

Avis juridique important

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Judgment of the Court of 7 July 1992. - The Queen v Immigration Appeal Tribunal et Surinder Singh, ex parte Secretary of State for Home Department. - Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom. - Freedom of movement for persons - Right of residence of the spouse of a national of a Member State who returns to establish himself in his country of origin. - Case C-370/90.

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Keywords

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Freedom of movement for persons ° Right of entry and residence for nationals of Member States ° Return to a Member State of one of its nationals who has exercised his right of free movement ° Right of residence of that person's spouse

(EEC Treaty, Art. 52; Council Directive 73/148)

Summary

The provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State. For that purpose, nationals of Member States have in particular the right, which they derive directly from Articles 48 and 52 of the Treaty, to enter and reside in the territory of other Member States in order to pursue an economic activity there as envisaged by those provisions.

A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, his conditions were not at least equivalent to those which he would enjoy under Community law in the territory of another Member State. He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of that State under conditions at least equivalent to those granted by Community law in the territory of another Member State.

The fact that a national of a Member State enters and resides in the territory of that State by virtue of the rights attendant upon his nationality, without its being necessary for him to rely on his rights under Articles 48 and 52 of the Treaty, does not preclude him from relying on the latter rights when he takes up residence again in that Member State.

Consequently, Article 52 of the Treaty and 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 must be construed as requiring a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or

she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered or resided in the territory of another Member State.

Parties

In Case C-370/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice (Queen's Bench Division) for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Immigration Appeal Tribunal and Surinder Singh

Ex parte: Secretary of State for the Home Department,

on the interpretation of Article 52 of the EEC Treaty and 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),

THE COURT,

composed of: O. Due, President, R. Joliet, F.A. Schockweiler, F. Grévisse, P.J.G. Kapteyn (Presidents of Chambers), G.F. Mancini, C.N. Kakouris, J.C. Moitinho de Almeida, G.C. Rodríguez Iglesias, M. Díez de Velasco, M. Zuleeg, J.L. Murray and D.A.O. Edward, Judges,

Advocate General: G. Tesauero,

Registrar: H.A. Ruehl, Principal Administrator,

after considering the written observations submitted on behalf of:

° the United Kingdom by Rosemary Caudwell, of the Treasury Solicitor's Department, acting as Agent, assisted by David Pannick, Barrister,

° Surinder Singh by Richard Plender, QC, of the Bar of England and Wales, and Nicholas Blake, Barrister, instructed by T. I. Clough and Co., Solicitors,

° the Commission of the European Communities by António Caeiro, Legal Adviser, and Nicholas Khan, a member of its Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the United Kingdom, represented by John F. Collins, of the Treasury Solicitor's Department, assisted by Stephen Richards, Barrister, Surinder Singh and the Commission of the European Communities at the hearing on 24 March 1992,

after hearing the Opinion of the Advocate General at the sitting on 20 May 1992,

gives the following

Judgment

Grounds

1 By order of 19 October 1990, which was received at the Court on 17 December 1990, the High Court of Justice (Queen's Bench Division) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 52 of the Treaty and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

2 That question was raised in the course of proceedings between Surinder Singh, an Indian national, and the Secretary of State for the Home Department, who decided to deport Mr Singh from the United Kingdom on 15 December 1988.

3 It appears from the order of the national court that Surinder Singh married Rashpal Purewal, a British national, on 29 October 1982 in Bradford (United Kingdom). From 1983 until 1985 Mr and Mrs Singh were employed in the Federal Republic of Germany. At the end of 1985 they returned to the United Kingdom in order to open a business.

4 In 1986 Mr Singh was granted limited leave to remain in the United Kingdom as the husband of a British national. In July 1987 a decree nisi of divorce was pronounced against him in proceedings brought by his wife. Because of that decree the British authorities cut short his leave to remain and refused to grant him indefinite leave to remain as the spouse of a British citizen.

5 Mr Singh resided lawfully in the United Kingdom until 23 May 1988, on which date he withdrew the administrative appeal which he had lodged against the decision refusing him permanent leave to remain. After that date he remained in the United Kingdom without leave.

6 The deportation order made on 15 December 1988 was based on section 3(5)(a) of the Immigration Act 1971, concerning foreign nationals who remain unlawfully in the United Kingdom beyond the time limited by their leave.

7 On 17 February 1989 the decree absolute was pronounced in Mr and Mrs Singh's divorce.

8 The appeal to an Adjudicator against the decision of 15 December 1988 was dismissed on 3 March 1989. In a determination of 17 August 1989 the Immigration Appeal Tribunal allowed Mr Singh's appeal against the decision of the Adjudicator, holding that he "had a Community right as the spouse of a British citizen who herself had a Community right to set up in business in this country."

9 On application by the Secretary of State for the Home Department for judicial review of that determination, the High Court of Justice (Queen's Bench Division) referred the following question to the Court for a preliminary ruling :

"Where a married woman who is a national of a Member State has exercised Treaty rights in another Member State by working there and enters and remains in the Member State of which she is a national for the purposes of running a business with her husband, do Article 52 of the Treaty of Rome and Council Directive 73/148 of 21 May 1973 entitle her spouse (who is not a Community national) to enter and remain in that Member State with his wife?"

