Opinion of Advocate General La Pergola delivered on 30 September 1999

Arben Kaba v Secretary of State for the Home Department

Reference for a preliminary ruling: Immigration Adjudicator - United Kingdom

Regulation (EEC) No 1612/68 - Free movement of workers - Social advantage - Right of the spouse of a migrant worker to obtain leave to remain indefinitely in the territory of a Member State

Case C-356/98

European Court reports 2000 Page I-02623

Opinion of the Advocate-General

1. The questions before the Court today have been submitted by the United Kingdom Immigration Adjudicator in connection with proceedings brought by Mr Arben Kaba against the decision of the Secretary of State for the Home Department (hereinafter the Secretary of State or the SSHD) rejecting his application for authorisation to reside indefinitely in that country.

I - The relevant Community legislation

2. Article 7 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (hereinafter the Regulation), provides;

1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.

Article 10(1) of the Regulation provides that the following shall, irrespective of the 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 ....

Pursuant to Article 3(1) 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 (hereinafter the Directive), Community citizens and members of their families enjoy a right of entry to the other Member States simply on production of a valid identity card or passport. Article 3(2) of the Directive provides that members of the family of a migrant worker who is a Community national who do not possess the nationality of one of the Member States may be required to have an entry visa, and that Member States are to accord to such persons every facility for obtaining any necessary visas.

Pursuant to Article 4(1) of the Directive, migrant workers and the members of their families have a right of residence in the territory of the Member States other than that of their origin, provided that they are able to produce a residence permit. Under Article 6(1)(b) of the Directive, the residence permit must be valid for at least five years from the date of issue and be automatically renewable.

Pursuant to Article 4(4) of the Directive, a member of the family who is not a national of a Member State shall be issued with a residence document which shall have the same validity as that issued to the worker on whom he is dependent.

II - The National legislative background

A - The relevant legislation

3. Entry to and residence in the United Kingdom are governed, inter alia, by the Immigration Act 1971 (hereinafter The Immigration Act); by the Immigration (European Economic Area) Order 1994 (hereinafter the EEA Order), which is not of concern to United Kingdom citizens and their families and by which the United Kingdom, inter alia, transposed the Directive; and by the Immigration Rules 1994 (hereinafter the Immigration Rules), by means of which - in the exercise of the powers conferred by section 3(2) of the Immigration Act - the Secretary of State issued directions for the application by the administration of the legislation on immigration in connection with entry to and residence in the territory of the United Kingdom.

B - Leave to remain

4. Under the Immigration Act, United Kingdom citizens are entitled to live in and to come and go into and from the United Kingdom without let or hindrance: in other words, they have a right of abode. Unlike Community citizens (see point 11), nationals of non-member countries who do not have that right may live, work and settle in the United Kingdom only after obtaining permission. Any person not a British citizen may be given leave to enter or, if already present in the United Kingdom, leave to remain either for a limited or for an indefinite period.

5. Conditions may be attached to such leave only where (whether it be leave to enter or to remain) it is granted for a limited period (thus, for example, restrictions may be imposed on the employment in which the holder of the leave may engage in the United Kingdom or a requirement to maintain and accommodate himself without recourse to public funds). The leave may be withdrawn if the holder does not observe the conditions attached to it or ceases to meet the requirements of the rules under which leave was granted.

1 - In particular, indefinite leave to remain

6. The United Kingdom, which has submitted observations in this case, informs us that the holder of an indefinite leave to remain is not subject to any condition, restriction or requirement, and that such leave cannot be withdrawn from him. In exceptional cases, however, provided that he is not a British citizen, the person concerned may be expelled from the United Kingdom. Normally, indefinite leave to remain is granted - where other conditions are fulfilled - after four years' continuous presence in the United Kingdom. For the present purposes, of particular interest among the various cases in which an immigrant may be granted indefinite leave to remain is the case where a person is admitted to the United Kingdom as the holder of a work permit subject to the condition, among others, that for four years he has continuously engaged in the United Kingdom in the employment for which he was admitted. In certain cases, however, leave may be granted more rapidly: in only twelve months rather than the normal four years. That applies, in particular and so far as is relevant here, where the applicant is the spouse of a person present and settled in the United Kingdom.

7. According to section 33(2A) of the Immigration Act, a person is regarded as settled in the United Kingdom if he is ordinarily resident there without being subject under the immigration laws to any restrictions on the period for which he may remain. In addition to British citizens who are ordinarily resident there, persons settled in the United Kingdom include the holders of indefinite leave to remain. According to the relevant national case-law mentioned by the referring court, a Community migrant worker who establishes his residence in the United Kingdom is not thereby settled there within the meaning of section 33(2A) of the Immigration Act.

2 - In particular, indefinite leave to remain granted to the spouse of a person present and settled in the United Kingdom (paragraph 287 of the Immigration Rules)

8. As in force at the material time, paragraph 287 of the Immigration Rules - entitled Requirements for [the grant of] indefinite leave to remain for the spouse of a person present and settled in the United Kingdom - provided as follows:

The requirements for indefinite leave to remain for the spouse of a person present and settled in the United Kingdom are that:

(i) the applicant was admitted to the United Kingdom ... and has completed a period of twelve months as the spouse of a person present and settled here;

(ii) the applicant is still the spouse of the person he or she was admitted ... to join and the marriage is subsisting; and

(iii) each of the parties intends to live permanently with the other as his or her spouse.

9. The United Kingdom Government has observed that the expression admitted to the United Kingdom in paragraph 287 must, in the context of the Immigration Rules, be understood as meaning admitted to the United Kingdom after being granted leave to enter, as provided for by paragraph 281 of the Immigration Rules, entitled Requirements for leave to enter the United Kingdom with a view to settlement as the spouse of a person present and settled in the United Kingdom .... Leave to enter with a view to settlement in the United Kingdom is granted in the event of a successful outcome of the examination conducted by the administration to verify whether the applicant meets the requirements laid down by paragraph 281 of the Immigration Rules. Those conditions are in part different from those - laid down, in accordance with Article 3 of the Directive, by the EEA Order - for entry to the United Kingdom by migrant workers who are citizens of a Member State of the European Economic Area (hereinafter EEA) and members of their families, even if they are nationals of a non-member country:

(i) the applicant [for leave to enter with a view to settlement in the United Kingdom] is married to a person present and settled in the United Kingdom ...;

(ii) the marriage was not entered into primarily to obtain admission into the United Kingdom;

(iii) the parties to the marriage have met;

(iv) each of the parties intends to live permanently with the other as his or her spouse ...;

(v) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively;

(vi) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds ....

10. Since it is not subject to requirements or restrictions of any kind, indefinite leave to remain, granted to the spouse of a person present and settled in the United Kingdom, does not lapse in the event of a subsequent

divorce or where the person who is present and settled later ceases to work in the United Kingdom. Accordingly it may be said that the situation of the person present and settled in the United Kingdom is similar to that of a British citizen who lives in that country, except in the case of expulsion - but that is not an issue in these proceedings. The grant of an indefinite leave to remain may also be a prelude to naturalisation of a British citizen.

