

JUDGMENT OF THE COURT (Fifth Chamber)

9 November 2000 *

In Case C-357/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Court of Appeal of England and Wales, United Kingdom, for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for the Home Department,

ex parte: Nana Yaa Konadu Yiadom,

on the interpretation of Articles 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117),

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the First Chamber, acting as President of the Fifth Chamber, D.A.O. Edward and L. Sevón (Rapporteur), Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Ms Yiadom, by P. Duffy QC and T. Eicke, Barrister, instructed by A. Stanley, Solicitor,
- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by E. Sharpston and S. Kovats, Barristers,
- the Commission of the European Communities, by P.J. Kuijper, Legal Adviser, and N. Yerrell, a national civil servant on secondment to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Yiadom, represented by D. Anderson QC and T. Eicke, of the United Kingdom Government, represented by

J.E. Collins, assisted by E. Sharpston and S. Kovats, and of the Commission, represented by N. Yerrell, at the hearing on 20 January 2000,

after hearing the Opinion of the Advocate General at the sitting on 30 March 2000,

gives the following

Judgment

- 1 By order of 13 May 1998, received at the Court on 1 October 1998, the Court of Appeal of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) six questions on the interpretation of Articles 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117; 'the Directive').
- 2 Those questions have been raised in proceedings between Ms Yiadom and the Secretary of State for the Home Department ('the Secretary of State') concerning his decision to refuse her leave to enter the United Kingdom.

The relevant legislation

The Directive

3 Article 5(1) of the Directive provides:

‘[A] decision to grant or to refuse a first residence permit shall be taken as soon as possible and in any event not later than six months from the date of application for the permit.

The person concerned shall be allowed to remain temporarily in the territory pending a decision either to grant or to refuse a residence permit.’

4 Article 8 of the Directive states:

‘[T]he person concerned shall have the same legal remedies in respect of any decision concerning entry, or refusing the issue or renewal of a residence permit,

or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.'

5 Article 9 of the Directive provides:

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

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

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

National law

- 6 In the United Kingdom, Article 3(1) of the Immigration (European Economic Area) Order 1994 states:

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

- 7 Article 15(1) of the same order states:

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

- 8 Under section 13 of the Immigration Act 1971, a person who is refused leave to enter the United Kingdom has a right of appeal to an adjudicator against that decision. His right of appeal is said to be ‘out of country’, meaning that it is exercisable only once the person concerned has left the United Kingdom, unless he held a current entry clearance or a current work permit.

- 9 In addition, paragraph 16 of Schedule 2 to the Immigration Act 1971 provides that a person who may be required to submit to examination may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter. Under paragraph 21 of that schedule, as an alternative to detention, a person liable to be so detained may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or may be released from detention. Such temporary admission may include restrictions on, *inter alia*, his employment or occupation.
- 10 Under section 11(1) of the Immigration Act 1971, a person who has not entered the United Kingdom is, in particular, to be deemed not to have done so as long as he is detained, or temporarily admitted or released while liable to detention, under the powers conferred by Schedule 2 to that Act.

The facts of the main proceedings and the questions referred for preliminary ruling

- 11 On 7 August 1995, Ms Yiadom, a Netherlands national of Ghanaian origin, arrived in the United Kingdom accompanied by another woman whom she falsely claimed to be her daughter. The other woman was sent back to Ghana, while Ms Yiadom was temporarily admitted to the United Kingdom pending the investigation of her case.
- 12 By decision of 3 March 1996, the Secretary of State refused her leave to enter the United Kingdom on grounds of public policy. He claimed that, in the past, Ms

Yiadom had facilitated the illegal entry of others and, unless refused admission, was likely to do so again in the future. Pending removal she was again allowed temporary admission.

