

JUDGMENT OF THE COURT

6 March 2003 *

In Case C-466/00,

REFERENCE to the Court under Article 234 EC by the Immigration Adjudicator (United Kingdom) for a preliminary ruling in the proceedings pending before that tribunal between

Arben Kaba

and

Secretary of State for the Home Department,

on the interpretation of the general principles of law governing proceedings before the Court of Justice and of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

* Language of the case: English.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), D.A.O. Edward, P. Jann (Rapporteur), F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Kaba, by R. Allen QC and T. Eicke, Barrister, instructed by N. Rollason, Solicitor,

- the United Kingdom Government, by G. Amodeo, acting as Agent, and R. Plender QC,

- the Commission of the European Communities, by N. Yerrell and C. Ladenburger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Kaba, represented by R. Allen and T. Eicke; of the United Kingdom Government, represented by G. Amodeo and

R. Plender; of the Netherlands Government, represented by H.G. Sevenster, acting as Agent; and of the Commission, represented by M. Shotter, acting as Agent, at the hearing on 16 April 2002,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2002,

gives the following

Judgment

- 1 By order of 19 December 2000, received at the Court on 27 December 2000, the Immigration Adjudicator referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of the general principles of law governing proceedings before the Court of Justice and on the interpretation of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

- 2 Those questions have been raised in proceedings brought by Mr Kaba against the Secretary of State for the Home Department concerning the latter's refusal to grant him indefinite leave to remain in the United Kingdom.

Legal framework

Community legislation

3 Article 7(1) and (2) of Regulation No 1612/68 provides:

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

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

4 Article 10(1) of Regulation No 1612/68 is worded as follows:

‘The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:

(a) his spouse and their descendants who are under the age of 21 years or who are dependants;

(b) dependent relatives in the ascending line of the worker and his spouse.’

- 5 Article 4(4) of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485) provides as follows:

‘A member of the family who is not a national of a Member State shall be issued with a residence document which shall have the same validity as that issued to the worker on whom he is dependent.’

National legislation

- 6 The relevant provisions of national law are to be found in the Immigration Act 1971, the Immigration (European Economic Area) Order 1994 (‘the EEA Order’) and the United Kingdom Immigration Rules 1994 (House of Commons Paper 395) (‘the Immigration Rules’), as in force at the time of the events in the main proceedings. These provisions govern admission to and residence in the United Kingdom.
- 7 The EEA Order was repealed by the Immigration (European Economic Area) Regulations 2000, the provisions of which, however, are not applicable in the main proceedings.

8 Paragraph 255 of the Immigration Rules provided as follows:

‘An EEA national (other than a student) and the family member of such a person, who has been issued with a residence permit or residence document valid for five years, and who has remained in the United Kingdom in accordance with the provisions of the 1994 EEA Order for four years and continues to do so may, on application, have his residence permit or residence document (as the case may be) endorsed to show permission to remain in the United Kingdom indefinitely.’

9 Paragraph 287 of the Immigration Rules was worded as follows:

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

- (i) the applicant was admitted to the United Kingdom or given an extension of stay for a period of 12 months and has completed a period of 12 months as the spouse of a person present and settled here; and

- (ii) the applicant is still the spouse of the person he or she was admitted or granted an extension of stay to join and the marriage is subsisting; and

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

- 10 Under section 33(2A) of the Immigration Act 1971, ‘references to a person being settled in the United Kingdom are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain’.
- 11 The national courts have held that a migrant worker who is a national of a Member State of the European Union and is residing in the United Kingdom is not, by virtue of those facts alone, ‘settled’ within the meaning of that provision.
- 12 According to article 2(1) of the EEA Order, an EEA national is a national of a State which is a Contracting Party to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) other than the United Kingdom of Great Britain and Northern Ireland.
- 13 Article 4(1) of the EEA Order provided that a ‘qualified person’ was entitled to reside in the United Kingdom for as long as he remained a qualified person, and that entitlement was extended to members of his family, including a spouse, by article 4(2) of the EEA Order. Article 6 of that order defined a ‘qualified person’ as including an EEA national who was undertaking in the United Kingdom the activities of a worker.
- 14 Section 7(1) of the Immigration Act 1988 provides:

‘A person shall not under the principal Act [the Immigration Act 1971] require leave to enter or remain in the United Kingdom in any case in which he is entitled

to do so by virtue of an enforceable Community right or of any provision made under section 2(2) of the European Communities Act 1972.'