C - Right of residence

11. Like British citizens, a citizen of a Member State of the EEA (hereinafter EEA citizen) has a right of entry to and residence in the United Kingdom without the need for any permission. An EEA citizen may, however, remain in the territory of the United Kingdom without any need to obtain a residence permit within the meaning of the Immigration Act only for so long as he is a qualified person. Thus, to give an example which is relevant to the present proceedings, that status is also enjoyed by an EEA citizen who works (as an employee or self-employed person) in the United Kingdom. As regards family members of EEA citizens, they are entitled to reside in the United Kingdom, without the need for any permission, as long as they remain family member(s) of a qualified person. A citizen of a non-member country, married to an EEA citizen, thus loses his right of residence if his spouse ceases to be a qualified person, as would occur - in the example given above - where he no longer worked in the United Kingdom, or in the case of divorce. An EEA citizen residing in the United Kingdom, or a member of his family, who ceases to be qualified person is required to apply for leave to enter or to remain, and is liable to be expelled from the United Kingdom.

12. A qualified person and the members of his family are issued with a residence permit (or document) upon presentation of the documents provided for by Article 4(3) of the Directive (see footnote 3). In particular, a citizen of a non-member country who is the spouse of an EEA citizen enjoying the status of qualified person must prove membership of the family of such a person.

D - Permission to remain indefinitely for citizens of an EEA Member State and their family members (paragraph 255 of the Immigration Rules)

13. Since Community citizens and members of their families do not have to obtain any residence authorisation, no provision is made for them to be granted indefinite leave to remain. However, the United Kingdom immigration legislation provides that, after a certain period of time within the United Kingdom, any EEA citizen and his family members may also acquire the status of a settled person within the meaning of Article 33(2A) of the Immigration Act. They may obtain a permit the effects of which are equivalent to those of indefinite leave to remain. Indeed, the United Kingdom immigration legislation contains a provision specifically laying down the conditions under which a person to whom the EEA Order applies ratione personae may become settled in the United Kingdom, thereby enjoying a right of residence which extends beyond that available under the EEA Order (and the Directive).

As in force at the material time, paragraph 255 of the Immigration Rules - appearing in the section entitled Settlement - provided that an EEA national (other than a student) and the family member of such a person, who has been issued with a resident permit or residence document valid for five years, and who has remained in the United Kingdom in accordance with the provisions of the 1994 EEA Order for four years and continues to do so may, on application, have his residence permit or residence document (as the case may be) endorsed to show permission to remain in the United Kingdom indefinitely.

14. According to the national case-law mentioned by the national court, the effects which, under United Kingdom Law, are associated with permission to remain indefinitely (paragraph 255 of the Immigration Rules) and indefinite leave to remain (paragraph 287 of the Immigration Rules) are equivalent. In both cases, the right of residence thus recognised is not subject to any requirement, obligation or restriction. Essentially, in all cases the status of a person settled in the United Kingdom is acquired, resulting in enjoyment of a right of residence close (albeit not identical) to the right of abode of British citizens (only the latter, in fact, cannot be expelled from the country; see point 6 and, in particular, footnote 13). In formulating its second preliminary question, the national court itself uses the expression indefinite leave to remain to cover both the provisions of paragraph 255 and those of paragraph 287 of the Immigration Rules.

III - The facts and the main proceedings

15. Mr Kaba, a Kosovan Albanian, arrived in the United Kingdom on 5 August 1991 and applied for leave to enter for a period of one month. It was not granted. However, he was allowed to enter the United Kingdom temporarily on condition that he left the next day. Mr Kaba, who in the meantime remained in the United Kingdom, lodged an application for asylum on 25 February 1992. On 4 May 1994, the appellant in the main proceedings married Virginie Michonneau, a French citizen, whom he had met the previous summer when she was working in the United Kingdom as an au pair. On 7 November 1994 Ms Michonneau - who had temporarily left the United Kingdom and, on returning, had found employment there - was granted a residence permit valid until 2 November 1999. In response to an application, on 28 November 1994 Mr Kaba too was granted leave to remain in the United Kingdom until 2 November 1999. The reasons given by the United Kingdom immigration authorities (in this case the Home Office Immigration and Nationality Directorate, hereinafter the IND), were as follows;

At present [your] only claim to remain in the United Kingdom is as the spouse of a European Community national who is resident here and this Department should be notified should your spouse decide to leave the United Kingdom or to cease exercising Treaty rights here. If you decide to stay without your spouse you would then

have to qualify to remain in the United Kingdom in your own right under the current Immigration Rules. Having obtained permission to remain, Mr Kaba withdrew his application for asylum.

16. On 23 January 1996 Mr Kaba applied for indefinite leave to remain. On the basis that such leave constitutes a social advantage within the meaning of Article 7(2) of the Regulation; that that provision prohibits any discrimination between citizens of the host Member State and Community citizens; that paragraph 287 of the Immigration Rules lays down a period of only twelve months for the spouse of a British citizen or a person present and settled in the United Kingdom to be able to obtain indefinite leave to remain, Mr Kaba, as the spouse of a Community citizen, asked to be treated in the same way as a spouse of a British citizen. Pointing out that Ms Michonneau had obtained a residence permit valid from November 1994, Mr Kaba submitted that he satisfied the residence condition laid down by paragraph 287 of the Immigration Rules because his wife was, in his contention, a person present and the equivalent of settled in the United Kingdom for a period exceeding twelve months. The requirement laid down in connection with settlement - completion of a period of residence of four years within the United Kingdom - in his view represented a discriminatory obstacle to enjoyment of the social advantage in question and, as such, could not be applied to a Community citizen residing in the United Kingdom and exercising there the right guaranteed by Article 48 of the EC Treaty (now after amendment, Article 39 EC) and, therefore, likewise could not be applied to the spouse of such a person.

17. By letters of 9 September and 3 October 1996 the IND rejected that application on the ground that the applicant's spouse did not meet the condition of a minimum period of residence (four years) in the United Kingdom laid down in paragraph 255 of the Immigration Rules. The IND gave the following reasons for its rejection of Mr Kaba's application:

[you] have applied . .. for indefinite leave to remain in the United Kingdom as the holder of a five-year residence document who has remained in the United Kingdom for four years in accordance with the provisions of the 1994 EEA Order and continues to do so, but in view of the fact that your wife, an EEA National, has only been a qualified person in the United Kingdom (i.e. as a worker) for a total of one year ten months, the Secretary of State is not satisfied that you have fulfilled the requirements of paragraph 255 of the Immigration Rules and therefore he is not prepared to exercise his discretion in your favour.

18. Mr Kaba then appealed against that decision to the Immigration Adjudicator, the judicial authority seeking a preliminary ruling in this case. Before that authority, he essentially repeated the arguments used to support the application for indefinite leave to remain which he had made earlier to the IND. It appears from the order for reference that the two spouses have lived together since their marriage and that Ms Michonneau has continued to work in the United Kingdom. Since the request for a preliminary ruling reached the Registry of the Court, however, Mr Kaba and Ms Michonneau have divorced.

IV - The questions

19. To enable her to give a decision in the proceedings between Mr Kaba and the Secretary of State, the Immigration Adjudicator has submitted the following questions to the Court for a preliminary ruling:

1. Does the right to apply for indefinite leave to remain in the United Kingdom and the right to have that application considered constitute a "social advantage" within the meaning of Article 7(2) of Regulation No 1612/68?

2. Does the requirement imposed on the spouses of EC nationals to have been resident in the United Kingdom for four years before an application for indefinite leave to remain in the United Kingdom may be made and considered (see paragraph 255 of the United Kingdom Immigration Rules, House of Commons Paper 395), as compared to a requirement of 12 months' residence before such application can be made, as is applied to spouses of UK nationals and spouses of those present and settled in the United Kingdom (paragraph 287 of the United Kingdom Immigration Rules, House of Commons Paper 395) constitute unlawful discrimination contrary to Article 7(2) of Regulation No 1612/68?

