FOLKETINGET

Europaudvalget
2890 - RIA - Svar på Spørgsmål 1
Offentligt

Europaudvalget

Til: Udvalgets medlemmer og stedfortrædere
Dato: 27. oktober 2008

2890 - RIA
Rådsmøde nr. 2890 (retlige og indre anliggender) den 25. september 2008

Hermed fremsendes indlæg ved EF-Domstolen i Metock-sagen (C-127/08) fra Finland. Holland, Danmark og EU-Kommissionen.

En række andre lande har ønsket fortrolighed omkring deres indlæg ved EF-Domstolen - hvorfor deres indlæg er fremsendt til Europaudvalget under dobbelt fortrolighed. Indlæggene fra disse lande kan derfor læses i EU-sekretariatet, men kan ikke omdeles og udleveres ikke i kopi.

Indlæggene er fremsendt sammen med udenrigsministerens svar på spørgsmål 1 ad rådsmøde 2890: "Ministerens bedes - i forlængelse af integrationsministerens forelæggelse for Europaudvalget den 19. september 2008 - oversende medlemslandenes indlæg i Metock-sagen (C-127/08)". Udenrigsministerens besvarelse af spørgsmålet er tillige fortrolig og kan læses i EU-sekretariatet.

Med venlig hilsen,

Signe Riis Andersen,
Udvalgssekretær

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Observations of Finland

Case C-127/08*

Document lodged by:

Ulkoasiainministeriö (Ministry of Foreign Affairs, Finland)

Usual name of the case:

Metock and Others

Date lodged:

14 May 2008

ULKOASIAINMINISTERIÖ

(MINISTRY OF FOREIGN AFFAIRS)

14 May 2008

UM2008-00989

Court of Justice of the European Communities

WRITTEN OBSERVATIONS OF THE FINNISH GOVERNMENT IN CASE C-127/08 METOCK AND OTHERS BROUGHT UNDER ARTICLE 234 EC

WRITTEN OBSERVATIONS

submitted pursuant to the second paragraph of Article 23a of the Statute of the Court of Justice of the European Communities

by the **FINNISH GOVERNMENT**

in Case C-127/08 Metock and Others

1 The Irish High Court has submitted a reference for a preliminary ruling to the Court of Justice of the European Communities concerning the interpretation of Directive 2004/38/EC on the right of citizens of the Union and their family

* Language of the case: English.

members to move and reside freely within the territory of the Member States ('the Directive'). [1]

2 The national court wishes by its first question to clarify whether a Member State is allowed to require a national of a non-member country who is the spouse of a citizen of the Union to have been *lawfully resident* in another Member State before arriving in the host Member State concerned.

3 By its second question the national court asks whether Article 3(1) of the Directive may apply to a national of a non-member country resident in the host Member State as the spouse of a citizen of the Union who satisfies a condition in Article 7(1)(a), (b) or (c) of the Directive, irrespective of when and where the marriage has been solemnised and when and how the national of a non-member country entered the host Member State.

4 If the second question is answered in the negative, the national court asks by its third question whether Article 3(1) of the Directive may apply to a national of a non-member country, resident in the host Member State as the spouse of a citizen of the Union who satisfies a condition in Article 7(1)(a), (b) or (c) of the Directive, who has entered the host Member State independently of the citizen of the Union and has afterwards married the citizen of the Union there.

5 The essence of the national court's second and third questions is to clarify whether the spouse resident in the host Member State of a citizen of the Union may obtain the *right of residence of a family member of a Union citizen* within the meaning of the Directive. Finland will address the second and third questions in the present case together.

6 In Finland's view, the essential point of law of the second and third questions in this case is also the subject of interpretation by the Court of Justice in Case C-551/07 *Deniz Sahin* now pending before the Court. Finland submitted its written observations in that case on 4 April 2008. The interpretation adopted by the Finnish Government in Case C-551/07 *Deniz Sahin* is therefore followed in its written observations on the second and third questions in the present case.

7 Before a legal assessment of the present case, Finland will deal with the Community law that is essential to the case as well as Irish and Finnish national law, after which the facts of the main proceedings pending before the national court will be described in summary.