15 Under section 3(4) of the Immigration Act 1971 a person's leave to enter or remain would ordinarily lapse on his leaving the 'common travel area' (that is to say, the United Kingdom, Ireland, the Channel Islands and the Isle of Man).

16 Paragraph 18 of the Immigration Rules, however, makes the following provision:

'A person seeking leave to enter the United Kingdom as a returning resident may be admitted for settlement provided the Immigration Officer is satisfied that the person concerned:

- (i) had indefinite leave to enter or remain in the United Kingdom when he last left; and

- (ii) has not been away from the United Kingdom for more than two years; and

- (iii) did not receive assistance from public funds towards the cost of leaving the United Kingdom; and

(iv) now seeks admission for the purpose of settlement.’

Facts and dispute in the main proceedings

- 17 Mr Kaba, a Yugoslav national, arrived in the United Kingdom on 5 August 1991. Although his request for leave to enter that Member State for one month as a visitor was refused, he did not leave the United Kingdom. In February 1992 an application for asylum was lodged on his behalf.

- 18 On 4 May 1994 Mr Kaba married Ms Michonneau, a French national, whom he had met in 1993 when she was working in the United Kingdom. The couple have lived together since their marriage. Having temporarily gone back to France, Ms Michonneau returned to the United Kingdom in January 1994 to seek work, which she found in April 1994. In November 1994 she obtained a five-year residence permit valid until 2 November 1999. Mr Kaba was granted leave to remain in the United Kingdom for the same period in his capacity as the spouse of a Community national exercising her rights under the EC Treaty within the United Kingdom.

- 19 On 23 January 1996 Mr Kaba applied for indefinite leave to remain in the United Kingdom.

- 20 His application was turned down by decision of 9 September 1996 of the Secretary of State for the Home Department, who stated in a letter of 3 October 1996 that Mr Kaba did not fulfil the requirements of paragraph 255 of the

Immigration Rules as his wife had remained in the United Kingdom, in accordance with the provisions of the EEA Order, for a total of only one year and 10 months.

21 On 15 September 1996 Mr Kaba appealed against that decision to the Immigration Adjudicator, arguing that the provisions of the Immigration Rules applicable to persons 'present and settled' in the United Kingdom were more favourable than the provisions that applied to his wife and to himself.

22 In those circumstances, the Immigration Adjudicator, by order of 25 September 1998 ('the first order for reference'), decided to stay the proceedings for a first time and to refer the following questions to the Court for a preliminary ruling:

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

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

- 23 The hearing before the Court took place on 15 June 1999 and the Advocate General delivered his Opinion on 30 September 1999 ('the first Opinion'). An English version of this Opinion was sent to Mr Kaba on 27 January 2000.
- 24 By fax of 3 February 2000, Mr Kaba informed the Court of his doubts as to the accuracy of certain factual issues on which the first Opinion appeared to be based. Arguing that these inaccuracies amounted to exceptional grounds justifying the re-opening of the oral procedure, Mr Kaba stated that further observations would shortly be lodged.
- 25 By fax dated 16 March 2000 Mr Kaba submitted further written observations, which concluded as follows:

'The points made above are demonstrated by the documents already submitted to the Court. However, if the Court considers that it is necessary to reopen the oral procedure to ensure that it fully understands the critical facts and corrects any erroneous conclusions reached by the Advocate General, Mr Kaba's representatives would offer the Court every assistance.'

- 26 By letter dated 31 March 2000, the Registrar of the Court acknowledged receipt of these further written submissions and pointed out, for Mr Kaba's information, that the Rules of Procedure of the Court made no provision for the submission of observations after the oral procedure had been closed. In those circumstances, the submissions were returned and were not accepted as forming part of the Court file.

27 In its judgment of 11 April 2000 in Case C-356/98 *Kaba* [2000] ECR I-2623, as rectified by an unpublished order of 4 May 2001, the Court ruled as follows:

‘Legislation of a Member State which requires spouses of migrant workers who are nationals of other Member States to have resided in the territory of that Member State for four years before they become entitled to apply for indefinite leave to remain and to have their applications considered, but which requires residence of only 12 months for the spouses of persons who are present and settled in that territory and are not subject to any restriction on the period for which they may remain there, does not constitute discrimination contrary to Article 7(2) of Regulation... No 1612/68...’.