20. The need for a preliminary ruling on the provisions referred to arises, according to the national court, from the uncertainty created by the Court of Justice in the cases of Reed and Singh. in Reed, the Court held that the right of the unmarried companion of a migrant worker to live with that worker in the host Member State constitutes a social advantage for that worker. That advantage therefore, if granted by the host Member State to workers of its own nationality, cannot be withheld from workers who are nationals of other Member States without discrimination arising of the kind prohibited by Article 7 (which became Article 6 as a result of the Treaty on European Union and is now, after amendment, Article 12 EC) and Article 48 of the EC Treaty and, therefore, Article 7(2) of the Regulation. In Singh, however, the Court also observed that Articles 48 and 52 of the Treaty [the latter, after amendment, now being Article 43 EC] do not prevent the 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.

V - Substance

A - The first question

1 - Introduction

21. The first question seeks essentially to ascertain whether or not indefinite leave to remain in the United Kingdom is to be regarded as a social advantage within the meaning of Article 7(2) of the Regulation. The

national court formulated the question in the above terms because, in its opinion, there is no other way of bringing the matter before the Court if Mr Kaba is entitled, in the circumstances of the case, to invoke a right of residence without limitation of time under Community law. The only possible legal basis in Community law for his claim appears to lie in the prohibition of discrimination in Article 7(2) of the Regulation; and, consequently, the only way of overcoming the IND's refusal of his application is to contend that the right claimed amounts to a social advantage within the meaning of the abovementioned provision. That is the logic of the order for reference. I think it is appropriate, before considering the substance, to give a brief overview of the present Community rules concerning rights of residence.

2 - The rights of residence of migrant Community nationals under Community law

22. As already pointed out (see point 11), the EEA Order, which inter alia gives effect to the Directive, grants the right of residence in the United Kingdom only to qualified persons, subject to their remaining so qualified, and to certain members of their families (spouse, children who are under 21 or dependent on them and dependent ascendants of the worker or the worker's spouse). The Treaty and the Directive in fact confer on those who, possibly with members of their families, go to another Member State only a right of residence conditional upon the exercise of an economic activity within the meaning of Article 48: the Directive requires the Member State to grant a right of residence to workers and members of their family (see Article 48(3)(c) of the EC Treaty). Under Article 7 of the Directive, the residence permit (which, however, has only declaratory and probative force regarding that right) may be withdrawn in the event of loss of employment which is not involuntary or the result of temporary incapacity. The Court made it clear that the right conferred by Article 48, although implying the possibility of moving freely in the territory of the other Member States and of residing there for the purpose of seeking employment, does not prevent the Member States from imposing a reasonable limit - for example, six months - on the duration of any such residence or, even, excluding it entirely where the migrant has no prospect of employment whatsoever.

23. Similar provisions concern the rights conferred by Articles 52 and 59 of the EC Treaty (the latter now being, after amendment, Article 49 EC). Reference need only be made to the provisions of Directive 73/148/EEC. It may be true that - in order to ensure full implementation of the freedom of establishment (see the second recital in the preamble to the Directive) - Article 4(1) of Directive 73/148/EEC requires the right of permanent residence to be granted to Community nationals and their family members who establish themselves in a Member State other than that of their origin in order to pursue activities as self-employed persons (when the restrictions on such activities have been abolished pursuant to the Treaty). However, that provision (like Article 52) presupposes in all cases that an economic activity is engaged in by the holder of that right of residence. With regard to the freedom to provide services, Community law provides for a right of residence both for the providers and for the recipients of services; here too, therefore, there is a clear reference to the economic value of the activity associated with presence in another Member State; indeed, under Article 4(3) of Directive 73/148, the right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided.

24. Then there are the directives from which derives the freedom of movement for persons not engaged in any economic activity (hereinafter jointly referred to as the residence directives). However, in providing in their turn for a right of residence, those directives too require that certain conditions be satisfied (and continue to be satisfied), such as the availability of sickness insurance and sufficient resources to ensure that migrant Community nationals (and persons dependent on them) do not in the course of their residence become a burden on the social security scheme of the host Member State.

25. It should also be remembered that - by Regulation No 1251/70 and Directive 75/34 - the Community legal order also provides, as a corollary for the free movement of persons guaranteed by the Treaty, that is to say a right of residence conditional upon the exercise of an economic activity, the right - in special cases in fact, which are different from that with which the main proceedings are concerned - of employed or self-employed workers (and their family members) to remain permanently in a Member State after working there.

26. Finally, for all Community migrants (and their family members) engaged in economic activity or possessing sufficient resources to maintain themselves, whether or not vested with a permanent right of residence, Community law imposes limits on enjoyment of their right to remain in the territory of the host Member State. Those limits are based on grounds of public policy, public security and public health. They are provided for in Article 48(3), Article 56(1) (now, after amendment, Article 46 EC) and Article 66 of the EC Treaty (now Article 55 EC) and by the three directives for the coordination of national provisions, which rely on the same grounds and provide for a special regime for the expulsion of aliens (hereinafter directives concerning the movement of foreign nationals).

3 - The meaning of social advantage

27. In view of the foregoing considerations it must be concluded that Community law does not in this case confer on Mr Kaba any unlimited right of residence in the United Kingdom. More precisely, there are no provisions in the Treaty or secondary law which expressly and directly confer such a right upon him. Quite properly, therefore, the national court has merely referred to the Court of Justice the question whether Mr Kaba may be entitled to reside permanently in the host State on an indirect basis, so to speak, if this Court considers that the right to apply for indefinite leave to remain and the right to have that application examined (obviously, in the event of the application being granted) constitutes a social advantage within the meaning of Article 7(2) of the Regulation. That, specifically, is the purpose of the first preliminary question, which I shall examine shortly. Only if the answer is affirmative, of course, will it be necessary to go on to examine the second question submitted by the Immigration Adjudicator as to whether the difference between the requirements imposed by the national

legislation - depending on whether the application for indefinite leave to remain is submitted by the spouse of a British citizen (or, which is the same for the purposes of these proceedings, a person who is present and settled) or, on the other hand, by the spouse of a national of another Member State - amounts to discrimination regarding enjoyment of the right which has been found to be in the nature of a social advantage, thereby giving rise to an infringement of Article 7(2) of the Regulation.

28. In order to address and resolve the first question correctly it is necessary, in my view, to bear in mind that, according to the case-law of the Court, the aim of Regulation No 1612/68, namely freedom of movement for workers, requires, for such freedom to be guaranteed in compliance with the principles of liberty and dignity, the best possible conditions for the integration of the Community worker's family in the society of the host country. In that connection, the Court has held that it is essential for a worker and the members of his family to be able to enjoy the same social advantages as those granted by the host State to its own citizens. That means, therefore, that in order fully to achieve the aims pursued by Community law the phrase social advantages in Article 7(2) [cannot] be interpreted restrictively. Moreover, the Court has adopted a fairly broad definition of social advantages; and it has consistently stated that that concept is extended ... to workers who are nationals of other Member States, so that it must include all advantages which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member countries therefore seems suitable to facilitate their mobility within the Community.

