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Judgment of the Court of Justice in Case C-109/01

Secretary of State for the Home Department / Hacene Akrich

A NATIONAL OF A NON-EU STATE WHO IS MARRIED TO A EU CITIZEN MAY RESIDE IN THE CITIZEN'S STATE OF ORIGIN WHEN THAT CITIZEN, AFTER MAKING USE OF THEIR RIGHT TO FREEDOM OF MOVEMENT, RETURNS TO THEIR HOME COUNTRY WITH THEIR SPOUSE IN ORDER TO WORK, PROVIDED THAT THE SPOUSE HAS LAWFULLY RESIDED IN ANOTHER MEMBER STATE

The motives which prompt a couple to move to another Member State are irrelevant, even if their purpose in doing so is – with a view to returning to the first Member State where the spouse did not have the right to remain at the time when the couple settled in another Member State – to establish a right to remain under Community law

Since 1989, Hacene Akrich, a Moroccan citizen, has attempted on a number of occasions to enter and reside in the United Kingdom. His applications for leave to remain have always been refused. In 1992, less than a month after having been deported for the second time, Mr Akrich illegally returned to the United Kingdom. In 1996, whilst residing there unlawfully, he married a British citizen and applied for leave to remain in his capacity as her spouse. In August 1997, he was deported to Dublin, where his spouse had been established since June 1997 and worked from August 1997 until June 1998. She was offered a post in the United Kingdom commencing in August 1998.

At the beginning of 1998, Mr Akrich applied to the United Kingdom authorities for leave to enter as the spouse of a person settled in the United Kingdom. He relied on the judgment of the Court of Justice of the EC in *Singh*. The Court held in that case that a national of a Member State who has worked as an employed person within the meaning of Community law in another Member State may, when he returns to his own country, be accompanied by his spouse, of whatever nationality. Under Community legislation, the spouse has the right to enter and to remain which he may invoke directly against the Member State of which the worker is a national.

Upon making their application, Mr and Mrs Akrich were questioned by the United Kingdom Embassy in Dublin. It emerged that they intended to return to the United Kingdom "because [they] had heard about EU rights, staying six months and then going back to the UK".

The application was refused by the Secretary of State for the Home Department. The Secretary of State considered that the move to Ireland was no more than a temporary absence deliberately designed to manufacture a right of residence for Mr Akrich and to evade the provisions of the United Kingdom legislation. Mr Akrich appealed against this refusal.

The case eventually came before the Immigration Appeal Tribunal, which requested the Court of Justice of the EC whether, in such circumstances, the Member State of origin may refuse the spouse who is a national of a non-member country the right to enter and may take into account the fact that the couple's motive was to claim the benefit of Community rights on returning to the Member State of origin.

The Court refers to its judgment in *Singh*, where it held that under Community law a Member State is obliged to grant leave to enter and remain on its territory to the spouse of a national of that State who has gone, with his or her spouse, to another Member State in order to work there as an employed person and who returns to settle in the territory of the State of which he or she is a national. None the less, the Court observes that Community law, specifically Regulation 1612/68 on freedom of movement for workers, refers only to freedom of movement within the Community and is silent as to the rights of **a national of a non-member country, who is the spouse of a citizen of the Union**, in regard to **access to the territory of the Community**.

In order to benefit from the right to install himself with the citizen of the Union, **this spouse must**, according to the Court, **be lawfully resident in a Member State** when he moves to another Member State to which the citizen of the Union migrates.

The Court observes that the same applies where the citizen of the Union married to a national of another Member State returns to the Member State of which he is a national in order to work there as an employed person.

As regards the question of **abuse**, the Court states that the **motives** of the citizen intending to seek work in a Member State **are irrelevant** in assessing the legal situation of the couple at the time of their return to the Member State of origin. Such conduct cannot constitute an abuse even if the spouse did not have a right to remain in the Member State of origin at the time when the couple installed themselves in another Member State. The Court considers that **there would be an abuse** if the Community rights had been invoked in the context of **marriages of convenience** entered into in order to circumvent the national immigration provisions.

The Court then states on the basis of these considerations that where a marriage is genuine and where a national of a Member State married to a national of a non-member country returns to his State of origin, where the spouse does not enjoy Community rights, not having resided lawfully on the territory of another Member State, the authorities of the State of origin must none the less take account of the **right to respect for family life** under Article 8 of the Convention on Human Rights.

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Judgment of 7 July 1992 in Case C-370/90.