28 Following that judgment, Mr Kaba argued before the Immigration Adjudicator that the first Opinion was based on a misunderstanding of the facts found in the first order for reference and of the relevant national law.

29 Mr Kaba contended, first, that the Court had erroneously treated indefinite leave to remain in the United Kingdom as being significantly more secure or more stable than the status which EC nationals have within that Member State. That treatment may, according to the Immigration Adjudicator, have been influenced by the Opinion of the Advocate General, who had construed the observations made by the United Kingdom Government as providing justification for the difference in treatment found to have been made between a person such as Mr Kaba and the spouse of a person ‘present and settled’ in the United Kingdom. Those observations were, however, based in reality on the comparability of situations. The issue of justification was not raised in the proceedings before the Court.

- 30 Second, Mr Kaba submitted that the Advocate General had reappraised the facts underlying the case in the main proceedings. The Immigration Adjudicator endorsed that argument in so far as, in her view, the only critical feature in the first order for reference was the difference between the periods of residency required of the two categories of persons in question.
- 31 The Immigration Adjudicator pointed out that, while leave to remain indefinitely in the United Kingdom could not be subject to an express condition as to the duration of its validity, that was also the case with regard to the right of residence of a worker who is a national of a Member State. She further took the view that once a person with indefinite leave to remain leaves the United Kingdom, his leave lapses under section 3(4) of the Immigration Act 1971 and he is required to obtain fresh leave to enter, subject to fulfilling the conditions laid down in paragraph 18 of the Immigration Rules. The Immigration Adjudicator also noted that both persons with indefinite leave to remain in the United Kingdom and workers who are EC nationals can be deported from that Member State on grounds of public policy, public security or public health.
- 32 Mr Kaba also referred to the established practice of the Nationality Directorate of the Home Office of treating nationals of Member States as being settled in the United Kingdom, this being an additional factor tending to show that spouses of Community nationals are in a comparable situation to that of spouses of United Kingdom nationals and persons settled in the United Kingdom. Regarding this latter point, the Immigration Adjudicator did not make any further finding as the matter had not been fully argued before her.
- 33 Third, the Immigration Adjudicator found that the Advocate General had stated, at paragraph 3 of the first Opinion, that the EEA Order was not of concern to United Kingdom citizens and their families. That statement, it was claimed, was incorrect in so far as the EEA Order applies, pursuant to the judgment in Case

C-370/90 *Singh* [1992] ECR I-4265, to all those United Kingdom citizens and their families who return to the United Kingdom after having exercised their rights under the Treaty in another Member State.

- 34 In those circumstances, the Immigration Adjudicator was unsure whether the proceedings before the Court had been conducted in accordance with Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR'). She pointed out in this connection that the proceedings before the Court formed an integral part of the proceedings before her and that she was therefore responsible for any infringement of Article 6 that might have occurred. She referred in this context to the order in Case C-17/98 *Emesa Sugar* [2000] ECR I-665.
- 35 The Immigration Adjudicator also referred to certain doubts concerning the reply in the abovementioned judgment in *Kaba* to the questions which had been submitted to the Court.
- 36 Under those circumstances the Immigration Adjudicator decided to stay the proceedings for a second time and to refer the following questions to the Court for a preliminary ruling:

'Question 1:

1. What mechanisms are there for the referring court or the parties to the proceedings (before the referring court and the ECJ) to ensure that the totality of the proceedings comply with the obligations under Article 6 ECHR and therefore to ensure that no liability for breach of Article 6 ECHR arises either under the domestic human rights statute or before the Court of Human Rights? and

2. Was the procedure followed in this case in compliance with the requirements of Article 6 ECHR and, if not, how does this affect the validity of the first judgment?

Question 2:

The Immigration Adjudicator having found that the Appellant and the spouse of a person present and settled in the United Kingdom were (or would be) afforded different treatment in that

- (a) the Appellant, having entered the United Kingdom as the spouse of an EU citizen exercising free movement rights, was required to have been in the United Kingdom for four years before he could apply for indefinite leave to remain, whereas
- (b) the spouse of a person who was present and settled in the United Kingdom (whether a British national or as a person who had been granted indefinite leave to remain) would qualify after one year for indefinite leave to remain.