29. Among the numerous benefits classified by the Court as social advantages there are some of a financial nature which accrue to the worker himself directly, or indirectly in so far as they are granted to members of his family in their own right; others of a non-financial nature; and yet others, paid to members of a worker's family, being different from those to which the worker might be entitled in his own right. A social advantage does not cease to be such, as the Court has made clear, merely because a migrant worker who applied for it on behalf of his family has died in the meantime. Thus construed, Article 7(2) of the Regulation now covers a large number and wide range of cases. In Reed, for example, the Court ruled that Article 10(1) of the Regulation could not confer on a migrant worker the right to be accompanied by his or her unmarried companion (paragraph 16). However, it classified the right conferred by the national legislation on workers who are nationals of the host State as a social advantage falling within the scope of Article 7(2) of the Regulation (paragraph 28). Applying the principle of non-discrimination, the Court thus extended the range of the persons to whom the Regulation applies to include a person who, under Community law, is not a member of the family of a migrant worker.

4 - The meaning of social advantage and the indefinite right to remain

30. On the basis of the case-law of the Court, in Mr Kaba's view the indefinite and unconditional right of the spouse of a migrant worker to remain constitutes a social advantage. Whilst it is true that that right is directly available only to the holder thereof, it nevertheless attaches specifically, albeit indirectly, also to a spouse who works. In response to that contention, the United Kingdom states that the practical benefits deriving from the indefinite (and unconditional) right to remain granted to a person who, like Mr Kaba, has no independent right of residence under Community law manifest themselves in situations unconnected with Community law which are therefore not covered by the scope of the Regulation, particularly Article 7(2). Those benefits may be relevant, in the United Kingdom Government's view, only if the other spouse, that is to say the migrant worker, loses that status (for example by returning to his country of origin), or where, having obtained that right, the family member intends applying for naturalization as a British citizen. In other words, the right claimed in these proceedings cannot be classified as a social advantage because it does not constitute an advantage or benefit the extension of which to migrant workers who are nationals of another Member State is likely to facilitate their mobility within the Community (see point 28).

31. I do not find the observations made by the United Kingdom Government regarding this point convincing. The practical advantages deriving from the right to remain to which the plaintiff in the main proceedings claims entitlement already exist by virtue of a marriage and do not materialise only in the event of divorce or when the migrant worker leaves the United Kingdom or ceases to be a qualified person, or again in the case of the family member intending to become a British citizen. The opportunity for one of the couple to reside in the host Member State permanently and unconditionally - therefore regardless of whether the other spouse retains the status of qualified person - may, it seems to me, contribute to better integration of the migrant worker and his family into the society of the host State and thus be conducive to the aim of free movement for workers. An indefinite right to remain guarantees greater stability and better planning for the family and facilitates the mobility of workers, specifically because it allows them to live in the host State in circumstances as close as possible to those in which they would live in their State of origin. That represents, in my opinion, specific implementation of the aim, indicated in the fifth recital in the preamble to the Regulation, of removing every obstacle regarding integration of the family into the society of the host country.

32. The United Kingdom also submits that the social advantage within the meaning of the regulation is intended to cease when the person concerned loses his status as a migrant worker or, in the case of benefits allocated to members of his family, when the relationship between them and the migrant worker is broken off. The social advantage claimed by Mr Kaba, on the other hand, is the right to enjoy a right of residence not limited in time, which does not lapse either when the spouse ceases to be a migrant worker or when the matrimonial link between the latter and the person concerned is dissolved.

33. In view of the foregoing considerations, it should be noted that a manifest aim underlying the Treaty is that of providing certain and efficient guarantees to uphold the free movement of workers, the first of which is removal of any obstacles, however slight, which might impede its exercise. As I observed earlier, a response to that most important requirement is the Court's interpretation of the concept of social advantages which each

Member State must thus ensure for the nationals of the other Community States (including members of their families) in the same way as for its own nationals; moreover, as stated by the Court itself, the importance is apparent from the provisions of the regulation, taken as a whole, from all points of view, of the integration of the worker and his family into the host Member State without any difference of treatment in relation to nationals of that State. The case now before us arises because in certain circumstances the spouse of a British citizen or of a person present and settled in the United Kingdom may apply for indefinite leave to remain, which may be available to the applicant even if his spouse is not engaged in active employment, and even if the matrimonial bond is dissolved. However, I do not see why it should be assumed that the extension of that benefit to the spouse of a Community citizen should constitute a case necessarily falling outside the scope of the principle of non-discrimination upheld by the Regulation. In particular, I see no reason to conclude that the advantage claimed by Mr Kaba could not - precisely because it was granted without limitation, once and for all, and was not conditional upon enduring satisfaction of the legal requirements - be regarded as a social advantage within the meaning of the Community Regulation. The case-law of the Court on this matter appears to point in another direction, as may be inferred from a number of decisions. In the context of Article 38 of the Treaty and Regulation No 1612/68 ... once the employment relationship has ended, the person concerned as a rule loses his status of worker, although that status may produce certain effects after the relationship has ended .... In Lair and Meints, the Court held that certain social advantages connected with the status of worker are guaranteed to migrant workers even if, strictly, they are no longer in an employment relationship. In Cristini, the Court stated that if the widow and infant children of a national of a Member State are entitled to ... cards (for cut-price transport, issued to large families by a railway company), provided that the request had been made by the father before his death, the same must apply where the deceased father was a migrant worker and a national of another Member State. It would be contrary to the purpose and the spirit of the Community rules on freedom of movement for workers to deprive the survivors of such a benefit following the death of the worker whilst granting the same benefit to the survivors of a national (paragraphs 15 and 16). Not only that. In Echternach and Moritz, national legislation which did not allow the child of a migrant worker to obtain funds for studies after his father had returned to his country of origin was held to be discriminatory. On the basis of those dicta of the Court, it must be concluded, in my view, that to deprive spouses of migrant workers of an indefinite right to remain whenever some requirement relating to that situation ceases to be fulfilled is not in conformity either with the purpose or spirit of the Community legislation on freedom of movement for workers.

34. For its part, the European Commission, which, like the United Kingdom, has submitted observations in these proceedings, puts forward arguments which essentially, albeit by another route, come to the same conclusions as those of the United Kingdom Government: the right claimed by Mr Kaba goes beyond the scope of Article 7(2) of the Regulation. Bearing in mind that the dependent family workers of a migrant worker enjoy indirectly, that is to say not in their own right, the equal treatment due to the migrant worker, the Commission maintains that they may only enjoy rights corresponding to those granted to the worker himself: Mr Kaba, it says, contends on the other hand, on the basis of the principle of non-discrimination, for an indefinite right to remain, which is a wider right than the one conferred on his wife by Article 48. In order not to lose the status of qualified person, his wife would in fact in any event remain subject to the limits laid down by Community law (or by the EEA Order) and should therefore remain in employment.

35. As regards the provisions of paragraphs 255 and 287 of the Immigration Rules and in contrast to the position advocated by the Commission, I consider it inappropriate to dismiss Mr Kaba's claim as unlawful on the basis that the right which he seeks is wider than that granted to his wife under Article 48(3)(b) of the EC Treaty, by the Directive and by the EEA Order. Indeed, that argument can be easily countered, first, by pointing out that what distinguishes the right sought by Mr Kaba from the one enjoyed by his wife is not its duration: potentially (as the Commission itself has recognised), Ms Michonneau is also entitled to extend her stay in the United Kingdom indefinitely, provided that she continues to be a qualified person. Secondly, on the basis of the case-law of the Court, it is possible to regard as social advantages benefits which are granted to the family members of a worker which differ from those due to him as such. An example is the special old-age grant which guarantees a minimum income to the worker's ascendants (see footnote 56); there is no other explanation for the case-law of the Court which regards as social advantages a whole series of benefits attributed not so much to the worker as to his family members in their own right (see footnotes 56 and 58).