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, corrected version OJ 2004 L 229, p. 35).

Community law

8 The first sentence of recital 5 in the preamble to the Directive reads as follows:

> 'The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.'

9 Recital 6 in the preamble to the Directive reads as follows:

> 'In order to maintain the unity of the family in a broader sense and without prejudice to the prohibition of discrimination on grounds of nationality, the situation of those persons who are not included in the definition of family members under this Directive, and who therefore do not enjoy an automatic right of entry and residence in the host Member State, should be examined by the host Member State on the basis of its own national legislation, in order to decide whether entry and residence could be granted to such persons, taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen.'

10 The great importance the Directive attaches to the protection of family life is also apparent from recitals 8, 15 and 17 in the preamble to the Directive.

11 According to Article 1(a) concerning the subject of the Directive, the Directive lays down the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members. According to Article 1(b), the Directive governs the right of permanent residence in the territory of the Member States for Union citizens and their family members.

12 According to Article 2(2)(a) of the Directive concerning definitions, a family member means a spouse.

13 Article 3 of the Directive lays down the persons to whom the Directive applies. According to Article 3(1), the Directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.

14 Under Article 7(1) of the Directive:

> 'All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
>
> (a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) – are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

– have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) – are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).'

15 Article 7(2) of the Directive provides as follows: 'The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).'

16 Under Article 9(1) of the Directive, a Member State must issue a residence card to family members of a Union citizen who are not nationals of a Member State if they intend to reside in the country for more than three months.

Irish national law

17 According to the provisions of the Irish regulation relevant to the present case, the *European Communities (Free Movement of Persons) (No 2) Regulations 2006* (SI No 656 of 2006), a national of a non-member country must have been lawfully resident in another Member State before arriving in the host Member State, in order to obtain a residence card of a family member of a Union citizen. A national of a non-member country also has to enter the State in the company of the Union citizen whose family member he is, or join him later.

Finnish national law

18 The Directive has been implemented in Finland inter alia by certain provisions of the Ulkomaalaislaki (Law on foreigners, 301/2004). According to the

Ulkomaalaislaki, obtaining a right of residence and a residence card of a family member of a Union citizen requires that the family member moves from another Member State to Finland with the Union citizen or joins the Union citizen later. The family member must before moving have resided with the citizen of the Union in the other Member State lawfully and not merely temporarily. [2]

19 However, under the Ulkomaalaislaki, a family member who may not be granted a residence card in accordance with the Directive may apply for a national residence permit in Finland under Paragraph 50a of the Ulkomaalaislaki. The purpose of that provision is to ensure the protection of family life in a situation in which a national of a non-member country is not entitled to a residence card of a family member of a Union citizen under the Directive.

Facts

20 In the cases pending before the national court four nationals of non-member countries challenge the decisions refusing their applications for residence cards of a family member of a Union citizen. The applicants previously arrived in Ireland and applied at that time for asylum there, but all their applications for asylum were refused. All the applicants, after arriving in Ireland, married there. One of the couples was together for some years already before their marriage in Ireland. The spouses were nationals of another Member State of the Union who are entitled to reside lawfully in Ireland. One of the applicants has already been returned.

Legal assessment

The first question referred for a preliminary ruling – the requirement of previous lawful residence

21 Finland considers that the first question referred for a preliminary ruling should be answered in the affirmative. A Member State may thus require a national of a non-member country who is the spouse of a Union citizen to have been lawfully resident in another Member State before arriving in the host Member State.

22 In Finland's view, the Directive regulates the right of citizens of the Union and their family members to move and reside freely *within the territory of the Member States*. That is apparent inter alia from the title of the Directive and from Article 1(a) and (b) which defines its subject, all of which speak of rights of movement and residence within the territory of the Member States. The rights of nationals of non-member countries to enter Community territory are thus excluded from the provisions of the Directive.

2 Paragraphs 153, 158a and 161 of the Ulkomaalaislaki.

23 The Directive thus also does not regulate whether the host Member State may impose a condition of previous lawful residence on a national of a non-member country. [3] Regulation of that matter is thus left to the competence of the Member States.

