

Thou Shalt Not Oppress a Stranger:^{*}
On the Judicial Protection of the
Human Rights of Non-EC Nationals – A Critique

Joseph H.H. Weiler ^{**}

And I charged your judges at that time ... judge righteously between a man and his brother, and the stranger that is with him (Deu.1.16)

I. Introduction

In this article I examine the manner in which the European Court of Justice has interpreted the limits to its human rights jurisdiction in cases concerning non-EC nationals. So far the Court has interpreted these limits narrowly. This whole area has now become socially, politically and ethically most delicate. I think the current jurisprudence is unsatisfactory both in its reasoning and its results. I also think that it is important for symbolic, and not only practical reasons, that the voice of the European Court, within the proper bounds of the judicial function, should be particularly pure. I shall therefore try and demonstrate why the case-law is 'wrong' and in need of review.

Frequently, the classical language of law – dispassionate, dry and technical – conceals the dramatic social context to which it relates and masks the underlying ethical precepts and ideological prejudices on which it is premised. In the analytical and critical part of this essay I shall follow these hallowed canons of our discipline.¹ But in this brief introduction I take the licence to transgress the line. The treatment of aliens, in the Community and by the Community and its Member States, has become in my view a defining challenge to an important aspect of the moral identity of the emerging European

* (Ex.23:9).

** Professor of Law, Michigan Law School, Ann Arbor & Director, Academy of European Law, European University Institute, Florence. My thanks to Susanne Roggenbuck for her dedicated and skilful assistance.

1 The post-modernists among my readers can relax. The inability of a truly value-free discourse is acknowledged and the possibility of exposing the contradiction of any normative language is always fun. It is a price I readily accept if the alternative is normatively empty critique. Cf. Eagleton, *Literary Theory* (1983) esp. 144-150.

polity and the process of European integration. Hermann Cohen (1842-1918), the great Kantian philosopher of religion, in an exquisite interpretation of the Mosaic law on this subject² captures its deep meaning in a way which retains its vitality even in today's Ever Closer Union. It has been usefully summarized as follows: 'This law of shielding the alien from all wrong is of vital significance... The alien was to be protected, not because he was a member of one's family, clan, religious community or people; but because he was a human being. In the alien, therefore, man discovered the idea of humanity.'³

It is this idea of humanity which the Community, or the Union, must safeguard. It is thus chilling, though not altogether unexpected, to watch the recent spate of ugly, at times murderous, racist, xenophobic and anti-semitic incidents sweeping through Europe, West and East.⁴ There will, of course, always be those who perpetrate evil. They are few. But there are also those (us) who avert their eyes, who pretend not to see, not to be involved. They are the many. It is the many who allow the few.⁵ It is thus the reaction to xenophobia which matters most.

- 2 Ex.22.20: And a stranger shalt thou not wrong, neither shalt thou oppress him; for ye were strangers in the land of Egypt. Lev.19.33,34: And if a stranger sojourn with thee in your land, ye shall not do him wrong. The stranger that sojourneth with you shall be unto you as the homeborn among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt: I am the Lord your God. Lev. 24.22: Ye shall have one manner of law, as well for the stranger as for the homeborn; for I am the Eternal your God. See also Ex.23.9, Num.15.15,16, Deu.27.19.
- 3 J.H. Hertz, *Commentary to the Pentateuch 313* (1980 2nd ed.) explicating H. Cohen, *Religion der Vernunft aus den Quellen des Judentums*, translated as *Religion of Reason, Out of the Sources of Judaism* Chs. 5, 8 and 9 esp. at 125 et seq. The early Sages, all aliens in one sense or another, explicate the religious variant to this idea in their rendition of Leviticus 19.34 (But the stranger that dwelleth with you shall be unto you as one born among you, and thou shalt love him as thyself; for ye were strangers in the land of Egypt: I am the Lord your God). Rashi (Rabbi Shlomo Yitzchaki, circa 1040-1105 CE earliest edition of his commentary published in Regio di Calabria, Italy): 'I am the Lord your God: Your God but also his God.' Rasag (Rabbi Saadia Gaon, circa 882-942 CE earliest edition published in Arabic in Constantinopol): 'I am the Lord your God: I am the God of both of you'. Rabaa (Rabbi Abraham Ibn Ezra, circa 1089-1164 earliest edition published in Naples): 'I am your God: I am one God when I see you [together]'.
4 This phenomenon has drawn attention worldwide. It became notorious in the USA with the publication of a cover article in the *Sunday Times Magazine* of 15 September 1991. (Judith Miller, *Strangers at the Gate: Europe's Immigration Crisis*). See too R. Bernstein, *Fragile Glory* (1991) at Chapter 9.
5 Nowhere is this better expressed than in Richard von Weizsäcker's moving speech on 8 May 1985 – one of the great speeches of this century:
The perpetration of this crime [against Jews and other 'aliens'] was in the hands of a few people. It was concealed from the eyes of the public, but every German was able to experience what [the victims] had to suffer, ranging from plain apathy and hidden intolerance to outright hatred.
...
The nature and scope of the destruction may have exceeded human imagination, but in reality there was apart from the crime itself, the attempt by too many people, including those of my generation, who were young and were not involved in planning the events and carrying them out, not to take note of what was happening. There were many ways of not burdening one's conscience, of shunning responsibility, looking away, keeping mum.

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The reaction of European public authorities – representing ‘the many’ – has been complex. At one level, practically all public authorities have issued stern statements of disapproval regarding these events. Notably, the recent Maastricht Summit, at the very moment of making some first moves towards the establishment of a European Citizenship, issued a Declaration on Racism and Xenophobia expressing its concern and revulsion ‘... that manifestations of racism and xenophobia are steadily growing in Europe’⁶ especially towards third country nationals. But this principled reaction has not been without its own ambiguities. Electoral politics being what they are, politicians of all persuasions, at all levels in many Member States, have resorted to a new tough *parler vrai* or even *parler cru* type of discourse, which while situated in the context of an inevitable debate on immigration policies, has had the effect of sanctioning or even inflaming, the excesses of the street.⁷

The very shaping of an external immigration policy – deciding who may come in and who will be left at the gate – involves a discourse which can easily pollute internal attitudes towards aliens within the polity. Two examples are sufficient to illustrate this point. Economic considerations such as weighing the utility of the migrant to the labour force and the costs of absorption to the host country are, perhaps, inevitable but they constitute a signal which feeds an attitude whereby aliens are regarded in utilitarian terms, like foreign investment or imported electrical energy. Likewise, concern for the cultural, linguistic and ethnic integration of aliens may send a signal which accentuates both the otherness of the alien and an intolerance of the dominant culture towards such otherness.

So long as immigration policies are in place with their explosive social and political sensibilities they will continue to feed internal xenophobic sentiments. This danger will persist, must be acknowledged and countered.

For the European Community there is a special responsibility – not only the legal responsibility under Community law (which I shall analyze below) – towards non-Community nationals but also towards itself, its own identity, self-perception and ethos.⁸

I have addressed this issue more extensively in Weiler, ‘The Patriarch Abraham, Law and Violence in the Modern Age’, in *Rechtsstaat und Menschenwürde – Festschrift für Werner Maihofer zum 70. Geburtstag* (1988).

6 EUROPE 5628 (New Series) of 12 December 1991, page 6.

7 ‘Social Parasites’ (Haider, Austria); ‘overdose of immigrants’ (Chirac, France) etc. For more see, Miller, *supra* note 4.

8 Sefer Hachinuch (*The Book of Education*) published anonymously in Venice circa 1523 gives another deeply captivating meaning to Mosaic alien law. The very weakness of the alien acts as a temptation and the laws of protection serve therefore to prevent us from abusing the power we have (over him or her). ‘Each of us has the power to abuse the alien, and the Torah warns us to treat him as one of us, and through these interdictions we gain a precious soul, decorated and embellished with fine moral features, and ready to do good as is intended.’ (para. 63) In other words, as I argue in the text, this interdiction is not only in the interest of the object of our deeds – the alien – but of ourselves.