36. Rather, the indirect enjoyment by the family members of a migrant worker of the equal treatment guaranteed to migrant workers by the Treaty and by the Regulation - equal treatment which, inter alia, is reflected by their enjoyment of the same social advantages as those granted by the host Member State to the family members of national workers - means that they enjoy certain social advantages only if and to the extent to which those advantages may be regarded as such for the migrant worker himself, within the meaning of Article 7(2) of the Regulation (which, in this case, is not in doubt; see footnote 60 and point 31). And that is so regardless of the greater or lesser extent to which they are equivalent to those granted directly and in his own right to the migrant worker concerned.

37. Moreover, as Mr Kaba himself has pointed out, the concept of social advantage expounded by the Court does not imply that a particular benefit has to be provided for and recognised by Community law as a right attaching to a migrant worker. A characteristic common to many social advantages progressively identified by the Court is that they were not rights of general application deriving from Community provisions but rights already conferred on the migrant worker. Article 7(2) of the Regulation, which establishes the principle of non-discrimination as regards all the social advantages enjoyed by workers (and their family members) who are nationals of the host Member State, constitutes, essentially, an open provision, which relies on national laws and the rights provided for by them. It was not fortuitously that, with reference to a study grant, the Court made it clear that the child [of the migrant worker] may itself rely on Article 7(2) in order to obtain that financing if, under national law, it is granted directly to the student.

38. The Commission also states that, under Community legislation, a spouse is entitled to establish himself with the migrant worker and that the Member States are obliged to issue the national of a third country with a residence document having the same validity as that issued to the migrant worker to whom he is married and on whom he depends. The Commission also refers to Diatta, in which the Court held that Article 11 of Regulation No 1612/68 ... does not confer on the members of a migrant worker's family an independent right of residence, but solely a right to exercise any activity as employed persons throughout the territory of the State in question. Article 11 cannot therefore constitute the legal basis for a right of residence without reference to the conditions laid down in Article 10. The Commission's reference to the legislation and case-law, however, is not relevant to this case for more than one reason. In the first place, the residence document is merely declaratory of the right of residence (see point 22) and, therefore, the duration of its validity can have no impact on the continuation of that right. Secondly, above all, Mr Kaba's claim to an indefinite right of residence is based not on any specific provision of Community law but on the combined provisions of the relevant United Kingdom immigration legislation and the principle of non-discrimination laid down in Article 7(2) of the Regulation. The Court's reasoning in Diatta is therefore very different from the thesis put forward by Mr Kaba.

39. The United Kingdom Government has observed that the indefinite right to remain falls outside the scope of Article 7(2) of the Regulation for a further reason: it is one of those advantages generally granted to national workers and its grant to the spouse of a person present and settled in the territory of the United Kingdom has nothing to do with the latter's status as a worker. For a benefit to fall to be regarded as a social advantage it is sufficient that it is granted, inter alia, to national workers. In Reed, the Court did in fact include in the list of social advantages a benefit granted, without further qualification, to the nationals of the host Member State and to the holders of an unlimited right of residence.

40. Finally, the United Kingdom Government also observed, with reference to the concept of social advantage defined by the Court, that indefinite leave to remain is not granted by virtue of the mere fact of their residence on the national territory: entitlement thereto arises, under national legislation, only after special links have been established with the United Kingdom, in particular as a result of residence for four years during which the person concerned has continued to engage in the employment for which he was initially admitted, or by means of 12 months' residence as the spouse of a person who is already present and settled and following a positive outcome of the checks provided for by paragraph 281 of the Immigration Rules. It may however be stated in reply to that argument that, according to the case-law of the Court, the status of social advantage also attaches to a benefit granted to national workers generally [and not exclusively] ... because of their objective status as workers or by virtue of the mere fact of their residence on the national territory (see point 28). Among the reasons which might prompt a Member State to grant a particular advantage to a person residing in its territory may be included, therefore, the existence of a particular link - over and above mere residence - between the beneficiary and the host country.

41. I am therefore of the opinion that, as regards the first question, an indefinite right to remain granted to the spouse of a migrant worker constitutes a social advantage within the meaning of Article 7(2) of the Regulation. It does not matter here that it is a right not expressly provided for by Community law, differing from those already enjoyed by the worker in his own right, and granted by reason of the existence of a particular link with the host State.

B - The second question

1 - The issues

42. It is now appropriate to consider the second question, the terms of which have already been set out (see point 19). Does the unlawful discrimination of which the person concerned complains on the basis of a comparison between the treatment which he receives and that accorded to the spouse of a United Kingdom national or a person present and settled in the United Kingdom exist or not?

43. Normally, persons present and settled in the United Kingdom within the meaning of paragraph 287 of the Immigration Rules possess British nationality. To justify his claim, Mr Kaba relies on the case-law of the Court which held to be discriminatory a condition requiring completion of a specific period of residence in the territory of the Member State concerned, which is laid down for the grant of a social advantage to the workers of other Member States but is not imposed on national workers. According to the United Kingdom and the Commission, on the other hand, paragraphs 255 and 287 of the Immigration Rules are not discriminatory, since the two situations treated differently are not similar. In their view, the legal situation of a spouse of a person who applies for indefinite leave to remain, namely that of a qualified person (migrant worker), differs from that of a person who is present and settled (including nationals of the State concerned). Secondly, as the United Kingdom Government observed, an applicant under paragraph 287 of the Immigration Rules must have first passed a number of checks, which do not apply to a person who, having obtained leave to reside in the United Kingdom as the spouse of a Community migrant worker, submits an application under paragraph 255 of the Immigration Rules.

44. The argument advanced by Mr Kaba is based on the opposite view, namely that an indefinite right to remain is to be granted on a precisely equal basis to the spouse of a migrant worker and to the spouse of a Community national. On that view, the plaintiff in the main proceedings assumes that those subjective situations are comparable and therefore deserving of equal treatment: the fact of applying different rules to him offends against the prohibition of treating differently according to their nationality people covered by national legislation. However, as stated earlier, the United Kingdom legislature did not in point of fact fail to provide for an indefinite right to remain, having equivalent effect for both categories of spouse covered by the present preliminary question, even though the measure to be adopted is described by the law in one case as indefinite leave to

remain and in the other as permission to remain indefinitely. The provision which Mr Kaba considers discriminatory is the one concerning the duration - different in each case - of the periods of residence to be completed for the purposes of the leave applied for. That criticism, however, has no basis. The prohibition of treating nationality as a lawful distinguishing factor is included in the Regulation in pursuance of the general principle of equality before the law, according to which, in the Community order, as in State legal systems, identical situations or those which are at least justifiably comparable may not be treated differently. It is true that the Court has several times repeated that an obligation of residence to be fulfilled before a social benefit is granted is discriminatory if based on nationality: directly if not imposed on nationals of the host Member State (see footnote 77) or indirectly - in that it can be more easily satisfied by nationals of the host Member State - if imposed regardless of the nationality of the applicant. But, in the decisions in which the Court expressed that view, the requirement of residence was found to be discriminatory in that it applied to situations which, in the light of all the applicable rules, could and should have been treated as similar. In this case, however, we have different provisions, as was necessary, specifically to govern different cases. I agree with the United Kingdom and the Commission in the view - I shall clarify the point below - that the respective situations governed by paragraphs 255 and 287 of the Immigration Rules are not comparable. I shall concentrate on the view put forward by the United Kingdom Government. There are, in its view, two aspects - one is a question of substance and, the other, I will say, is procedural - which clearly show the objective difference between the two situations which, according to Mr Kaba's lawyer, should in fact be governed by the same rules.