24 National provisions may not, however, obstruct a Union citizen's right of free movement and residence, and may not obstruct the protection of family life. [4] In a situation in which the Directive cannot apply to nationals of non-member countries, in order to guarantee their rights residence permits differing from the residence permit of a family member of a Union citizen may be included in the national legislation of the Member States. In Finland, for example, that is done by granting family members who cannot be granted a residence card under the Directive a national permanent residence permit on the ground of the family relationship, under Paragraph 50a of the Ulkomaalaislaki.

25 Finland considers that interpretative aid to assessing the compatibility with Community law of the requirement of previous lawful residence is not necessarily to be found in the earlier case-law of the Court of Justice on freedom of movement. That case-law dates partly from before the entry into force of the Directive and relates to individual situations that differ from the present case.

26 The case-law of the Court of Justice is also not consistent in all respects. Thus in Case C-109/01 *Akrich* the Court would appear to have allowed Member States the right to impose on a national of a non-member country a requirement of previous lawful residence as a condition for entering the country, [5] but in C-1/05 *Jia* the Court would appear to have confined the requirement of previous lawful residence to the case at issue in Case C-109/01 *Akrich*. [6]

27 In Finland's view, the Court of Justice did not, however, in its judgment in Case C-1/05 *Jia* prevent the Member States from imposing in their national legislation a requirement of previous lawful residence on nationals of non-member countries. In the paragraph of the judgment that is essential in this respect, the Court found only that 'Community law does not require Member States to make the grant of a residence permit to nationals of a non-Member State ... subject to the condition that those family members have previously been residing lawfully in another Member State'. [7] It could be deduced, by converse reasoning, that the imposition of a requirement of previous lawful residence remained within the discretion of the Member States.

3 See Case C-109/01 *Akrich* [2003] ECR I-9607, paragraph 49.

4 See Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraphs 38, 41 and 42; Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 53; and Case C-291/05 *Eind* [2007] ECR I-0000, paragraph 44.

5 Case C-109/01 *Akrich*, paragraphs 49 and 50.

6 Case C-1/05 *Jia* [2007] ECR I-1, paragraphs 32 and 33.

7 Case C-1/05 *Jia*, paragraph 33.

The second and third questions referred for a preliminary ruling – the scope of Article 3(1) of the Directive

28 Finland considers that the second and third questions referred for a preliminary ruling should be answered in the negative. Article 3(1) of the Directive cannot apply to a national of a non-member country resident as the spouse of a Union citizen who satisfies the condition in Article 7(1)(a), (b) or (c) of the Directive in the host Member State, irrespective of when and where the marriage was solemnised or when and how the national of a non-member country entered the host Member State.

29 Nor may Article 3(1) of the Directive apply to a national of a non-member country, resident as the spouse of a Union citizen who satisfies the condition in Article 7(1)(b), (b) or (c) of the Directive in the host Member State, who has entered the host Member State independently of the Union citizen and has afterwards married the citizen of the Union there.

30 Finland refers, *first*, to the wording of Article 3(1) of the Directive, the subject of interpretation in the questions referred for a preliminary ruling, according to which '[t]his Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 *who accompany or join them*'. [8]

31 According to settled case-law of the Court of Justice, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part. [9] Where the wording of a Community law provision is clear and is not open to contradictory interpretations in the different language versions, a literal interpretation is a strong indication as to the correct meaning of the provision. [10]

32 The wording of Article 3(1) of the Directive is, in Finland's view, completely unambiguous. Based on it, it is clear that a family member of a Union citizen, residing in the host Member State, who does not enter the host Member State together with the Union citizen or join him there later, is not within the personal scope of the Directive.