- 13 Ms Yiadom applied for judicial review of that decision before the High Court of Justice of England and Wales, Queen's Bench Division. When that application was dismissed, she appealed to the Court of Appeal.
- 14 Before the Court of Appeal, she claims, first, that there is no sufficient basis for restricting her right to freedom of movement within the Community, since her presence does not represent a sufficiently serious threat to one of the fundamental interests of the United Kingdom and, second, that, under Articles 8 and 9 of the Directive, she is entitled to a right of appeal to the adjudicator whilst she is physically present in the United Kingdom (an 'in-country right of appeal') and not merely the right of appeal granted by national law where the person concerned is no longer in the country (an 'out of country right of appeal').
- 15 In the light of the documents before it, the national court considers that the public policy grounds relied on by the Secretary of State are justified.
- 16 However, as regards the plea alleging breach of Articles 8 and 9 of the Directive, the Court of Appeal decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Do both Article 8 and Article 9 of Council Directive 64/221/EEC on the coordination of special measures concerning the movement and residence of

foreign nationals which are justified on grounds of public policy, public security or public health (OJ, English Special Edition 1963-1964, p. 117) apply to decisions concerning entry into the territory of a Member State, or are decisions concerning entry covered solely by the provisions of Article 8?

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

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

- permits the competent authorities, as an alternative to detention, to grant “temporary admission” to a national of another Member State who does not hold a current residence permit onto the territory of the host Member State, without granting that person “entry” under national law into the Member State concerned; and
- permits the competent authorities to keep the person concerned on temporary admission until they have completed their enquiries as to whether or not the facts justify measures to exclude that person from the Member State on grounds of public policy,

is a subsequent decision to “refuse entry” to that person and to exclude her from the territory of the Member State on grounds of public policy a decision concerning entry into the territory of a Member State, or a decision concerning expulsion from the territory of a Member State?

- (4) Is the answer to Question 3 different if national law permits the competent national authorities to lift employment restrictions initially imposed as a condition of such temporary admission, and those authorities do so after the decision is taken to refuse admission to the national territory, pending the determination of judicial review proceedings to set aside that refusal?
- (5) Is the answer to Question 3 capable of being affected by the length of time taken (a) to “refuse entry” and/or (b) to implement such decision by actually removing the person concerned from the territory of the Member State, and if so in what way?
- (6) Is the answer to Question 5 in turn capable of being affected by whether the delay in implementing a decision to “refuse entry” is due to a challenge to its legality, and if so in what way?

- 17 By those questions, which should be taken together, the national court seeks to ascertain, essentially, whether Articles 8 and 9 of the Directive must be interpreted as meaning that a decision adopted by the authorities of a Member

State refusing a Community national, not in possession of a residence permit, leave to enter its territory constitutes a 'decision concerning entry' within the meaning of Article 8 thereof in a case such as that at issue in the main proceedings where:

- the person concerned was temporarily admitted to the territory, pending a decision following the enquiries required for the examination of her case,

- notwithstanding the decision to refuse admission and pending the outcome of the legal proceedings to set aside that refusal, the person concerned was permitted to take up employment, and

- several months elapsed between her arrival in the territory of the Member State and the decision refusing entry, which has not yet been implemented because of the institution of legal proceedings.

- 18 Ms Yiadom and the Commission claim that, since the person concerned was admitted to the territory, albeit temporarily, any subsequent decision affecting her situation constitutes, in fact, a decision refusing a residence permit and, in so far as it involves the exclusion of the person concerned from the territory, a decision ordering expulsion. That is, according to Ms Yiadom, all the more so because of the length of time taken to make that decision. In this respect, the Commission submits that if the main proceedings were to be regarded as relating to a decision concerning the entry of a Community national to the territory of a Member State, such an interpretation would be contrary to the scheme of the Directive, which draws an important distinction between, on the one hand, a 'decision concerning entry' and, on the other, decisions 'refusing the issue or renewal' of a residence permit.

- 19 Ms Yiadom also relies on the decision of the European Commission of Human Rights of 26 June 1996 in *D v United Kingdom* in which it was found that the fact of refusing leave to enter to the person concerned following his temporary admission to the territory of the State concerned is an artificial construction.
- 20 She also submits that any permission to take up employment during the period of temporary admission and the delay caused by the bringing of proceedings against the initial decision by the person concerned have no effect on the classification of that decision under the Directive. The Commission endorses that last argument, whilst submitting that the passage of a substantial period of time between the arrival in the territory and the date on which the decision concerning entry is taken is likely to strengthen the classification of that decision as a refusal of a residence permit and an exclusion measure.
- 21 The United Kingdom Government submits, by contrast, that a decision refusing entry remains such a decision even if, in accordance with national law, it is adopted only after a period of temporary admission of the person concerned to the territory. Accordingly, that person should not be deemed to have entered a Member State merely by reason of his physical presence in its territory.
- 22 The United Kingdom Government contends, in particular, that temporary admission pending the investigation of a Community citizen's case is a measure which is more favourable to the citizen than detention, which is also provided for under national law. Granting permission to work during the period of temporary admission is less restrictive for the person concerned than maintaining a prohibition on employment. As regards the time which elapsed between taking the decision refusing entry and its implementation, the Government submits that,