Elsewhere I have argued⁹ that one of the core ideas of the process of European integration has been to conceive of Europe as a community which does not only condition discourse among states but also spills over to the peoples of these states and thus seeks to influence relations among individuals. Take, for example, the classical provisions for free movement of workers. On the one hand they have a de-humanizing element in treating workers as 'factors of production' on par with goods, services and capital. But they are also part of a matrix which prohibits, for example, discrimination on grounds of nationality, and encourages generally a rich network of transnational social transactions. They may thus also be seen as intended not simply to create the optimal conditions for the free movement of factors of production in the Common Market. *They also serve, echoing Hermann Cohen, to remove nationality and state affiliation of the individual, so divisive in the past, as the principal referent for transnational human intercourse.*

Here then is a dilemma and challenge of post-1992 Europe in this context. The successful elimination of internal frontiers will of course accentuate in a symbolic (and in a real sense too) the external frontiers of the Community. The privileges of Community membership for its Member States and of Community citizenship for individuals are becoming increasingly pronounced. In one way, the more these external boundaries are accentuated, the greater the sense of internal solidarity. (Thus, forgivably perhaps, the Community could not resist the resort to statal symbols such as flag and anthem.¹⁰) But in the very concept of citizenship a distinction is created between the insider and outsider that tugs on their common humanity. The potential corrosive effect on the values of the community vision of European integration is self-evident. *Nationality as referent for interpersonal relations, and the human alienating effect of Us and Them are brought back again, simply transferred from their previous intra-Community context to the new inter-Community one. We have made little progress if the Us becomes European (instead of German or French or British) and the Them becomes those outside the Community.*

Thus, there is a delicate path to tread, one which is supportive of the process of European Union but acknowledges the dangers of feeding xenophobia towards non-Europeans and the even deeper danger towards one of the moral assets of European integration – its historical downplaying of nationality as a principal referent in transnational intercourse.

The task of traversing this path safely will not only fall on public authorities. There is an important role to be played by education (and educators), private groups, the Church and other 'non-State' actors. But public authorities will be in the forefront.

9 Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 2403 at 2478 et seq.

10 There has always been a flag waving over all manner of public villainies in Western history, and even Beethoven's Op. 125, the stirring Ode to Joy, was played to the victims of the greatest shame of Western civilization. Is it really necessary for the forging of a European consciousness to resort to those statal artifacts? Apparently, yes.

I have already mentioned the ambivalence of holders of political office and the constraints of electoral politics. Similar doubts may be expressed as regards bureaucracies. Two factors may be mentioned, briefly, in this regard. First, the closeness of public officials to elected politicians and to the shaping and execution of immigration policies will tend to pull them to one side of the path. Second, bureaucracies tend to suffer from what may be called the banalization of suffering. Faced with large numbers of human problems, these become 'cases', the problems become 'categories', and the solutions become mechanical. We shall see examples of this even in the few court 'Cases' I shall discuss below.

Courts, especially high jurisdictions, are more removed from direct political pressures. They are also removed, one hopes, from the banalization effect. They will have thus a critical role to play in safeguarding the values of common humanity which must counter the exigencies of immigration policies.

In the sphere of application of Community law, the European Court must therefore approach its task of vindicating the rights of non-Community nationals with the full realization of the high stakes involved. Of course, the European Court has to operate within a binding normative framework of rules and principles. But, like similar high jurisdictions, it also plays a role in shaping and developing the binding normative framework within which it operates. Likewise, its pronouncements not only resolve specific disputes but also constitute an important voice in the overall rhetoric which is constitutive of the political culture of the polity.

Appreciation of these high stakes will impact, within the legitimate boundaries of judicial discretion, the way it shapes the normative framework.

II. The European Court and the Protection of Human Rights of Non-Community Nationals

One critical dimension of the Court's charge¹¹ will be the extent to which it will be willing to review Community and Member State action for violation of fundamental human rights.

The strict legal question I shall pose is the following: what ought to be the jurisdictional limits of the European Court of Justice in protecting the human rights of non-EC nationals?

Part of that answer is simple enough: the Court has stated and restated that it is its '... duty to ensure observance of fundamental rights in the field of Community law'. So, clearly and uncontroversially, all conduct by Community organs in this area, whether legislative, administrative or executive, is subject to review by the Court, which must

¹¹ It does not purport to cover the entire area of the treatment of Non-Community nationals under Community law, but rather the very narrow topic of their rights to human rights protection by the European Court. Other aspects are dealt with extensively in other contributions to this issue.

ensure observance of fundamental human rights by these organs. And one hardly needs reminding that the standard of review is not simply the European Convention of Human Rights (which must serve only as a base line) but all other norms of international law as well as Community norms deriving from the Constitutional traditions of the Member States, which might afford higher protection than the ECHR and other international guarantees.

Since, however, under the present stage of Community law most aspects of life of migrants within the Community are affected by Member State conduct, the delicate question is to inquire what in this area comes under the term 'in the field of Community law' and whether and how far should the European Court go in reviewing such conduct of the Member State authorities. As is well known, the European Court has taken a prudent and self-limiting approach in this regard, but one that, nonetheless, has been expanding.¹²

In relation to Non-Community nationals the Court has been, as we shall see, particularly prudent and has eschewed the boldness which characterizes some of its jurisprudence in other areas. It is understandable. This area is a political mine field in which Governmental reaction to 'judicial meddling' may be particularly harsh.¹³ It is also an area which in the past may have appeared less pressing in its social dimension and less critical to the evolving Community architecture and principles. As part of the phenomenology of judging, this is an area which may have appeared to be not sufficiently important to 'spend judicial capital', measured in the coin of credibility and legitimacy, which is involved each time a court breaks with the past and makes a new development.¹⁴

This, as I have been at pains to argue, has changed. The stakes now *are* high. The issue is critical. In other areas the Court has, in the face of a novel political, economic or social context, been willing to review its earlier jurisprudence and change course.¹⁵ I am advocating a similar change here.

In the remainder of the article I shall try to show that this change is not only desirable but can be done well within the legitimate boundaries of judicial discretion and the classical cannons of legal construction and judicial interpretation practised by the European Court.

12 Case 159/90, *Grogan Opinion of AG* of 11 June 1991 (not yet reported) and Case 260/89, *Ellinik Radiophonia Tileorassi (ERT) v. Dimotiki*. Judgment of 18 June 1991 (not yet reported). See annotation by Slot, in 28 *CML Rev.* (1991) 964.

13 Note the caution whereby judicial review by the Court was excluded from the Maastricht Treaty provisions on Home Affairs, the code for immigration policy. See Article L, Title VII (Final Provisions) of Draft Maastricht Treaty.

14 See Kennedy, 'Toward a Critical Phenomenology of Judging', 36 *Journal of Legal Education* (1986) 518.

15 See for example the change of course in the Jurisprudence of the Court, conditioned, *inter alia* by an appreciation of a new context: Case 302/87, *Parliament v. Council (Comitology)*, [1988] ECR 5615; cf. Case 70/88, *Parliament v. Council (Chernobyl)*, [1990] ECR 2041; Case 45/86, *Commission v. Council (General Tariff Preferences)*, [1987] ECR 1493 cf. Case 8/73, *Hauptzollamt Bremerhaven v. Massey-Fergusson GmbH*, [1973] ECR 897.