33 Finland considers that it would be contrary to the wording of that provision to interpret the non-member-country national as accompanying the Union citizen to the host Member State or joining him there at the time at which the national of a non-member country, after marrying the citizen of the relevant Member State of the Union in the host Member State, makes an application for a residence card of a

8 Emphasis added.

9 For example, Case C-173/06 *Agrover* [2007] ECR I-0000, paragraph 17.

10 Opinion of Advocate General Sharpston in Case C-366/05 *Optimus – Telecomunicações* [2007] ECR I-4985, point 45. See also the judgment in that case, paragraph 30.

family member of a citizen of the Member State of the Union. [11] Instead of the time of making the application, what is essential in assessing the application of the Directive is the determination whether the national of the non-member country concerned is a family member of a Union citizen within the meaning of Article 2(2) of the Directive when he or she arrives in the host Member State. Only if that is the case can a national of a non-member country accompany or join the Union citizen within the meaning of Article 3(1) of the Directive.

34 It may thus also be excluded that a national of a non-member country who has arrived in the host Member State *before* a citizen of another Member State of the Union and has since married that Union citizen could accompany or join the Union citizen.

35 Family members other than those who accompany the Union citizen to the host Member State or join him there cannot rely on the rights under the Directive such as the right of residence mentioned in Article 7(2) of the Directive.

36 Although it follows simply from the wording of Article 3(1) of the Directive that the Directive applies exclusively to family members as defined in Article 2(2) of the Directive who accompany the citizen of the Union or join him, Finland wishes to draw attention also to the wording of Article 7(2) of the Directive. That provision relates expressly to the conditions in the host Member State under which family members of a Union citizen who are not nationals of a Member State may obtain a right of residence. Like the provision in Article 3(1) of the Directive, the wording of this provision too requires that the family member of the Union citizen either accompanies the Union citizen to the host Member State or joins him there.

37 A comparison of the different language versions of the Directive does not, in Finland's view, suggest any other conclusion. In Finland's view, the equivalent meaning is also contained, for example, in the French language version of Article 3(1) of the Directive, which says that 'la présente directive s'applique ... aux membres de sa famille, tels que définis à l'article 2, point 2), *qui l'accompagnent ou le rejoignent*'; the German language version, which says that 'diese Richtlinie gilt für ... seine Familienangehörigen im Sinne von Artikel 2 Nummer 2, *die ihn begleiten oder ihm nachziehen*'; and the English language version, which says that 'this Directive shall apply ... to their family members as defined in point 2 of Article 2 *who accompany or join them*'. [12] The expressions in italics correspond to the expressions also contained in Article 7(2) of the French, German and English language versions of the Directive.

38 *Second*, in Finland's view, it does not follow from the Court's case-law that a literal interpretation of Article 3(1) of the Directive should be departed from. The national court itself has not even expressly referred to the case-law of the Court of

11 See in this respect points 63, 64 and 67 of the order for reference.

12 Emphasis added.

Justice with respect to the second and third questions referred for a preliminary ruling in the case. [13]

39 *Third*, in Finland's view, the Community legislature expressed in the Directive, even more clearly than the previous legal position, that a family member of a Union citizen must accompany the Union citizen to the host Member State or join him there in order to be able to rely on the right of residence under the Directive. Before the entry into force of the Directive, situations such as those at issue in the present case had to be assessed on the basis of Regulation (EEC) No 1612/68. [14] Under Article 10(1) of the regulation, inter alia spouses of nationals of a Member State employed in another Member State had 'the right to install themselves' with the national of a Member State, regardless of their nationality.

40 *Fourth*, the purpose of the Directive, in Finland's view, is to guarantee specifically the right of a Union citizen to move and reside freely in the territory of a Member State. At the same time the Directive endeavours to ensure that the exercise of those rights is not hindered by factors deriving from the family life of the Union citizen. To achieve those aims, the Directive also endeavours to guarantee the right of the Union citizen's family members to move and reside in the territory of the Member States. Those aims are achieved inter alia by the provisions in Article 3(1) and (7) of the Directive. Achieving those aims is thus not hindered by the fact that, when a national of a non-member country becomes a family member of a Union citizen only in the host Member State, Article 3(1) of the Directive cannot apply to that person and he does not obtain the right of residence of a family member of a Union citizen. For in that case the citizen of the Union has already exercised his right of movement and residence before the creation of the family unit, and the exercise of that right cannot therefore be jeopardised in a situation such as that at issue here.