10 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the Community legislation in issue, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

11 The question submitted by the national court for a preliminary ruling concerns the issue whether Article 52 of the Treaty and Directive 73/148, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone with that spouse to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national.

12 It should also be observed that it is not alleged that Mr and Mrs Singh's marriage was a sham. Moreover, although the marriage was dissolved by the decree absolute of divorce delivered in 1989, that is not relevant to

the question referred for a preliminary ruling, which concerns the basis of the right of residence of the person concerned during the period before the date of that decree.

13 Mr Singh and the Commission submit that a national of a Member State who returns to establish himself in that State after having pursued an economic activity in another Member State is in the same situation as a national of another Member State who comes to establish himself in that country. In their view he must be treated in the same manner, in accordance with the prohibition of discrimination laid down in Article 7 of the Treaty, and he may therefore rely on Article 52 of the Treaty, particularly in relation to the right of residence of his spouse when the latter is not a national of a Member State.

14 The United Kingdom, on the other hand, submits that a Community national who returns to establish himself in his country of origin is not in a situation comparable to that of nationals of other Member States, because he enters and remains in that country by virtue not of Community law but of national law. Article 52 of the Treaty and Directive 73/148 are not therefore applicable to him. The United Kingdom also argues that the application of Community law to a national who returns to establish himself in his country of origin has paradoxical consequences, since Community law would inter alia allow him to be deported from that country, and maintains that to grant a right of residence to the spouse increases the risk of fraud associated with sham marriages.

15 In its judgment in Case 118/75 Watson and Belmann ([1976] ECR 1185, paragraph 16), the Court held that Articles 48 and 52 of the Treaty and 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), Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485) and Directive 73/148, cited above, implement a fundamental principle contained in Article 3(c) of the Treaty, which states that, for the purposes set out in Article 2, the activities of the Community shall include the abolition, as between Member States, of obstacles to freedom of movement for persons.

16 The Court has also held, in its judgment in Case 143/87 Stanton v INASTI ([1988] ECR 3877, paragraph 13), that the provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.

17 For that purpose, nationals of Member States have in particular the right, which they derive directly from Articles 48 and 52 of the Treaty, to enter and reside in the territory of other Member States in order to pursue an economic activity there as envisaged by those provisions (see in particular the judgments in Case 48/75 Royer [1976] ECR 497, paragraph 31, and Case C-363/89 Roux v Belgian State [1991] ECR I-273, paragraph 9).

18 The provisions of the Council regulations and directives on freedom of movement within the Community for employed and self-employed persons, in particular Article 10 of Regulation No 1612/68, cited above, Articles 1 and 4 of Directive 68/360, cited above, and Articles 1(c) and 4 of Directive 73/148, cited above, provide that the Member States must grant the spouse and children of such a person rights of residence equivalent to that granted to the person himself.

19 A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State.

20 He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.

21 It follows that a national of a Member State who has gone to another Member State in order to work there as an employed person pursuant to Article 48 of the Treaty and returns to establish himself in order to pursue an activity as a self-employed person in the territory of the Member State of which he is a national has the right, under Article 52 of the Treaty, to be accompanied in the territory of the latter State by his spouse, a national of a non-member country, under the same conditions as are laid down by Regulation No 1612/68, Directive 68/360 or Directive 73/148, cited above.

22 Admittedly, as the United Kingdom submits, a national of a Member State enters and resides in the territory of that State by virtue of the rights attendant upon his nationality and not by virtue of those conferred on him by Community law. In particular, as is provided, moreover, by Article 3 of the Fourth Protocol to the European Convention on Human Rights, a State may not expel one of its own nationals or deny him entry to its territory.

23 However, this case is concerned not with a right under national law but with the rights of movement and establishment granted to a Community national by Articles 48 and 52 of the Treaty. These rights cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State. Nevertheless, Articles 48 and 52 of the Treaty do not prevent Member States from applying to foreign spouses of their own nationals rules on entry and residence more favourable than those provided for by Community law.

24 As regards the risk of fraud referred to by the United Kingdom, it is sufficient to note that, as the Court has consistently held (see in particular the judgments in Case 115/78 *Knoors v Secretary of State for Economic Affairs* [1979] ECR 399, paragraph 25, and Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 14), the facilities created by the Treaty cannot have the effect of allowing the persons who benefit from them to evade the application of national legislation and of prohibiting Member States from taking the measures necessary to prevent such abuse.

25 The answer to the question referred for a preliminary ruling must therefore be that Article 52 of the Treaty and Directive 73/148, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of the State of which he or she is a national. The spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in the territory of another Member State.

Decision on costs

Costs

26 The costs incurred by the Commission of the European Communities, which has 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.

Operative part

On those grounds,

THE COURT,

in answer to the question referred to it by the High Court of Justice (Queen's Bench Division) by order of 19 October 1990, hereby rules:

Article 52 of the Treaty and Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, properly construed, require a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the Treaty and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the State of which he or she is a national. A spouse must enjoy at least the same rights as would be granted to him or her under Community law if his or her spouse entered and resided in another Member State.