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It may of course be asked whether a more assertive role for the European Court – of expanding the type of case in which it would be willing to review alleged violation of human rights of aliens – is necessary. After all, in most Member States such migrants would enjoy protection under the national legal system by national courts. While in principle and in theory this is true, this solution is not always satisfactory. As Arnall and Jacobs argue, albeit in a slightly different context,

Where national judges are called upon to apply those provisions [protecting human rights] they should clearly give the same weight as the Court of Justice to the protection of fundamental rights. In practice, however, they may be influenced by the status accorded to such rights in their domestic law. Judges in the United Kingdom, for example, where there is no constitutional guarantee of fundamental rights and where the European Convention on Human Rights does not have direct effect may be less inclined to be swayed by arguments based on fundamental rights than judges in Member States where such rights are protected under their national constitutional law and where the European convention is regularly applied by the national courts.¹⁶

One can think of other, political, reasons why national judges may not be as vigilant as the European Court and additionally, the Community standard of protection may, in certain instances, be higher than that prevailing in a particular Member State.

Further, if the scope of Community human rights law is extended to more situations covering non-EC nationals, the Commission of the EC could also play a role by bringing cases against Member State practices in situations where the non-EC national is unable to do so for either legal (e.g. lack of *locus standi* or direct effect) or practical (ignorance, poverty) reasons.

III. The Paradigmatic Situations

Most non-EC nationals enter Member States of the Community under the immigration rules of those states without any nexus with the Community and thus fall outside the scope of Community law. They are in the situation of a Member State national in his or her own country who, under the Court's doctrine of Reverse Discrimination, does not enjoy protection under Community law under the free movement provisions of the Treaty.

There are, however, two basic situations which bring non-EC migrants into the province of Community law:

16 Arnall & Jacobs, 'Free Movement of Persons in Europe – The Role of the National Judiciary', Paper submitted to the Asser Institute Colloquium on European Law, 12-13 September 1991, at 5. (Hereinafter Asser Institute Colloquium).

- a. Migrants falling under the umbrella of some international agreement between their country of origin and the Community bestowing 'direct rights' on migrants in the field of free movement;
- and
- b. Migrants who enjoy 'derivative rights' by virtue of being family members of a Community national enjoying rights in another Member State.¹⁷

These situations concern the rights of residence itself. Of course, violation of human rights on non-EC nationals might occur even if they are permitted residence in a Member State. Since the right of residence is politically the most explosive issue, and since all Member States accept that if a non-national is lawfully resident, his or her fundamental human rights may not be compromised, I shall focus only on the right of residence itself.

I have chosen to address some of the problems in this area by examining two typical cases representing the paradigmatic situation: Case 12/86 *Demirel*¹⁸ for the first category and Case 267/83 *Diatta*¹⁹ for the second.²⁰

IV. Demirel

In a characteristically terse decision the Court tells us briefly that the action (a 177 reference) arose from an appeal against an order to leave the country issued by the German city of Schwäbisch Gmünd against Ms Meryem Demirel, the wife of a Turkish national who had been lawfully living and working in Germany since 1979. Ms Demirel did not come under the conditions of German law for family reunification which were tightened in 1982 and 1984 and which raised from three to eight years the period which a migrant in the situation of Mr Demirel had to live and work in the Germany before his family could join him.²¹

17 This categorization is, of course, quite basic. One may identify other derivative rights such as employees of a firm providing services in another Member State. See Cases 62 & 63/81 *Seco* and discussion by Alexander, 'Free Movement of non-EC Nationals – A Review of the Case-Law of the Court of Justice', in this issue, p. 53. But the most common situation will surely remain family rights.

18 [1987] ECR 3719.

19 [1985] ECR 567.

20 There have been some developments such as Case 18/90, *Office national de l'emploi v. Bahia Kziber*, [1991] ECR 199; Joined Cases 297/88 and 197/89, *Massam Dzodzi v. Belgium*, [1990] ECR 3763; Case 105/89, *Buhari* of 14 November 1990 (not yet reported). *Demirel supra* note 18 and *Diatta*, *ibid.*, still control the basic approach of the Court.

21 Since we are dealing with human rights, it may be interesting to expand the narrative. The Report for the Hearing adds some human touch to this dry tale. When Demirel arrived in Germany in September 1979 (himself under reunification law, joining his family) he would have had to wait only three years for reunification under the then existing law. He married in Turkey in August 1981 before the law was changed and at a time when he would have had to wait only another 13 months for his bride to join him permanently. The Demirels had a son, but the law changed and mother and son could not join husband and father. (Their son was conceived before the law changed.) In March 1984 Ms Demirel entered with

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There must be many cases such as this in many of the Member States. Was the order against Ms Demirel a violation of his and her human rights? The reports by Errara, Schermers and others demonstrate how tricky are the interpretation and application of the rights to family life and other related rights.²² I leave, thus, this issue open.

Of interest to me then is not whether in this specific case Ms Demirel's rights were infringed but, instead, whether and what role the European Court should have in determining that issue and whether it comes within the 'field of Community law'.

The Administrative Court in Stuttgart, to which Demirel appealed, made a preliminary reference to the Court, asking whether Article 12 of the Turkey EC Association Agreement and Article 36 of the Additional Protocol in conjunction with Article 7 of the Agreement lay down a prohibition, directly applicable in the Member States, on the introduction of further restrictions on freedom of movement applicable to Turkish workers. In other words, whether these provisions created a standstill provision, which individuals could invoke before a national court, whereby under Community law Germany could not tighten the conditions for movement. The Court also asked whether the expression 'freedom of movement' in the Association Agreement gave rights to workers resident in a Member State to bring children and spouse to join them.

(Interestingly, the German Court, unlike the German administrative authorities, believed that the reply to both questions was affirmative).

The European Court analyzed Articles 12 and 36 and concluded that they 'essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers'. As regards Article 7 (the functional equivalent of Article 5 EEC) it concluded that '[t]hat provision does no more than impose on the Contracting Parties a general obligation to co-operate in order to

her son on a strict visitors visa. She violated her visa by not leaving Germany and her husband. In June 1984 the visa expired. She also lied to the town authorities shortly before her visa expired, saying she would leave. Instead she stayed. She was pregnant at the time and gave birth, in Germany, to another child. In May 1985 the City authorities issued the order to leave the country (threatening expulsion if she did not leave of her own volition) on the grounds that she had violated the conditions of her visa. They were not swayed by Demirel's plea of difficulty of establishing herself alone in Turkey, nor by the fact that again, she was pregnant. Her appeal to the Regional Administrative Authority in Stuttgart was also rejected. German authorities insisted that pregnant mother and children leave their country (and husband and father). Of course the option existed of her husband leaving his original family and his job in Germany and returning with his wife and children to Turkey (meaning, of course, that he would be separated from his family which he had brought together under family unification.)

22 See Schermers, 'Human Rights and the Free Movement of Persons. The Role of the European Commission and Court of Human Rights', Paper submitted to the Asser Institute Colloquium on Free Movement of Persons in Europe on 12-13 September 1991, at 7-9.

achieve the aims of the Agreement and it cannot directly confer on individuals rights which are not already vested in them by other provisions of the Agreement.’

Consequently, the Court held that none of these articles was directly applicable, which obviated the need to answer the second question at all.²³

That is a plausible interpretation of the provisions. Two other issues, which were not the subject of a specific question by the Stuttgart court, were raised before the ECJ which are of more direct concern to the jurisdictional issue at the centre of my inquiry.

The Government of the UK (forcefully) and that of Germany (ambivalently) challenged the jurisdiction of the Court to interpret those parts of the Association Agreement – a Mixed Agreement – dealing with Turkish migrant workers:

The Agreement and Protocol constitute ... a mixed agreement in which the Community has competence in relation to some matters and the Member States have competence in relation to others. [24] The measures adopted by the Council approving those instruments in the name of the Community in accordance with Article 228 of the EEC Treaty as well as the Court of Justice’s power of interpretation under Article 177 relate only to the provision which are within the powers of the Community. The EEC Treaty does not confer any powers on the Community either to legislate or to enter into external agreements with regard to the movement of workers from non-member countries.²⁵

It is important to follow the structure and content of the Court’s reply with particular attention.