41 Accordingly, a literal interpretation of Article 3(1) of the Directive cannot, in Finland's view, lead to an interpretation contrary to the aims pursued by the Directive.

42 On the above grounds Finland considers that Article 3(1) of the Directive cannot apply to family members within the meaning of Article 2(2) of the Directive who have entered the host Member State independently of the Union citizen and who have become family members of the Union citizen only in that State or have only there started family life with him.

13 See points 58 to 74 of the order for reference.

14 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).

Conclusion

Finland considers that the Court of Justice should answer the questions referred by the national court for a preliminary ruling as follows.

- Finland considers that the first question referred for a preliminary ruling should be answered in the affirmative. A Member State may thus require a national of a non-member country who is the spouse of a Union national to have been lawfully resident in another Member State before entering the host Member State.

- Finland considers that the second question referred for a preliminary ruling should be answered in the negative. Article 3(1) of the Directive cannot apply to a national of a non-member country residing as the spouse of a Union citizen who satisfies a condition laid down in Article 7(1)(a), (b) or (c) of the Directive in the host Member State, irrespective of when and where the marriage was solemnised or when and how the national of a non-member country arrived in the host Member State.

- Finland considers that the third question referred for a preliminary ruling should be answered in the negative. Article 3(1) of the Directive cannot apply to a national of a non-member country, resident as the spouse of a Union citizen who satisfies a condition laid down in Article 7(1)(a), (b) or (c) of the Directive in the host Member State, who has entered the host Member State independently of the Union citizen and afterwards married the Union citizen there.

Respectfully

For the Finnish Government

Agent [15] (signed) Alice Guimaraes-Purokoski

No annexes

[15] Alice Guimaraes-Purokoski, Legislative Adviser, acts as Finland's Agent before the Court of Justice of the European Communities under Paragraph 92 of the Rules of Procedure of the Ministry of Foreign Affairs (No 1174/2005 of 22 December 2005) and Decision HEL6070-8 of the Ministry of Foreign Affairs of 20 March 2008.

COMMISSION OF THE EUROPEAN COMMUNITIES

17

COPY

Brussels, 15 May 2008
JURM(2008) 13020

TO THE PRESIDENT AND MEMBERS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

WRITTEN OBSERVATIONS

Submitted by the

COMMISSION OF THE EUROPEAN COMMUNITIES

Represented by Dominique Maidani and Michael Wilderspin, Legal Advisers, with an address for service in Luxembourg at the office of Antonio Aresu, a member of its legal Service, Centre Wagner, Kirchberg

in Case C-127/08

Metock et al

v

Minister for Justice, Equality and Law Reform

In which the High Court of Ireland has requested a preliminary ruling pursuant to Article 234 of the EC Treaty on the interpretation of Directive 2004/38/EC on the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

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1. THE FIRST QUESTION

2. QUESTIONS 2 AND 3

A. LEGAL BACKGROUND

1. COMMUNITY LEGISLATION

1. So far as material, Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158, 30.4.2004) herewith referred to as "the Directive", provides as follows:

"Article 2

For the purposes of this Directive:

1. 'Union citizen' means any person having the nationality of a Member State;

2. 'family member' means:

(a) the spouse;

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State;

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b);

(d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b);

3. 'host Member State' means the Member State to which a Union citizen moves in order to exercise his/her right of free movement and residence.

Article 3

Beneficiaries

1. This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them."

Article 7

Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

(a) are workers or self-employed persons in the host Member State; or

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or

(c) are enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training; and

have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority, by means of a declaration or by such equivalent means as they may choose, that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence; or

(d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c)."

2. NATIONAL LEGISLATION

2. Effect was initially given to Directive 2004/38/EC in Ireland by the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 226 of 2006).

3. On 18 December 2006, the Minister made the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006) also to give effect to Directive 2004/38/EC in Ireland. Those Regulations came into operation on 1 January 2007 and repealed the earlier Regulations.

4. Whilst certain of the applications were made to the Minister when the earlier Regulations were in force, all of the applications were expressly stated to have been decided under the later Regulations.