2 - Rights of residence and comparison of the legal situations of a person settled in the United Kingdom and a Community migrant worker residing there

45. How, for the present purposes, do the subjective situations of a Community migrant and a person present and settled in the United Kingdom, whether or not a United Kingdom national, differ? I shall start by considering the first of the aspects mentioned by the United Kingdom Government, with whose position the Commission has also associated itself. As regards migrant nationals, it is Community law itself which grants them a right to reside in the host State, subject to the continuing fulfilment of certain conditions: connection with some economic activity, for example, or the status of student, provided that the person concerned has sufficient resources not to be a burden on the social security system of the place of residence. On the other hand, a person present and settled in the United Kingdom falls into a category created by the national legislation and enjoys the unconditional right of residence which the domestic law guarantees him. The latter situation is in fact described as that of people living in their country of origin: nationals of the host State enjoy comprehensive freedom of action in their home country, not a right to reside there for a specific purpose. As the Court has made clear, admittedly ... 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 other words, whilst a person present and settled in the United Kingdom enjoys a permanent right to remain, a migrant worker like Ms Michonneau has a right to remain in the host State which is only potentially permanent; that right extends until the time at which she engages in (or intends taking up) an economic activity (see point 22). Moreover, only the holder of an indefinite right to remain, that is to say a settled person (who does not yet possess United Kingdom nationality), may submit an application to become a British citizen (see point 10).

46. As regards, in particular, rights of residence, it is once again Community law which draws a clear distinction, which it is appropriate to recall here: first, a migrant worker has an ordinary right of residence and, second, once a migrant Community national has established himself in the host Member State, he has a permanent right of residence which is no longer subject to any condition, restriction or requirement. That new and wider right of residence constitutes a corollary of the right ordinarily enjoyed by virtue of the free movement of persons. In particular cases, in fact, Regulation No 1251/70 (the legal basis of which is Article 48(3)(d)) and Directive 75/34 confer the right to remain in the host State, that is to say a permanent right of residence, on migrant workers (employed or self-employed) and their family members residing in the territory of a Member State other than that of origin by virtue of the right conferred on them by Article 48(3)(c) and Article 52 of the EC Treaty, implemented by the abovementioned directive and by Directive 73/148 (see point 25). Among the cases envisaged by Regulation No 1251/70, we find that of a worker who has reached pensionable age, after employment, in the territory of the host Member State, for at least 12 months and has resided there continuously for more than three years (see Article 2(1)(a)); we also find the case of a worker who, having resided continuously in the territory of a Member State for more than two years, ceases to work there as an employed person as a result of permanent incapacity to work (see Article 2(1)(b)). The cases to which I refer are substantially equivalent to that of a person present and settled in the United Kingdom. But it is clear that, in the main proceedings, the circumstances of Mr Kaba's spouse do not fall within any of the provisions just mentioned.

47. It should be remembered (see footnote 49), in that connection, that Article 6 (in particular Article 6(2)(e)) of the EEA Order and paragraphs 256 and 257 of the Immigration Rules - contained in the section entitled Settlement, together with paragraph 255 - provide for the case of those who meet the conditions laid down by Regulation No 1251/70 and by Directive 75/34, granting those persons the right to obtain indefinite leave to remain (the holder of which, by that very fact, becomes a person settled in the United Kingdom). In that way, national legislation entirely assimilates the permission to remain indefinitely provided for by paragraph 255 to the right to remain provided for by Community law (and reflected in paragraphs 256 and 257 of the Immigration Rules) and distinguishes the various situations constituting settlement in the United Kingdom under the immigration laws from the ordinary right of residence of a qualified person within the meaning of the EEA Order.

48. With regard to residence in a given Member State, the difference between the legal circumstances of the nationals of that State and those of nationals of other Member States is such that Community law itself empowers the Member States to treat their own nationals (and their family members) in a more favourable manner. And it is in the light of the foregoing consideration that, in my opinion, the ruling of the Court of Justice

in Singh must be read: since a national of a Member State enters and resides in the territory of that State by virtue of the rights attendant upon his nationality, 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. The link between individual Member States and their own nationals is certainly closer than and, in any event, different from that which each individual country of the Community, under the Treaty, has established with the nationals of the other Member States. Hence, as far as rights of entry and residence are concerned, differing treatment for the two categories of nationals does not necessarily involve unlawful discrimination.

49. The judgment in Reed can, if examined closely, be reconciled with the statements of the Court in Singh and with the foregoing reconstruction. Mr Kaba points out that, in Reed, the Court found Netherlands legislation to involve discrimination on grounds of nationality in not granting a right of residence to the unmarried companion of a Community migrant worker residing in the Netherlands. That was because the same right was available to the unmarried companion of a Netherlands national or the holder of an unlimited right of residence (refugee or person granted asylum). I do not deny that, as regards residence once again, the circumstances of that person (similiar to those of the Netherlands national) appear to come close to those of a person who is present and settled (in turn, not far removed from the circumstances of a British national). The fact is, however, that in criticising the discriminatory nature of the national measure, the Court confined itself to drawing attention to the difference of treatment as between (companions of) Community nationals as compared with that of (companions of) Netherlands nationals. Thus, the Court did not expressly consider the arguments whereby the Netherlands Government, in response to Mrs Reed's complaint, drew attention to the substantial difference between the rights of residence of its own nationals and those of Community migrant workers. Indeed, in Reed the Court, in my opinion, concluded that a typical case of discrimination on grounds of nationality arose in that - as noted by Advocate General Lenz in his Opinion in Reed (see point II-1-a) - the Member State concerned had failed to show conclusively why the difference of treatment of Community migrant workers was attributable to their different legal situation in relation to rights of residence rather than solely in relation to their nationality as such.

50. In this case, the United Kingdom offers us a clear and persuasive explanation for the regime adopted to cover the situations provided for respectively by paragraphs 255 and 287 of the Immigration Rules; far from constituting discrimination (albeit indirect, it might be said) based on nationality, the longer period of prior residence required by paragraph 255 clearly derives from the fact that, as regards the right of residence, the case of a migrant worker was to be appraised and regulated, as it in fact was, differently from that of a person present and settled in the United Kingdom. According to the United Kingdom Government, essentially, in contrast to the case of a Community migrant worker holding an ordinary right of residence under the EEA Order (and the Directive), a foreign national settled in the United Kingdom has established close links with the host country, having normally spent a continuous period of four years there. A fortiori, a British national, as such, enjoys in his own country a permanent and unconditional right of residence. Moreover, even a Community migrant worker, who, in the view of the national legislature, has enduring links with the United Kingdom, is entitled to apply for and obtain settlement. Paragraph 255 of the Immigration Rules in fact presupposes that a person who has remained in the country for four years is established there. That clarifies the reason for the reduction, for the purposes of applications to reside for an indefinite period, of the period of prior residence laid down for a person applying to remain indefinitely in order to join a spouse who is already a settled person. It was not, on the other hand, decided - and that choice does not seem to me to be unreasonable - that after only 12 months after entry into the United Kingdom a migrant worker had established himself in the host country to such an extent that a spouse wishing to follow him should be given the same treatment as that accorded to the spouse of a person already settled in the country. Community law too, it should be remembered, makes the right of residence for an indefinite period conditional upon attainment of a sufficient degree of integration into the host State, which is presumed to exist only after completion of an adequate period of continuous residence, together with fulfilment of other requirements in certain cases.