The Court first recasts the Member State challenge thus:

[T]he German Government and the United Kingdom take the view that, in the case of ‘mixed’ agreements ... the Court’s interpretative jurisdiction does not extend to provisions whereby

23 From a strict legal point of view this case does not resolve the substantive question of the referring Court. If the Commission had brought an action against Germany, the Court may have given a different reply on the substance. Imagine that in the *Fisheries Case* (Case 804/79, *Commission v. UK* [1981] ECR 1045) an individual brought an action rather than the Commission. Clearly, in that case too the Court would have held that the relevant provisions of Community law did not produce direct effect. And yet, since it was an action by the Commission the Court had to go into the merits and actually found against the UK.

24 It should not be assumed, as the German Government explicitly argued, that the ‘mixed nature of the agreement proves that certain commitments entered into *vis-à-vis* Turkey could not and must not have been entered into by the Community.’ (See *Demirel supra* note 18, at 3725) It is quite possible for the Community and its Member States to opt for a mixed agreement as a matter of internal political expediency even if the agreement actually covers matters falling entirely within putative Community competence. In Opinion 1/78, *International Agreement on Natural Rubber*, [1979] ECR 2871, the financing of the Rubber Agreement could, according to the Court, have been done either by the Community or the Member States. The Court allowed the Community the option to go mixed or pure. Such an agreement would be clearly illegal only if the matters so covered fell within exclusive Community competence e.g. ex Article 113 EEC. On this issue see now also Case 192/89, *Sevince*, [1990] ECR 3461.

25 *Demirel supra* note 18, at 3729.

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Member States have entered into commitments with regard to Turkey *in the exercise of their own power which is the case of the provisions on freedom of movement for workers*. [26]
In that connection it is sufficient to state that that is precisely not the case in this instance.

The recasting is subtle but significant. The UK (and Germany) in their submission contended that the Community had no power in this area and thus, *ipso facto* and *ipso jure*, the free movement provisions would be an exercise of Member State powers over which the Court has no interpretative jurisdiction. The Court could simply have refuted the absence of Community powers in this area. But that would have left open the possibility that this was an area of concurrent (Community and Member State) powers and that in relation to free movement the provisions in the Agreement were an expression of Member State rather than Community powers, even if the Community did have theoretical powers in this area.²⁷ So, to avoid this problem, the Court recasts the challenge to its jurisdiction. It asks not simply whether the Community had powers in this area but whether, in this agreement, the provisions in question were an *exercise of Member State powers* – a subtle but significant difference.

The Court then says: 'that is precisely not the case.' What is not the case? That the Community had no powers in this area? Not simply that, though that too, of course. It is not the case that in relation to the Agreement with Turkey the provisions on free movement were an exercise of the Member States' own powers.

The importance of this will transpire shortly.

The Court then interprets the Agreement with Turkey as creating 'special, privileged links' with a non-member country which must, at least to a certain extent, partake in the Community system and thus, according to the Court, Article 238, the Visa of the Agreement,

... must necessarily empower the Community to guarantee commitments towards non-member countries in all fields covered by the Treaty. Since freedom of movement for workers is, by virtue of Article 48 et seq ... one of the fields covered by the Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 238. Thus the question whether the Court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only Member States could enter into in the sphere of their own powers does not arise.²⁸

It does not arise only if, indeed, in the Turkey Agreement the free movement provision were an expression of Community powers and not that of the Member States.

26 Emphasis added.

27 One recalls that in the Opinion 1/78 (*Rubber supra* note 24) the Court held that both the Community and the Member States had jurisdiction over the financial provisions of the Agreement and that they could elect whose competence would be exercised. If they elected for the Member States, the Agreement would, as a result, be mixed.

28 *Demirel supra* note 18, at recital 9.

An interim conclusion, therefore, is that in establishing its jurisdiction to interpret the free movement provisions of the Agreement, the Court did not only assert the existence of Community competence in this area, but also actual exercise of such competence by the Community rather than by the Member States.

The Court ends this part of the decision by going on to state that this conclusion is not affected by the fact that:

... in the field of free movement for workers, as Community law now stands, it is for the Member States to lay down the rules which are necessary to give effect in the territory to the provisions of the Agreement or the decisions to be adopted by the Association Council.²⁹

Recalling its decision in *Kupferberg*, the Court states that:

... in ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil, within the Community system, an obligation in relation to the Community which has assumed responsibility for the due performance of the agreement.³⁰

Kupferberg dealt, of course, with a pure rather than mixed agreement. But this fact is not material if we accept the logic of the Court whereby in the Turkey Agreement the free movement provision were an exercise of Community powers.³¹

En route to establish its own jurisdiction the Court found thus, that:

- a. The free movement provisions in the agreement are an exercise of Community rather than Member State powers;
- b. The Community is the guarantor of the commitments in this field;
- c. That the Member States in relation to these commitments act as executors of a Community responsibility.

In direct response to the questions posed by the preliminary reference the Court concluded that upon analysis of the relevant provisions,³² the Agreement does not introduce a standstill as regards provisions for family reunification so that further restrictions in this matter are permissible under the terms of the Agreement, and that in

29 Ibid., at recital 10.

30 Ibid., at recital 11.

31 In *Sevince supra* note 24, at recital 8, the Court was even more forceful in asserting jurisdiction of a mixed agreement, without reference to the precise demarcation between Community and Member State competences: '... provisions of an agreement concluded by the Council under Articles 228 and 238 of the EEC Treaty form an integral part of the Community legal system' (recital 8). In *Demirel supra* note 18, at recital 7, the Court qualified this statement by the inclusion of the words: '... as far as the Community is concerned' thus alluding to the mixed nature of the Agreement, suggesting that this inclusion in the Community legal system will apply only to those areas for which the Community has competence. In *Sevince supra* note 24, the qualifying phrase has been dropped.

32 Articles 7 and 12 of the Agreement, Decision 1/80 adopted by the Council of Association pursuant to Article 36 of the Protocol to the Agreement.

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any event these provisions do not constitute rules of Community law which are directly applicable in the internal legal order of the Member States.

The Court examined Article 12 which provides that the Contracting Parties agree to be guided by Articles 48, 49 and 50 of the EEC Treaty for the purpose of progressively securing freedom of movement for workers among them. Article 36 of the Protocol to the Agreement provides that freedom of movement shall be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement between the end of the 12th and 22nd year of entry into force. Further, Article 36 charges the Council of Association with *exclusive* powers to lay down detailed rules for the progressive attainment of freedom of movement in accordance with political and economic conditions.

It is not surprising that in the face of these vague provisions, the Court concluded that these provisions:

... essentially serve to set out a programme and are not sufficiently precise and unconditional to be capable of governing directly the movement of workers.³³

But even assuming the Court to be correct, *neither of these responses disposes of the issue of human rights*. They miss the point.

It may be that the Agreement does not impose a standstill and that new restrictions on family unification may indeed be introduced. But it is a separate question whether one of the contracting parties to the Agreement, in introducing new restrictions, may violate the human rights of migrant workers in this connection. There is, after all, a large legal space between a conclusion which interprets the agreement as permitting the introduction of new restrictions on family unification and a conclusion which states that these new restrictions may violate human rights under the Agreement.

It may be that the correct interpretation of the Agreement is that new restrictions may be introduced, so long as these do not violate fundamental human rights.

The fact that the Court concluded that the provisions of the agreement did not produce direct effect is also, from the perspective of protection of fundamental human rights, non-dispositive.

First, even if individuals could not rely on provisions of the Agreement, this does not mean that, say, the Commission could not take the matter up. The Court has held that the GATT does not produce direct effect so that individuals cannot rely on it as against violations by Member States or the Community. But surely if the Commission could sue a Member State violating the GATT then a Member State could sue the Commission or Council for violation of the GATT. The holding of non-direct effect in this case is only procedural in nature: it establishes the inability of an individual to rely on a certain provision. It does not go to the merits.