No evidence (or argument) concerning justification of the differential treatment between the applicant and such a spouse of a person present and settled having been presented to the referring court either at the hearing leading up to the Order for Reference of 25 September 1998, in the written or oral observations made by the Respondent before the European Court of Justice or the hearing leading up to

the present Order for Reference, despite the request by the Adjudicator for full argument, the Immigration Adjudicator asks

1. Whatever the answer to the first question set out above, is the Court's judgment of 11 April 2000 in this case (Case C-356/98) to be interpreted as stating that, in these circumstances, there was discrimination contrary to Article 39 EC and/or Article 7(2) of Regulation No 1612/68?

2. After re-assessment of the facts, is there discrimination contrary to Article 39 EC and/or Article 7(2) of Regulation No 1612/68?

Concerning the questions submitted for preliminary ruling

- 37 In order to reply most usefully to the Immigration Adjudicator, it is appropriate to begin by examining the second question submitted.

The second question

- 38 By its second question, the national tribunal is asking essentially whether the reply which the Court, in its judgment in *Kaba*, gave to the questions referred would have been different had the Court taken account of the facts, first, that the situation under national law of the spouse of a migrant worker who is a national of a Member State other than the United Kingdom and the situation of the spouse

of a person ‘present and settled’ in the United Kingdom are in all respects comparable except with regard to the prior period of residence required for the purpose of being granted indefinite leave to remain in the United Kingdom and, second, that no argument was submitted by the competent authorities of the United Kingdom to justify such a difference in treatment.

- 39 It should be noted at the outset that the authority of a preliminary ruling does not preclude the national court or tribunal to which it is addressed from taking the view that it is necessary to make a further reference to the Court before giving judgment in the main proceedings. Such a procedure may be justified when the national court or tribunal encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to a question submitted earlier (order in Case 69/85 *Wünsche* [1986] ECR 947, paragraph 15).
- 40 The Court has, moreover, consistently ruled that, as the power to formulate the questions to be referred is vested in the national court or tribunal alone, the parties cannot alter the wording of those questions (Case 5/72 *Grassi* [1972] ECR 443, paragraph 4, and Case C-297/94 *Bruyère and Others* [1996] ECR I-1551, paragraph 19).
- 41 It follows that the Court must in principle confine its examination to the matters which the court or tribunal making the reference has decided to submit to it for consideration. The Court must therefore, as regards application of the relevant national rules, proceed on the basis of the situation which that court or tribunal considers to be established; it cannot be bound by suppositions raised by one of the parties to the main proceedings which the national court or tribunal has merely reproduced but on which it has not expressed an opinion.
- 42 With regard to the question whether the spouse of a migrant worker who is a national of a Member State other than the United Kingdom is in a situation which

is in all respects comparable to that of the spouse of a person 'present and settled' in the United Kingdom for the purpose of being granted indefinite leave to remain within its territory, the national tribunal indicates that, in its own assessment, the two situations are distinguishable only by the different periods of residence required for those two categories of persons.

- 43 It must, however, be pointed out that the question whether Article 7(2) of Regulation No 1612/68 precludes the application of national rules on the ground that those rules are discriminatory is a question involving the interpretation of Community law.
- 44 Consequently, the question whether two categories of persons are in a comparable situation and must for that reason enjoy a social advantage under the same conditions is also a question involving the interpretation of Community law.
- 45 It follows that the finding by a national court or tribunal that two categories of persons are in a comparable situation from the point of view of national law cannot preclude the Court from forming the view, if appropriate, that those two categories differ with regard to Community law.
- 46 Concerning the present case, the Court held, in paragraph 30 of its judgment in *Kaba*, that, as Community law stands at present, the right of nationals of a Member State to reside in another Member State is not unconditional. The Court referred in this regard, first, to the provisions on the free movement of persons contained in Title III of Part Three of the Treaty and the secondary legislation adopted to give them effect and, second, to the provisions of Part Two of the

Treaty, more particularly Article 8a of the EC Treaty (now, after amendment, Article 18 EC), which, while granting citizens of the Union the right to move and reside freely within the Member States, expressly refers to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.