3 - Effects of the entry into force of the Treaty on European Union

51. I have indicated the reasons for which the legal situation of persons present and settled in the United Kingdom differs from that of a Community migrant worker, such as Ms Michonneau in this case, who arrived in that country shortly before her husband applied for indefinite leave to remain. The problem arises at this stage of verifying whether the entry into force of the Treaty on European Union, on 1 November 1993 (that is to say before the events giving rise to the main proceedings), has in any way relevant to these proceedings changed Ms Michonneau's legal situation. Today, the EC Treaty contains Article 8a (introduced by the Treaty on European Union and now, after amendment, Article 18 EC). In other proceedings the opinion has been canvassed that the provisions of that article represent a considerable qualitative step forward from - or, it has even been said, a move beyond - the earlier view of freedom of movement linked, if not inevitably confined to, the exercise of economic activities (see Articles 48 to 66 of the EC Treaty) or conditional upon the availability of sufficient resources not to be a burden on the social security scheme of the host State (see the residence directives), so much so that today the acquis communautaire would be difficult to apply to the rights of residence of citizens of the European Union.

52. Let us not forget, however, the essence of the question from the national court, namely whether a Community national, of whom Mr Kaba was the spouse, may in the host State exercise a full right of residence, in other words an absolutely unconditional right: only if that is the case could the right in question be equal to that granted by the United Kingdom legislature to its own nationals or to persons present and settled there, negating the alleged discrimination as regards enjoyment of the social advantage at issue. The question is therefore concerned with the United Kingdom's allegedly unlawful act in failing fully to treat in the same way both the position of its own national or the position - which is equivalent - of a person present and settled there

and that granted to Community nationals, so as to eliminate the difference in the requirements of prior residence which their respective spouses must have satisfied before being entitled to apply for indefinite leave to remain. The Court has not yet had an opportunity to rule on the point at issue here, namely the equal standing - and therefore, I repeat, the alleged unlimited nature - of the freedom to remain which Mr Kaba seeks to have extended to other Community nationals in the same way and on the same basis as that made available by the host State to its own nationals.

53. For my part, I shall not say that the Maastricht and Amsterdam Treaty provisions support such a claim. That conclusion follows from a closer examination, in relation to the present question, of Article 8a(1) of the EC Treaty. It is hardly necessary to recall the legislative context of that provision. The preamble to the Treaty on European Union announces the aim of marking a new stage in the process of European integration ..., and reaffirms the objective [of the Member States] to facilitate the free movement of persons. Article B of that Treaty (now, after amendment, Article 2 EU) includes among the objectives of the Union that of strengthen[ing] the protection of the rights and interests of its Member States through the introduction of a citizenship of the Union. That citizenship has in fact been created. The Treaty now thus embodies the idea of a common status which individuals, whose subjectivity is recognised in the law of the Union (see Article 8 of the EC Treaty), acquire merely by being nationals of a Member State. And it is a fertile idea: on the basis of the Union between Member States, as historical experience teaches us, the union of peoples which the Treaties of Maastricht and Amsterdam envisage may grow and develop: the preamble to the Treaty on European Union refers to the decision to continue the process of creating an ever closer Union among the peoples of Europe. The contribution made to European construction by the introduction of the new citizenship is not, however, merely potential.

54. Let me repeat what I stated in other proceedings regarding the certain and immediate impact of citizenship of the Union upon the sphere in which the prohibition of discrimination on grounds of nationality operates. The right to the same treatment as the State of residence grants its own nationals may, in my opinion, be claimed by an individual, regardless of any status or standing as a user of the market, thanks to the situation of the citizen - a European citizen - which derives from the Treaty and is of importance for the application of that right to him. That is what I said in Martínez Sala. In that case, however, I also noted that citizenship of the Union cannot in any event be indiscriminately superimposed on national citizenship, or, therefore, provide a basis for any claim to enjoy additionally those rights which must be regarded as reserved to nationals of the State of residence, because they constitute an exclusive privilege associated with their nationality. That is a consideration which emerges from the clear wording of the Treaties. I must repeat it in this case: the prohibition of discrimination laid down by the Regulation in relation to social advantages is not intended to, and cannot, bind the United Kingdom legislature to fulfil an obligation which the Treaty, and indeed the rules on citizenship of the Union, do not allow to be imposed on it, such as, precisely, the obligation to place on an unqualified equal footing the right of abode upon which is clearly impressed the stamp of national citizenship and the right of residence of a Community citizen. Nor is Mr Kaba's thesis comforted by the fact that the freedom to reside in every Member State, in addition to freedom of movement, has been expressly provided for as a right deriving from citizenship of the Union by a provision of the Treaty. To ensure a correct reading of that provision it is necessary to have regard to the considerations and clarifications which I shall set out below, even if it is recognised that it was adopted to deal with a fundamental freedom, a right of a constitutional nature. Here the issue, the only issue, is whether Article 8a(1) of the EC Treaty has, preceptively, extended to all citizens a right of residence which by definition, throughout the Union, is free of any temporal limitation. However, the provision which enunciates that right nevertheless surrounds the exercise of it by specifically defined limitations, which must be observed whenever it is sought - as, in my opinion, is certainly possible - to rely on its direct effect. They do, it is true, have an impact. But they have been imposed by the primary source of law of the Union. The interpreter, like it or not, cannot ignore them.

55. The law as it stands is conducive to the conclusion that, in itself, the EU Treaty was not very innovative in the matter of residence in the sense contended for by Mr Kaba, in so far as the Council is entrusted, in the future and by unanimous decision (co-decision with the European Parliament), with the delicate task of facilitating the exercise by citizens of the Union of the right to reside freely in the territory of the Member States (see Article 8a(2)). Furthermore, the travaux préparatoires for the future Treaty on European Union show that, at least initially, the possibility was considered of establishing citizenship of the Union involving the right of complete freedom of movement and residence, or freedom of movement and residence irrespective of engagement in economic activity, or full freedom of movement, the intention being to develop the concept of European citizenship. For its part, the Commission has suggested the following wording: Every Union citizen shall have the right to move and reside freely within Union territory, without limits as to duration, whether or not he pursues a gainful occupation. Article 8a(1) of the EC Treaty now provides for the right of free residence in the Union by means of the following words: subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect. In that way the provision in question, it must be concluded, refers to the pre-existing provisions, such as those of the EC Treaty itself (see Articles 48 to 66), as well as the provisions of, inter alia, the Regulation, the Directive and the residence directives. The insertion of the limitations, in those terms, in the text of Article 8a(1) therefore means that freedom of residence is still linked to the exercise of an economic activity (Articles 48 to 66 and secondary implementing legislation) or to the availability of sufficient resources (residence directives), as well as being subject to the limitations indicated in the directives concerning the movement, that is to say expulsion, of foreign nationals.