33 *Demirel supra* note 18, at recital 23.

But there is a deeper reason why the finding that Article 12 of the Agreement and Article 36 of the Protocol read in conjunction with Article 7 do not constitute rules of Community law which are directly applicable in the internal legal order of the Member States is not dispositive of the fundamental human rights issue.

In its famous line of cases starting with *Stauder* and going through *Nold*, *Hauer*, *Panasonic* and all the rest, the Court has held, and it is reaffirmed in the *Demirel* case as well, that 'it is the duty of the Court to ensure observance of fundamental rights in the field of Community law'. Provided the measure under attack is indeed in the field of Community law, (and this normally will be the case as regards a Community measure rather than a Member State measure) the unwritten human rights guarantees have always been implicitly held to produce direct effect, i.e. they were such that an individual could always rely on them. I do not recall any case where the Court has enquired whether the standards of human rights it applies to review measures in the field of Community law are themselves directly effective. It has always been assumed that they are in the sense that individuals are able to invoke them. How else could they afford protection to individuals? This is a juridically significant fact since it represents an important departure from the normal doctrine of direct effect which insists on measures being sufficiently clear, precise and unconditional. Whereas the last condition is implicit in the human rights applied by the Court (unconditionality), the matter is more complex in relation to the first two conditions. Could it be said that the human rights which the Court applies – by a complex investigation into different international instruments and comparative constitutional law – are really 'clear' and 'precise'?

So, in this case, the fact that the substantive provisions of the Agreement are held not to have direct effect does not mean that an individual cannot rely on human rights norms – provided these come within the jurisdictional province of the ECJ. But whether they so come is not an issue which should turn on the separate issue of direct effect of this or that positive measure within the Agreement.

I want to stress this point further. Should the European Court of Justice receive under Article 177b a challenge to any internal measure of Community law on the grounds that it violates fundamental human rights, the Court will always give an answer to that preliminary reference. It would never decline an answer on the grounds that the challenged measure itself does not have direct effect. The individual is not relying on the challenged measure for his or her rights but on the human rights norm. In relation to this norm, it is always assumed that it has direct effect in the sense of allowing the individual to rely on it. If this were not so, the whole human rights protection would practically disappear since so many of the human rights which the Court asserts do not satisfy the trilogy of conditions for direct effect.

How does it deal with the issue of human rights in *Demirel*?

To its credit the Court, unlike one of the Member States intervening in the case, acknowledges that there is an issue of human rights here which is not simply disposed

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of by the direct effect issue. In dealing with this issue the Court makes the following moves:

The Court poses the question by asking whether Article 8 of the ECHR has any bearing on the issue.

The Court then repeats its *Cinéthèque* formula:

... although it is the duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law.³⁴

This formulation in itself is unexceptional; but the question becomes: what is the scope of Community law in this area?

In this regard the Court states that:

In this case, however, as is apparent from the answer to the first question, there is at present no provision of Community law defining the conditions in which Member States must permit the family reunification of Turkish workers lawfully settled in the Community. It follows that the national rules at issue in the main proceedings did not have to implement a provision of Community law. In those circumstances, the Court does not have jurisdiction to determine whether national rules such as those at issue are compatible with the principles enshrined in Article 8 of the European Convention on Human Rights.³⁵

In my view this is a very problematic statement for a variety of reasons.

First, and in passing, one should point out that putative review for violation of fundamental human rights should not only be conducted by reference to the ECHR but by reference to any internationally binding norm in this field, as well as any norm to be found as common to the constitutional traditions of the Member States. But this would be a moot point if, indeed, the Court were correct in stating that it had no power of review at all. This I believe is open to doubt.

It is correct that there is no positive provision of Community law defining the conditions in which Member States must permit the family reunification of Turkish workers lawfully settled in the Community. It is also true that the national rules at issue in this case did not have to directly implement a positive provision of Community law.

But it does not strictly follow from the absence of positive provisions of Community law defining the conditions in which Member States must permit family reunification and requiring implementation, that this field is totally 'outside the scope of Community law.' Nor does it follow that the Member States are totally free under the Agreement, and thus under Community law (Kupferberg and new *Sevince* formula) to do whatever

³⁴ *Demirel supra* note 18, at recital 28.

³⁵ *Demirel supra* note 18, at recital 28.

they want, including the violation of the fundamental human rights of migrants from Turkey.

My contention is that even in the absence of positive Community law defining with precision many of the conditions of sojourn of migrants from Turkey, a situation which leaves much liberty to the individual Member States in setting such conditions, the European Court of Justice retains jurisdiction (and a duty) to ensure that the fundamental human rights of such migrants, in relation to their rights of residence, should not be violated either by the Community or its Member States.

My reasoning is as follows.

Firstly, I defend the proposition that by the mere fact that in a certain area there is no *positive* provision of Community law which the Member States must implement, the matter is not necessarily taken entirely outside the scope of Community law for the purposes of review by the Court of Justice in general, and review for violation of fundamental human rights in particular.

I would like to argue, very cautiously, by analogy to similar provisions arising from the Community internal system itself.

In *Rutili* the principal issue which the European Court had to answer concerned the conditions under which a limitation on the free-movement regime would be justified on grounds of public policy – a permitted derogation under Article 48.

Although the Court first confirmed that the Member States were ‘... *in principle*, free to determine the requirement of public policy in the light of their national needs’ this determination would be subject to Community control.³⁶ Community control could of course derive from the substantive requirements of primary and secondary Community law. Thus, Directive 64/221 requires, *inter alia* consideration of the individual circumstances of the migrant.

Apart from specific secondary Community law, the freedom of the Member States to determine the scope of public policy as a ground for restricting the freedoms of the Community migrant worker is limited by more general, but explicit, provisions in the Treaty. Most important is the principle of non-discrimination on grounds of nationality articulated in Article 7 EEC. Thus, even if the definition of French public policy had not been at variance with specific provisions of Community law, some of which I outlined above, it could still fall foul of the Treaty regime if it involved a *non-authorized* discrimination between French nationals and Community migrants.

But what would be the situation if the state concept of public policy did not violate positive Community law? In other words, what if the national system permitted – in a *non-discriminatory way* – practices contrary to the standards of human rights accepted by the Court in its general jurisprudence of human rights?

Having asserted earlier in the judgment that the determination by Member States of public policy was subject to Community control, the Court then expanded on the explicit provisions of Community law on the subject, both general and specific, and in fact found

³⁶ See the excellent discussion in Arnulf & Jacobs, *supra* note 16, at 10 et seq.

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the French practice to be in violation. However in an *obiter dictum*, the Court went on to suggest, in language virtually identical to that in the human rights cases, that the explicit rules of Community law limiting the power of the Member States to control aliens (by devices such as public policy) *were a specific manifestation of the more general principle*, enshrined in Articles 8, 9, 10 and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms.³⁷

If the Community law is but a specific manifestation of a general principle it should follow that the general principle forms part of the Community regime which controls the practices of the Member States under the derogation. It further follows that a national practice which violated this general principle *without violating a specific rule of the Community regime* would violate Community law and, by virtue of the principle of supremacy, be inapplicable.³⁸ The protection against violation of fundamental human rights accorded by EEC law to Community migrants, exists according to this logic, independently of the specific regulations and directives which set in concrete the provisions in the Treaty.