- 47 It should also be added that, with regard more specifically to the situation of a migrant worker who is a national of a Member State, that person's right of residence is not unconditional inasmuch as it is subject to the condition that the person remains a worker or, where relevant, a person seeking employment (see, in this connection, Case C-292/89 *Antonissen* [1991] ECR I-745), unless he or she derives that right from other provisions of Community law.
- 48 In contrast, it appears from the information supplied to the Court concerning the national rules in issue in the main proceedings that a person who is 'present and settled' in the United Kingdom is not subject to any restriction regarding the period for which he or she may reside within the territory of that Member State and need not, during his or her stay, satisfy any condition comparable to those laid down by the provisions of Community law referred to in paragraph 46 above.
- 49 It follows that the right of residence which these latter provisions confer on nationals of other Member States is not comparable in all respects to that enjoyed by a person who is 'present and settled' in the United Kingdom according to the legislation of that Member State.
- 50 As the rights of residence of these two categories of persons are not in all respects comparable, the same holds true with regard to the situation of their spouses, particularly so far as concerns the question of the duration of the residence period on completion of which they may be given indefinite leave to remain in the United Kingdom.

- 51 The national tribunal, however, points to a variety of factors for the purpose of demonstrating that the situations in question are comparable.
- 52 It notes, first, that neither indefinite leave to remain in the United Kingdom nor the right of residence of a migrant Community worker is subject to an express condition regarding the duration of its validity. Second, indefinite leave to remain lapses once its beneficiary leaves the United Kingdom. Third, in the same way as migrant workers from other Member States, those with indefinite leave to remain in the United Kingdom may be deported on grounds of public policy, public security or public health. Fourth, the EEA Order applies not only to nationals of Member States other than the United Kingdom but also to United Kingdom nationals and members of their families returning to the United Kingdom after having exercised their Treaty rights in another Member State.
- 53 None of those points invalidates the soundness of the interpretation to the effect that the situations are not comparable in all respects inasmuch as a migrant worker who is a national of a Member State other than the United Kingdom must, in order to retain his or her right of residence, continue to satisfy certain conditions which are not imposed on a person who is 'present and settled' in the United Kingdom.
- 54 No relevance attaches in this regard to the fact that those conditions do not constitute an express limitation on the duration of residence *ratione temporis* or to the fact that indefinite leave to remain may also, in certain circumstances, cease to have any effect. The fact that the EEA Order may apply to United Kingdom nationals as well is also immaterial in this regard.

- 55 Furthermore, it follows from the foregoing that the Court's reasoning in *Kaba* was based on the lack of comparability of the situations in issue and not on the justification for a difference in treatment between the spouse of a migrant worker who is a national of a Member State other than the United Kingdom and the spouse of a person 'present and settled' in the United Kingdom, as the situations governed by paragraphs 255 and 287 of the Immigration Rules respectively are not comparable.
- 56 The answer to the second question must therefore be that the reply which the Court, in its judgment in *Kaba*, gave to the questions referred in that case for a preliminary ruling would not have been different had the Court taken into consideration the fact that the situation under national law of the spouse of a migrant worker who is a national of a Member State other than the United Kingdom and that of the spouse of a person who is 'present and settled' in the United Kingdom are, according to the referring tribunal, comparable in all respects except with regard to the period of prior residence which is required for the purpose of being granted indefinite leave to remain in the United Kingdom. In view of the fact that the situations are not comparable under Community law, the question whether such a difference in treatment may be justified has no relevance in this regard.

The first question

- 57 In its examination of the second question in the reference, the Court has addressed the doubts which led the national tribunal to refer fresh questions for a preliminary ruling.
- 58 That being so, it is unnecessary to reply to the first question.

Costs

- 59 The costs incurred by the Governments of the United Kingdom and the Netherlands and by the Commission, which have submitted observations to the Court, are not recoverable. As these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national tribunal, the decision on costs is a matter for that tribunal.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Immigration Adjudicator by order of 19 December 2000, hereby rules:

The reply which the Court, in its judgment in Case C-356/98 *Kaba*, gave to the questions referred in that case for a preliminary ruling would not have been different had the Court taken into consideration the fact that the situation under

national law of the spouse of a migrant worker who is a national of a Member State other than the United Kingdom of Great Britain and Northern Ireland and that of the spouse of a person who is 'present and settled' in the United Kingdom are, according to the referring tribunal, comparable in all respects except with regard to the period of prior residence which is required for the purpose of being granted indefinite leave to remain in the United Kingdom. In view of the fact that the situations are not comparable under Community law, the question whether such a difference in treatment may be justified has no relevance in this regard.

Rodríguez Iglesias

Puissochet

Wathelet

Schintgen

Timmermans

Edward

Jann

Macken

Colneric

von Bahr

Cunha Rodrigues

Delivered in open court in Luxembourg on 6 March 2003.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President