in principle, it is irrelevant to the classification of the decision, unless considerable delay is involved, but it is in any event not possible to take account of the delay caused by a challenge to the legality of that decision.

- 23 Article 8a of the EC Treaty (now, after amendment, Article 18 EC) provides that every citizen of the Union is to have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by measures adopted to give it effect.
- 24 The Court has consistently held that the principle of freedom of movement of persons must be given a broad interpretation (see, to that effect, Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 11; and Case C-344/95 *Commission v Belgium* [1997] ECR I-1035, paragraph 14), whereas derogations from that principle must be interpreted strictly (see, to that effect, Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, paragraph 18; Case 67/74 *Bonsignore v Stadt Köln* [1975] ECR 297, paragraph 6; and Case 139/85 *Kempf v Staatssecretaris van Justitie* [1986] ECR 1741, paragraph 13).
- 25 In the same way, provisions protecting Community nationals who exercise that fundamental freedom must be interpreted in their favour.
- 26 It should also be recalled that the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (Case 327/82 *Ekro v Produktschap voor Vee en Vlees* [1984] ECR 107, paragraph 11; and Case C-287/98 *State of the Grand Duchy of Luxembourg v Linster and Others* [2000] ECR I-6917, paragraph 43).

- 27 The purpose of Articles 8 and 9 of the Directive is to define the minimum procedural safeguards to which Community nationals are entitled when they rely on freedom of movement in relation to the situation in which they find themselves.
- 28 Article 8 of the Directive requires Member States to provide for Member State nationals the same legal remedies in respect of a decision concerning entry, or refusing the issue or renewal of a residence permit, or ordering expulsion from the territory, as are available to nationals of the State concerned in respect of acts of the administration.
- 29 The provisions of Article 9 of the Directive complement those of Article 8. Their purpose is to provide minimum procedural safeguards for persons affected by one of the measures referred to in the three cases mentioned in Article 9(1), namely where there is no right of appeal to a court of law, or where such appeal lies only in respect of the legal validity of the decision, or where the appeal cannot have suspensory effect (Joined Cases C-65/95 and C-111/95 *Shingara and Radiom* [1997] ECR I-3343, paragraph 34).
- 30 The Court held that those three cases must be taken into account in relation both to measures referred to in Article 9(1) of the Directive and to those mentioned in Article 9(2) thereof (*Shingara and Radiom*, paragraph 37).
- 31 Accordingly, Article 9(1) of the Directive provides that, in those cases, a decision refusing renewal of a residence permit or ordering the expulsion of the holder of a residence permit from the territory may not be taken, save in cases of urgency,

until an opinion has been obtained from a competent authority of the host Member State before which the person concerned enjoys such rights of defence and of assistance or representation as the domestic law of that country provides for.

- 32 Article 9(2) of the Directive provides that, in the same cases, any decision refusing the issue of a first residence permit or ordering expulsion of the person concerned before the issue of the permit must, where that person so requests, be referred for consideration to a competent authority before which the person concerned is to be entitled to submit his defence in person, except where this would be contrary to the interests of national security.
- 33 By contrast, Article 9 of the Directive does not lay down any particular requirement in relation to legal remedies in respect of decisions refusing entry to the territory. A Community national who is the subject of such a decision is therefore granted only the same legal remedies in respect of that decision as are available to nationals of the State concerned in respect of acts of the administration.
- 34 The limited nature of the procedural safeguards laid down in favour of the national who challenges a decision refusing entry may be explained by the fact that, as a rule, the person against whom such a decision is made is not physically present in the territory of a Member State and it is, therefore, materially impossible for him to submit his defence in person before the competent authority.
- 35 The Court has, moreover, interpreted Article 8 of the Directive as meaning that there may not be inferred from that provision an obligation for the Member States to permit a foreign national to remain in their territory for the duration of

the proceedings, so long as he is able nevertheless to obtain a fair hearing and to present his defence in full (Case 98/79 *Pecastaing v Belgium* [1980] ECR 691, paragraph 13).