We are of course aware that in the *Cinéthèque* decision the Court refused to apply this reasoning in the field of free movement of goods – and indeed has relied on its *Cinéthèque* formula in the *Demirel* case. But perhaps a distinction could, and should, be drawn, especially in relation to fundamental human rights, between provisions dealing with the situation of real living human beings and that dealing with goods? In any event, *Rutili* has never, to my knowledge, been explicitly disapproved.³⁹ Arnulf and

37 Case 36/75, *Rutili* [1975] ECR 1219, esp. recital 32.

38 At least two other cases are worth mentioning: in Case 222/84, *Johnston* [1986] ECR 1651 at 1682, in reviewing the compatibility of British administrative and legislative action with Directive 76/207 (sex discrimination), the Court said that:

The requirement of judicial control stipulated by that article reflects a general principle of law which underlies the constitutional traditions common to the Member States. That principle is also laid down in Articles 6 and 13 of the [ECHR]. As the European Parliament, Council and Commission recognized in their Joint Declaration of 5 April 1977 ... and as the Court has recognized in its decisions, the principles on which that Convention is based must be taken into consideration in Community law.

In Case 118/75, *Watson & Belman* [1976] ECR 1185 at 1207-1208, Advocate General Trabucchi was quite explicit:

[R]espect for fundamental principles governing the protection of the rights of man ... may, within the sphere of application of Community law, also be of importance in determining the legality of a State's conduct in relation to a freedom which the treaty accords to individuals... [W]ithout impinging upon the jurisdiction of other courts, this Court too, can look into an infringement of a fundamental right by a State body, if not to the same extent to which it could do so in reviewing the validity of Community acts, at least to the extent to which the fundamental right alleged to have been infringed may involve the protection of an economic right which is among the specific objects of the Treaty.

39 A very recent treatment of this topic suggests, cautiously, in an attempt to reconcile *Rutili* and *Cinéthèque* that '... it might be said that [after *Cinéthèque* the *Rutili* rationale] may be purely limited to questions concerning Article 48(3) EEC and not to Article 30.' A. Clapham, *Human Rights and the European Community: A Critical Overview* (1991) at 38. Cf., Case 249/86, *Commission v. Germany* [1989] ECR 1263.

Jacobs, particularly important commentators for obvious reasons, continue to cite Recital 32 in *Rutili* for the proposition that 'Fundamental rights are therefore capable of influencing the way in which the Community provisions on free movement of persons are interpreted and applied by the Court of Justice.'⁴⁰ They do not, of course, necessarily subscribe to my reading of that recital in the decision. The Decision of the Court in *Wachauf*,⁴¹ the Opinion of the Advocate General in the recent Irish Abortion Case⁴² and the Decision of the Court in *ERT*⁴³ suggest that the Court will review Member State action for violation of human rights as an *exception* to a positive provision of Community law – i.e. explicitly in an area in which the Member State *ipso facto* and *ipso jure* is not implementing a positive disposition of Community law.⁴⁴ It would seem that on this narrow issue *ERT* actually reverses the earlier decision in *Cinéthèque*, or comes close to such reversal.⁴⁵

It should be emphasized that I am not arguing here that *Rutili* and the other internal cases can be applied directly to the situation of the Turkish migrant. The scope of the Community Treaty and of the Association Agreement with Turkey are, after all, vastly different. I am, however, arguing for the narrower proposition, which I think these cases do prove, that the mere fact that the Member States are left a margin of action because of the absence of positive Community norms, does not *necessarily* mean that this area is totally outside the scope of Community law for the purpose of review by the Court.

One must still prove that similar protection must also derive from the Association Agreement and its Protocol. After all, Article 48 EEC (in *Rutili*) or 56 and 66 (in *ERT*) produce direct effect whereas the Court found, correctly, that Article 12 of the Association Agreement and Article 36 of the Protocol did not produce such effect. There is a thesis which holds that the protection by the Court of fundamental human rights extends only to areas covered by directly applicable Community law capable of producing direct effect. Additionally, in the Community situation, there were already implementing provisions to Article 48 EEC.⁴⁶

Here, then, are my reasons to argue that also in the context of the Association Agreement with Turkey, despite the large margin of manoeuvre accorded the Member

40 *Supra* note 16 and text thereto.

41 Case 5/88, *Wachauf*, [1989] ECR 2609.

42 Case 159/90, *Grogan* Opinion of 11 June 1991 (not yet reported). The Court in its Decision avoided the issue.

43 Case 260/89 *ERT* of 18 June 1991 (not yet reported).

44 See in particular recital 43.

45 I have dealt extensively with the problematic nature of *Cinéthèque* in this regard in Weiler, 'The European Court at a Crossroads: Community Human Rights and Member State Action', in F. Capotorti *et al.* (eds), *Du droit international au droit de l'intégration – Liber Amicorum Pierre Pescatore* (1987).

46 (Quaere: Would the Court not protect the fundamental human rights of Community migrants even before the adoption of implementing legislation under Article 48? Note, too, as will be discussed below, that there are some implementing measures to the Turkey Agreement.)

State, this residual jurisdiction of the Court to review for violation of human rights should exist and that the Court may have erred in denying this in the *Demirel* Decision.

It must first be noted that although Articles 12 and 36 lack the precision necessary to produce direct effect, the Association Agreement as a whole is directly applicable and capable of producing such effect. The references by the Court to its earlier *Haegeman* decision (Agreement with Greece) and *Kupferberg* (Agreement with Portugal) are evocative in this respect, and in subsequent decisions, the Court in fact found that some provisions under the Agreement did produce direct effect.⁴⁷

It must also be noted, that although Articles 12 and 36 themselves do not produce direct effect, and also leave because of the vagueness of the obligations a large measure of discretion to the Member States, some other provisions are not quite in the same category. For example, Article 37 of the Protocol prohibits any discrimination based on nationality between Turkish workers and Community workers as regards conditions of work and pay.

Could not then the principle announced by the Court in *Rutili* that the explicit rules of Community law limiting the power of the Member States to control aliens (by devices such as public policy) were a specific manifestation of the more general principles of human rights be applicable here? In other words, that implicit in the Agreement is a prohibition on violation of human rights to which one adds, from time to time, specific positive duties setting explicit conditions.⁴⁸ Would it not be a strange construction of the Association Agreement and Protocol which forbade the Contracting Parties discrimination in working conditions and pay but allowed violation of the human rights in general? In other words, I think that it is a conservative interpretation of the Association Agreement with Turkey, to claim that whatever protection it gave migrants workers under specific disposition, there is an implicit prohibition on the parties to violate the fundamental human rights of migrant workers covered by the Agreement.

This argument is not nullified by the possible objection that Article 37 is addressed to the Member States. The Court held, in upholding its own jurisdiction to interpret the free movement part of the Agreement, that it was the Community which had overall responsibility and that the Member States were simply executing that general responsibility. As mentioned above, this construct is even further strengthened in the later *Sevince* case.

An additional argument derives from the general principles of pre-emption.

In the earlier part of its decision the Court held, it will be recalled, that it had jurisdiction over the free movement provisions of the Agreement since the Agreement

⁴⁷ *Sevince supra* note 24.

⁴⁸ This has taken place twice already. See Decision 2/76 of the Association Council of the EEC Turkey Agreement of 20 December 1976 cited in *Demirel supra* note 18, at 3722 and Decision 1/80 of the Association Council of the EEC Turkey Agreement of 19 September 1980, which appears in the Review of the Work of the Council, 1980, at 136-139. The latter contains a very specific standstill provision as regards access to employment of migrants already legally in the Community.

in question creates special and privileged links with a third country which must, at least to a certain extent, take part in the Community system. It added that the Community must be empowered to guarantee commitments towards non-Member States in this field. What are these commitments? What exactly is the Community guaranteeing here? The objectives of the Agreement are, *inter alia*, the establishment *des liens de plus en plus étroits entre le peuple turc et les peuples réunis au sein de la Communauté économique européenne* (Preamble). It is towards, *inter alia*, this end that Article 36 of the Protocol affirms that the free circulation of workers will be secured by progressive stages in accordance with the principles set out in Article 12 of the Agreement, and Article 12 of the Agreement provides that the Parties will be guided by Articles 48-50 of the Treaty.