56. If Article 8a(1) had in fact created an absolute right of residence identical to that enjoyed by the citizens of the individual Member States, Union citizens who had emigrated could no longer be expelled from the host Member State and the directives on the movement of foreign nationals, if not repealed, would at least have had to reflect that change (none of Articles 48(3), 56(1) and 66 of the EC Treaty has been amended). Moreover, the Court has continued to give rulings on those directives in preliminary-ruling proceedings under Article 177 of the

EC Treaty (now Article 234 EC) without making the slightest reference to the Treaty on European Union, thereby indicating that it does not consider that, when it came into force, they had become obsolete.

57. Similar considerations apply to the residence directives, which have not been amended or repealed, and in relation to which the Court has recently given judgment in an action brought by the Commission under Article 169 of the EC Treaty (now Article 226 EC). Similarly, Articles 48 to 66 of EC Treaty (and the directives and regulations implementing them) would have been amended consequentially; after all, the Treaty on European Union was based on Article 49 of the EC Treaty (now, after amendment, Article 40 EC) which places an obligation on the Council to adopt the measures necessary progressively to facilitate the free movement of workers, as defined in Article 48. And with regard to those EC Treaty provisions as well - and also, for example, the Regulation and the Directive - the case-law of the Court has not ceased to develop without there being the slightest hint that, for example, the judgment in Antonissen - which upheld the right of the Member States to impose reasonable limits (in that case, six months) on the period of residence of a person seeking employment in a Member State other than that of his origin (see point 22) - is to be regarded as superseded; once again, I believe, this shows that Article 8a(1) does not, in itself, constitute a considerable qualitative step forward.

58. And again, if migrant Union nationals now enjoy a right of residence which is not subject to any condition, it is not clear why - following annulment of Directive 90/366 - the Council, only three days before the entry into force of the Treaty on European Union, adopted in its present terms Directive 93/96 on the right of residence for students (see point 22). It would not seem very meaningful to adopt a directive providing for a right of residence, limited to the period of training followed and conditional upon the availability of health insurance and sufficient resources, if, in that respect, it was destined to be superseded three days later. Moreover, certain recent proposals - including the proposal mentioned in footnote 68 - containing amendments to the Regulation and to Directives 68/360 and 73/148 do not rely on Article 8a(1) as the source of a new right of residence; instead, they reflect, for example, the Court's decisions in Levin and Antonissen, recognising their present validity. As well as the Commission (the author of those proposals), the European Parliament and the Economic and Social Committee have also demonstrated that they do not consider Directives 68/360 and 73/148 to have been repealed: in the course of the legislative procedure for their amendment, they did not raise objections to the retention of a conditional right of residence, as expressed in the provisions for the implementation of Articles 48 to 66 of the EC Treaty.

59. It also seems to me that some importance may be attached to the contents of a Commission report on the operation of the Treaty on European Union: Citizens of the Union have not been given general rights of freedom of movement and residence: the exercise of these rights is subject to the "limits and conditions" laid down by Community law. ... [W]hen it comes to the right of residence, the Treaty refers back to a complicated series of directives setting out the often restrictive conditions to which each category of persons is subject. ... In practice, therefore, the Treaty has made no improvement at all on what went on before. As ... residence [is a] right[...] of the individual, ordinary citizens' expectations can only have been disappointed. A clear view of the limitations still affecting the right of residence of migrant Community nationals also emerges from the Westendorp Report of 1995, the Veil Report of 1997, and a series of recent Commission measures.

60. The Court of First Instance of the European Communities, the prevailing academic view, and certain decisions of national courts incline towards a reading of Article 8a(1) of the EC Treaty which does not overlook the latter part thereof. All this does not change the fact that Article 8a, even as worded at present, apart from its obvious political importance, fulfils an important specialised legal function. Paragraph 2 of that provision has without doubt provided a specific legal basis for progress with future action by the Community to facilitate the free movement of non-active persons, obviating the need for recourse to Article 235 of the EC Treaty (see footnote 113).

61. In conclusion, with regard to the subject-matter of these proceedings and the legal situation in which, at the present stage of Community integration, a Community migrant citizen like Ms Michonneau finds herself, it does not yet appear possible to say that the Community rights of residence of citizens of the Union residing in a Member State other that of their origin are now similar to those granted by the Member States to their own nationals, or, in this case, by the United Kingdom to persons settled there.

4 - Comparison of the conditions of admission to the United Kingdom laid down by paragraphs 255 and 287 of the Immigration Rules

62. In order to demonstrate the difference between the cases covered by paragraphs 255 and 287 of the Immigration Rules, the United Kingdom also referred, as I noted earlier, to procedural provisions. First, the spouse of a Community migrant worker has a genuine right to enter and remain in the Member State if the worker is engaged in (or intends to take up) an economic activity. In order to enjoy freedom of movement he is required only, upon entry, to present a valid identity card or passport, and, as regards residence, obtain a residence document, simply by presenting the documents required by Article 4(3) of the Directive (see footnote 3). Those formalities have been reduced to a minimum in order to remove the restrictions on the movement and residence of migrant workers and their families (see Article 1 of the Directive) and are designed to guarantee almost immediate admission. Once those formalities have been fulfilled, paragraph 255 of the Immigration Rules requires only, as a condition for securing the right to remain indefinitely, residence in national territory for four years. On the other hand, an applicant under paragraph 287 of the Immigration Rules must have been admitted to the United Kingdom in accordance with the conditions laid down by paragraph 281 of the Immigration Rules (see point 9). Under the latter provision, it will be recalled, the spouse of a person present and settled in the United Kingdom who intends to settle there has no right of entry. For that purpose he must obtain an appropriate leave to enter, after satisfying a number of conditions intended, in particular, to ensure that the marriage is genuine and has not been contracted with the sole aim of securing settlement in the United Kingdom. The United Kingdom administration checks whether those conditions are fulfilled before the applicant can be admitted to the

United Kingdom; and not, within a few moments, upon entering the Member State, as in the case of those who rely on the freedom of movement guaranteed by Article 48 of the EC Treaty, and their family members. In view of the nature of the conditions laid down in paragraph 281 of the Immigration Rules, that check may even take several months. That was recognised by Mr Kaba himself.

63. In this case, Mr Kaba sought indefinite leave to remain within the meaning of paragraph 287 of the Immigration Rules, without however having first undergone the checks required by paragraph 281. Because, originally, Mr Kaba obtained a residence document as a spouse of a Community migrant worker, the United Kingdom authorities never had an opportunity to confirm, inter alia, that his marriage to Ms Michonneau was not contracted with the main aim of securing settlement in the United Kingdom.

64. In conclusion, I do not consider that the difference of treatment of the spouse of a Community migrant worker as compared with the spouse of a person settled in the United Kingdom within the meaning of the United Kingdom immigration legislation constitutes discrimination on grounds of nationality.

VI – Conclusion

65. Accordingly, in my opinion, the following answers should be given to the questions submitted by the Immigration Adjudicator:

(1) Indefinite leave to remain, of the kind provided for in paragraphs 255 and 287 of the United Kingdom Immigration Rules, constitutes a social advantage within the meaning of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

(2) The prohibition of discrimination on grounds of nationality within the meaning of Article 7(2) of Regulation (EEC) No 1612/68 is not infringed by provisions of national law such as those of paragraphs 255 and 287 of the United Kingdom Immigration Rules, which lay down - as a condition for eligibility for a social advantage such as indefinite leave to remain - the requirement of completion of a period of residence in the Member State concerned the duration of which differs according to whether the applicant is the spouse of a Community migrant worker or of a person present and settled in the host State.