based on nationality in the field of social security, contained in Article 41(1) of the Cooperation Agreement with Morocco precludes a Member State from refusing to grant an unemployment benefit to a resident family member of a Moroccan worker on the ground that the person seeking work is a Moroccan national.⁴⁶

In his opinion Advocate General Van Gerven submitted that in Cases 40/76 *Kermaschek* and 94/84 *Deak* the Court held that Regulation 1408/71 entitles members of the family of a worker who is a national of a Member State only to the benefits which the national legislation provides for the members of the family of unemployed workers. In particular, he argued that it does not entitle those relatives to unemployment benefits granted to young persons seeking employment, like those which were at issue in the main proceedings.⁴⁷ He then submitted that the rule of equal treatment of workers of Moroccan nationality does not allow the members of their families to claim more rights than those accruing to relatives of nationals of other EC Member States.⁴⁸ The Court did not make clear its reasoning for rejecting the opinion of the Advocate General. Yet a literal reading of Article 41(1) of the Cooperation Agreement appears to require that Moroccan workers and of members of their families be treated in the same way as nationals of the Member State in which they are employed, and not merely as nationals of another Member State and their relatives.

IV. Conclusions

Under Community law the rights of non-EC nationals to entry, residence, work, social security benefits, education and other social and tax advantages are based either on their relationship with EC nationals or firms or on their status as a national of a country with which the Community has concluded an international agreement. The attitude of the Court of Justice varies widely depending on which of these grounds is invoked. The reason is that the former ground is related to the freedom of movement within the common market, while the latter ground concerns the Community's external relations.

Whenever the freedom of movement within the common market is at stake, the Court is quick to condemn everything which might stand in its way. In the case of free movement of persons, the achievement of the objectives of family reunification and integration in the host Member State had far reaching consequences. The fact that this also benefits relatives who are nationals of third countries is not so much the Court's

45 Ibid. at para. 27.

46 Ibid. at paras. 28-29 of the judgment and ruling.

47 Case 94/98, *Deak*, *supra* note 21.

48 At para. 18 of the opinion in Case C-18/90, *Kziber*, *supra* note 43.

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achievement; the numerous regulations and directives stipulate that the various rights are extended to the spouse and the relatives irrespective of their nationality. On the other hand, in the case of freedom of providing services it has been the Court who decided that the nationality of the employees engaged by the provider of services should not constitute an obstacle.

Different rules, however, apply in the field of international agreements.

The recent *Kziber* case stands alone. This case resulted in the grant, to a relative of a worker from a third country, of certain rights falling within the scope of Regulation 1408/71, while previous case-law had denied such rights to relatives of workers from another Member State. In addition, it is the only one of the cases examined above in which a national of a third country was successful in invoking a provision of an international agreement.

In principle, the Court of Justice is prepared to regard a provision in an international agreement as being directly applicable. In practice, however, the Court is reluctant to render a judgment which would deprive the Community of any room for further negotiations with the other contracting partner. It can avoid such a decision either by denying direct effect, as it did in the *Demirel* case, or by adopting a restrictive interpretation of the scope of the provision, like in the *Razanatsimba* case.

The approach of the Court appears to be in line with its general attitude in cases involving the effects of international agreements in the legal order of the Community. I note, however, that the consequences of this approach can be harsh in cases involving the free movement of persons. Take the *Demirel* case for example. The Court could have declared that the obligation to refrain from any measures liable to jeopardize the attainment of the objectives of the Association Agreement is 'a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure'. Furthermore, it could have held that the increase from three to eight years of the period during which a foreign worker is required to have resided continuously and lawfully on German territory before being entitled to family reunification constitutes an infringement of that obligation. Ultimately, this is a matter of appreciation. The Court appears to have been deeply impressed by the problems which the presence of 1,500,000 Turkish immigrants caused to the Federal Republic of Germany. I would be inclined to be more persuaded by the inhumanity of a rule which compels a lawful immigrant to wait eight years before being allowed to resume family life.