Does this not mean, as a matter of pre-emption,⁴⁹ that whereas the Member States have not lost their competence in this field and retain a large margin of decision, they may, nevertheless, not adopt measures which actually obstruct the attainment of those provisions? And would not violations of human rights of migrant workers constitute such obstruction?

This legal duty may or may not be such that an individual could rely on it as a directly effective right, but surely in the existence of the Agreement, the Protocol, the Decisions of the Association Council we have sufficient 'elements of law'⁵⁰ to trigger such a duty on the Member States, even though a positive Community measure may be absent. If this is so, then the Court was wrong in its act of self-denial. At least the Commission, which is not subject to the requirements of direct that are incumbent on individuals, could bring suit should a Member State be found to be violating the fundamental human rights of Turkish migrants.

This of course does not mean that the German measure in this case would have necessarily been held to be such a violation. It does not mean that Member States would be faced with a legal obligation which they do not face now. After all the Member States themselves are subject to at least all the international law norms of human rights protecting migrants. It does mean that it would be the European Court of Justice which could, as a matter of Community law, ensure that these violations do not take place.

Finally, to accept my position *does not mean that the gates of the Community will be opened or that Member States will have lost their competence in this regard*. It does mean that non-Community nationals who come into the Community under the umbrella of a Community Agreement (or a Mixed Agreement, the free movement parts of which are held not to be the exercise of Member State Powers) are entitled, even in relation to their, and their family's, rights of residence, to protection of their fundamental human rights under Community law and with the vigilance of the European Court of Justice.

49 See generally Waelbroeck, 'The Emergent Doctrine of Community Pre-emption – Consent and Re-delegation', in T. Sandalow & E. Stein, *Courts and Free Markets* (1982) 548.

50 *Commission v. UK (Fisheries)* *supra* note 23.

My position does not even entail that the European Court of Justice will be charged with the entire competence to review. I subscribe fully to the analysis of Arnulf and Jacobs⁵¹ as regards the respective roles of the European Court and national courts in adjudicating the tangled questions of fact and law in making specific determinations.

V. Diatta

Ms Diatta, a Senegalese national, was the wife of a French national living in Berlin. She resided there from February 1978. The marriage did not work. She separated from her husband in August of that same year with the intention of divorcing him and lived in separate accommodation. She sought to renew her residency permit which had expired. The Berlin Chief Commissioner of Police refused to do so on the ground that she was no longer a member of family of a Community national and hence she no longer enjoyed the legal right to reside in Germany. The Berlin Administrative Court upheld the refusal though it held that formally she was still married.

On a preliminary reference, the ECJ was asked whether Article 10(1) of Regulation 1612/68 may be interpreted as meaning that the spouse of a worker who is a national of a Member State and who is employed in the territory of another Member State may be said to live 'with the worker' if she has in fact separated from her spouse permanently but nonetheless lives in her own accommodation in the same place as the worker. The Court was also asked whether Article 11 of the Regulation established for a spouse, who, though not a national of a Member State, is married to a national of a Member State in another Community country, a right of residence which does not depend on the conditions set out in Article 10 if the spouse wishes to pursue an activity as an employed person in the territory of that Member State.

In replying to the first question the Court first held that Article 10 'cannot be interpreted restrictively.' Consequently, '[a] requirement that the family must live under the same roof permanently cannot be implied.'⁵²

The Court further held that 'the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date.'⁵³

But, as regards Article 11, the Court stated that:

51 *Supra* note 16.

52 *Diatta supra* note 19, at recitals 17 and 18.

53 *Ibid.*, at recital 20.

... it is clear from the terms of that provision that it does not confer on 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 condition laid down in Article 10.⁵⁴

Clearly, the ruling implies that once the divorce was complete, and provided that Ms Diatta, or other ex-spouses in that situation, did not come under other positive provisions of Community law regulating family members (especially Commission Regulation 1251/70) she could be expelled.⁵⁵

In reaching the implicit decision on this second point the Court followed its Advocate General. It rejected the Commission's view which belatedly (only in the Oral Hearing and having earlier submitted in writing a contrary position) and half-heartedly ('in reply to a question posed by a Member of the Court, the Commission's representative candidly admitted that view was, or at least, might appear somewhat bold'⁵⁶) argued that a spouse in this situation retained a right of residence. The sensitivity of the case is evident by the intervention of Germany, the UK and the Netherlands.

Since the decision of the Court is laconic it is worthwhile examining the reasoning of the Advocate General.

He argued:

- a. That indeed the Commission position was bold (and wrong).
- b. That '[w]hen the Community legislator wishes to transform a right which is initially consequential [derivative] into a personal right, it makes express provision to that effect.'⁵⁷
- c. Following a 'concern to provide a strict interpretation,'⁵⁸ the proper construction of Article 11 does not justify a conclusion that the Community legislator intended to transform the spouse's derivative right into a personal right.

The Court, as mentioned above, also adopted this strict approach, in holding that Article 11 '... does not establish a right of residence independent of that provided for in Article 10.'⁵⁹

On a strict textual interpretation I agree with this conclusion, though I wonder about the criteria which prompt the Court and its Advocates General to adopt in some cases a 'concern to provide a strict interpretation' and other cases to take a broader, purposeful or systemic view.

54 Ibid., at recital 21.

55 See Oliver, 'Non-EC Nationals and the Treaty of Rome', *Yearbook of European Law* (1985) 66.

56 *Diatta supra* note 19, at para. 8 of the Opinion of the Advocate General.

57 Ibid.

58 Ibid., at para. 9.

59 *Diatta supra* note 19, at recital 22.

If I may be bold, I confess that either I did not understand the Advocate General and the Court, or, if I did, that their reasoning is, in my view, a colossal *non-sequitur*. Both Advocate General and Court seemed to have avoided the central issue; this for two distinct lines of reasoning.

The first line of reasoning is that of fundamental human rights.

In the oral hearing the Commission argued that 'it would be contrary to fundamental rights if a migrant worker could remove, unilaterally and arbitrarily, the protection accorded by Community law to the members of his [or her] family.'⁶⁰

The Commission thus argued (though, unfortunately, without the full legal apparatus of a written submission) that an interpretation of the Regulation (the one adopted by the Advocate General and the Court) which allowed, nay empowered, a migrant worker to have such leverage over the life of his or her spouse by divorce (or even the threat of divorce) would violate the human rights which, let us not forget, it is the duty of the Court to protect in the field of Community law. In this case, unlike *Demirel*, there is no question that we are squarely in the field of Community law.

What kind of reply is it to this argument to try and construe – strictly or otherwise – the intention of the Community legislator and the proper meaning of the provisions of the Article *and do no more*? We can readily accept that indeed the Regulation means that once the divorce is complete (and provided no other measure of Community law may be pleaded⁶¹) the spouse loses the right of residence. But surely when a violation of fundamental human rights is at issue, a court cannot stop there, as do both the Advocate General and the Court of Justice. It must first decide whether in fact there is a binding norm of human rights applicable in the context of the case. It may find that there is no such binding human rights norm or that a correct interpretation of that norm does not bring it into conflict with the Community measure as it did in the *Hauer* case and numerous others. But if there is a norm and it does appear to be in conflict with the Community measure, the Court has two, and only two, options: either to construe the Community measure in such a way that it does not conflict with human rights norms (as the Commission argued) or to strike the Community measure down.

Here, to drive the point home, is a *reductio ad absurdum*. Imagine that the Community Regulation had a provision which could be interpreted to mean that the police may enter a migrant's house and search it without an appropriate court warrant. Imagine further that this interpretation were challenged as violating fundamental human rights. Would it be an adequate judicial response simply to construe – strictly or otherwise – the measure and conclude that it indeed meant that the police could so enter? Or would the

60 Ibid., at page 585.

61 This point is what differentiates the Community spouse from the non-EC spouse. In similar circumstances the former will almost always have an independent personal right to stay *qua* Member State worker.

court have to determine if such an interpretation violated some fundamental human right.