- 36 The main proceedings concern a Community national who was temporarily admitted to the territory of the Member State many months previously and was therefore physically present there when the competent national authorities notified her of a decision prohibiting her from entering that territory for the purposes of national law.
- 37 By reason of a legal fiction under national law, according to which the national who is physically present in the territory of the host Member State is regarded as not yet having been the subject of a decision concerning entry, that national does not qualify for the procedural safeguards granted under Article 9 of the Directive to nationals regarded as lawfully present in the territory who are the subject of a decision refusing the issue or renewal of a residence permit, or ordering expulsion from the territory.
- 38 In the light of the principles for interpreting the Directive which are set out in paragraphs 24 to 26 above, it must be held that the measure determining the situation of such a national cannot be classified as a 'decision concerning entry' within the meaning of the Directive, but that the national must be entitled to the procedural safeguards laid down in Article 9 of the Directive.
- 39 It should be added that, in the main proceedings, almost seven months elapsed between the physical admission to the territory and the decision refusing entry.

- 40 It is of course understandable that a Member State should take the time necessary to carry out an administrative investigation of a Community national's situation before taking a decision refusing her leave to enter its territory.
- 41 However, if that State has accepted the physical presence of that national in its territory for a period which is manifestly longer than is required for such an investigation, it can also accept that national's presence during the time needed for him to exercise the rights of appeal referred to in Article 9 of the Directive.
- 42 All that must be taken into account is the time which elapsed between the physical entry into the territory and the competent authority's decision refusing admission, since the time which elapsed as a result of bringing legal proceedings having a suspensory effect and the grant of permission to take up employment pending the determination of those proceedings are not relevant for the purpose of determining the nature of that decision and its classification under the Directive (see, to that effect, Case C-192/89 *Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461, paragraph 31).
- 43 The answer to the questions referred must therefore be that Articles 8 and 9 of the Directive must be interpreted as meaning that a decision adopted by the authorities of a Member State refusing a Community national, not in possession of a residence permit, leave to enter its territory cannot be classified as a 'decision concerning entry' within the meaning of Article 8 thereof in a case such as that at issue in the main proceedings where the person concerned was temporarily admitted to the territory of that Member State, pending a decision following the enquiries required for the investigation of her case, and therefore resided for almost seven months in that territory before that decision was notified to her, since such a national must be entitled to the procedural safeguards referred to in Article 9 of the Directive.

The time which elapsed after the competent authority's decision as a result, first, of the suspensory effect of legal proceedings and, second, of the grant of permission to take up employment pending the determination of those proceedings, cannot have any bearing on the classification of that decision under the Directive.

Costs

- 44 The costs incurred by the United Kingdom Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Court of Appeal of England and Wales by order of 13 May 1998, hereby rules:

Articles 8 and 9 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of

foreign nationals which are justified on grounds of public policy, public security or public health must be interpreted as meaning that a decision adopted by the authorities of a Member State refusing a Community national, not in possession of a residence permit, leave to enter its territory cannot be classified as a 'decision concerning entry' within the meaning of Article 8 thereof in a case such as that at issue in the main proceedings where the person concerned was temporarily admitted to the territory of that Member State, pending a decision following the enquiries required for the investigation of her case, and therefore resided for almost seven months in that territory before that decision was notified to her, since such a national must be entitled to the procedural safeguards referred to in Article 9 of Directive 64/221.

The time which elapsed after the competent authority's decision as a result, first, of the suspensory effect of legal proceedings and, second, of the grant of permission to take up employment pending the determination of those proceedings, cannot have any bearing on the classification of that decision under Directive 64/221.

Wathelet

Edward

Sevón

Delivered in open court in Luxembourg on 9 November 2000.

R. Grass

A. La Pergola

Registrar

President of the Fifth Chamber