Thus, in the *Diatta* case simply to say that Article 11 does not itself give a right of residence, when that very interpretation is challenged as violating fundamental human rights, is no answer at all.

Note that I am not arguing that the Commission was necessarily right in saying that there was a violation of human rights. It would have been helpful if they were to articulate the contours and source of the right. There are several candidates. A construction of a Community measure which empowered say, a husband, to coerce his wife to do things under threat of divorce from which followed the consequence that she would be expelled, could potentially compromise the right to human dignity (encapsulated in Article 1 of the European Parliament Declaration of Human Rights); or it could compromise the right to family life if the husband gained custody over the children and such expulsion would sever the relationship between mother and children (or vice versa).⁶² The Court should at least review the Regulation once a violation of human rights has been alleged and motivate its decision that the correct interpretation of Article 11 of the Regulation does not violate human rights.

One could try and explain the Opinion and the Decision on the grounds that the human rights basis was so specious that it did not even merit consideration. But that could hardly be the case, especially since both Ms Diatta and the Commission pleaded it. Even if the Advocate General and the Court thought that the argument was specious, they should have addressed it.

I believe that they fell into a trap because of the way the Commission construed its argument. The Commission overstated their argument by stating that the right of the spouse to rest was automatic and absolute once she [or he] entered in conformity with the conditions set in Article 10 of the Regulation.

My view is that the correct construction would be to say that the spouse may not be expelled if such expulsion would compromise her or his fundamental human rights to be examined – according to the appropriate repartition of role by the ECJ and national courts – under the standards of Community law. In some cases (fictitious marriage, very short sojourn) the result may be that expulsion does not compromise fundamental human rights. But simply to construe the Regulation in accordance with the wishes of the Community legislator is not what judicial protection of human rights is all about.

There is a second line of reasoning which rests on the rationale of free movement of workers.

The primary rationale and purpose of Article 48 EEC and the implementing legislation is to ensure free movement of workers as one of the factors of production in

62 Declaration of Fundamental Rights and Freedoms of the European Parliament: Article 1: Human dignity shall be inviolable. Article 6(1) Everyone shall have the right to respect and protection for their identity.

the Common Market. If a worker cannot be joined by his or her family, this reasoning goes, this worker's right to free movement will be affected negatively. It is probably still the case that most people like to live with their family and not being able to do so will affect their willingness and ability to move. The Court has gone a long way to give effect to this type of reasoning in order to ensure that the free movement provisions are truly effective.⁶³

Let us assume a situation (still the more common) of the husband being the migrant worker wishing to move from one Member State to another. One can take of course the old fashioned view of family relations, that the woman, especially if she does 'not work' (meaning of course that she toils in the home) will blindly follow her husband and that the only issue is whether he will have a right to bring her with him. I do not think that the Court of Justice in its jurisprudence should base its reasoning on that implicit assumption. The modern way, which is becoming increasingly more realistic, is that the wife will have an autonomous and maybe even decisive say in this type of family decision. (The situation is even more evidently so in a situation where the woman is the putative primary migrant. In a better world the gender difference would not matter in this type of situation.) She will be affected by the knowledge that if she agreed to move, relocate, re-establish herself etc. and adopt, so to speak, a new country, she might nonetheless find herself expelled from her new country (unless she falls under some other Community measure) simply because her marriage broke down. This knowledge would act as deterrence on the free movement provisions of the Treaty. To interpret Regulation 1612/68 in the 1990s, as did the Court, would, thus, defeat its primary purpose and that of the Treaty itself. It would act as an impediment to truly effective free movement.

From the perspective of positive Community law, this construct has an appeal since it falls squarely within a jurisprudence which interprets relevant Community law so as to give maximum effect to the fundamental principle of free movement. The essential problem of the Diatta situation was, after all, the following: Diatta derived her right of entry and right to stay in the Community from her matrimonial relationship with a Community national. Once that relationship dissolved, her rights under Community law must, it could seem, dissolve as well.⁶⁴ This indeed was, it would appear, the implicit assumption under which the Advocate General and the Court operated. Under this perspective, unless the Legislator gave Diatta an independent positive right, the Court could not act. But, by showing that the construct adopted by the Court conflicts with the principle of free movement, the case can become a different type of *Casagrande*, enabling an interpretation which affirmed free movement rather than restricted it.

63 See, e.g., Case 9/74, *Casagrande*, [1974] ECR 773 in which the Court, employing this principle, allowed the Community legislator to encroach on the education provisions of one of the Member States.

64 One could express the same idea by saying that Diatta comes within the canopy of judicial protection of the Court of Justice by virtue of her matrimonial relationship to a Community national, and that once that relationship is dissolved, the Court loses its jurisdiction over her.

One could, perhaps, rest the argument here.

But in a deep sense this approach, which would actually expand the protection afforded the spouse of the migrant, is profoundly contradictory from a human rights perspective. It views the spouse not as an individual and as an end in itself, the fundamental rights of whom must be protected because of his or her humaneness, but rather as an instrumentality, a means to ensure the economic goal of free movement of all factors of production. Diatta does indeed derive her right of entry and stay from her matrimonial relationship to a Community national. Further, under this classical understanding, strictly speaking, the right does not attach to Diatta at all. It is a right which her husband has, a right to be joined by his wife. And this right is given to him so as to ensure that *his* free movement in the Community is not obstructed and that the overall benefits from free movement to the polity as a whole are not compromised. Diatta becomes reified: she is a 'thing' which serves the purpose of ensuring free movement. That is why she is accepted. Once she ceases to serve in this function, she no longer belongs.

Perceiving this contradiction enables us to recast the human rights argument in this case in a new way which brings us full circle back to Hermann Cohen's Neo-Kantian sensibilities.

The Court should, of course, acknowledge and accept the derivative, instrumentalist logic on which Diatta's original right to enter and stay is based. But it should also, in my view, refuse to base its jurisprudence *exclusively* on that basis and it should also refuse to construe any provision of Community law which involves real individuals exclusively on that basis. Article 1 of the European Parliament Declaration of Fundamental Rights and Freedoms, which according to its preamble gives expression to the *acquis communautaire*, provides that human dignity shall be inviolable. There is an inevitable violation of human dignity in a legal construct which insists on seeing an individual not as an end itself, but solely as a means and instrument at the service of other persons and other goals.

Diatta may have come under the canopy of Community law derivatively. It is useful for the Community to extend to her (or her spouse) the right of entry and stay within the Member States since that guarantees effective free movement which, in turn, contributes to the overarching goals of the Community. But, I am suggesting, in no situation can she be stripped of her humaneness. And it is that humaneness which guarantees her own fundamental human rights. Under Community law she must be accepted not simply as a means to ensure free movement but as a person, a universe unto itself. Once an individual, for whatever reason or on whatever basis, comes within the field of application of Community law, his or her fundamental human rights must be guaranteed. For the Court to say that at the moment of her divorce she does not only lose her derivative rights under Community law (which is acceptable), but also protection of fundamental human rights, is to strip her of that humaneness. It is to acknowledge that under Community law she is a mere instrumentality.

Judicial Protection of the Human Rights of Non-EC Nationals

It is important to note once more that there is a difference of content between the derivative rights which Diatta would lose at the moment of her divorce and her right to protection of fundamental human rights which must persist. If her derivative right were to continue Diatta would have an automatic entitlement to continue living in the Community. The human rights canopy does not bestow such an automatic entitlement. One can imagine circumstances where, after scrutiny, expulsion would not be considered a violation of human rights depending on the circumstances. But each individual must be entitled to such scrutiny. That judicial scrutiny, whatever its outcome in the individual case, would be the affirmation of the humaneness of the individual,