5. These Regulations provide in pertinent part as follows:

Article 2 defines a number of terms used in the Regulations. That Article provides inter alia that a 'qualifying family member' in relation to a Union citizen means inter alia the Union citizen's spouse. The expression 'spouse' does not a party to a marriage of convenience.

6. Article 3 provides that:

"3.(1) These Regulations shall apply to –

(a) Union citizens,

(b) subject to paragraph (2), qualifying family members of Union citizens who are not themselves Union citizens, and

(c) subject to paragraph (2), permitted family members of Union citizens.

(2) These Regulations shall not apply to a family member unless the family member is lawfully resident in another Member State and is –

(a) seeking to enter the State in the company of a Union citizen in respect of whom he or she is a family member, or

(b) seeking to join a Union citizen, in respect of whom he or she is a family member, who is lawfully present in the State."

7. Article 6 provides that:

"6.(1) Subject to Regulation 20, a person to whom these Regulations apply may reside in the State for up to 3 months on condition that he or she –

(a) (i) where the person is a Union citizen, holds a valid national identity card or passport,

(ii) where the person is not a Union citizen, holds a valid passport, and

(b) does not become an unreasonable burden on the social welfare system of the State.

(2) (a) Subject to Regulation 20, a Union citizen may reside in the State for a period longer than 3 months if he or she –

(i) is in employment or is self-employed in the State,

(ii) has sufficient resources to support himself or herself, his or her spouse and any accompanying dependents, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants,

(iii) is enrolled in an educational establishment in the State for the principal purpose of following a course of study there, including a vocational training course, and has comprehensive sickness insurance in respect of himself or herself, his or her spouse and any accompanying dependants, or

(iv) subject to paragraph (3), is a family member accompanying or joining a Union citizen who satisfies one or more of the conditions referred to in clause (i), (ii) or (iii)."

B. THE FACTS OF THE CASES BEFORE THE NATIONAL COURT

8. The questions referred by the High Court of Ireland concern four cases, regarded as test cases since a number of applications which raise similar issues are pending.

9. The first set of proceedings concerns Mr Metock, a national of Cameroon, married to a citizen of the United Kingdom who is resident and working in Ireland. He arrived in Ireland in 2006 and, by the time that his application for asylum was ultimately refused, had, in Ireland, married the citizen of the United Kingdom, with whom he had been in a relationship for thirteen years.

10. The second set of proceedings concerns Mr Chinedu, a Nigerian national married to a German citizen lawfully resident in Ireland. He arrived in Ireland in 2005 and, in that country, married Mrs Chinedu before his application for refugee status had been ultimately refused.

11. The nationality of Mr Ikogho, the applicant in the third set of proceedings is not specified in the interim decision. He is married to Mrs Ikogho, a citizen of the United Kingdom who resides and works in Ireland. Mr Ighoko arrived in Ireland in 2004. His application for asylum was refused and a deportation order made against him on 15 September 2005. Having commenced a relationship with Mrs Igokho shortly after his arrival in Ireland, they married in June 2006.

12. The fourth set of proceedings concerns Mr Igbonanusi, who is married to a Polish citizen who resides and works in Ireland. He arrived in Ireland in 2004. In May 2005 the Minister for Justice, Equality and Law Reform ("the Minister") refused to grant him refugee status and, in September 2005, made a deportation order against him. He married Ms Batkowska in Ireland in November 2006.

13. In each case, the applicant made an application for residence as the spouse of an EU citizen. In each case, the Minister refused the application for residence. In each decision reference was made to the applicant's failure to comply with the requirements of Regulation 3(2) which requires the applicant to produce evidence of lawful residence in another Member State prior to arrival in Ireland) and, in the case of Mr Ikogho, the Minister cited the additional reason that the applicant was illegally resident in Ireland at the time of his marriage to the EU citizen.

14. In each case, the applicant has applied for an order of certiorari to quash the decision by which the Minister refused the application for a residence card.

15. Thus, in all four cases, the salient features are with a few minor exceptions, identical.

16. All four cases involve a married couple. In each couple, one spouse is a Union citizen of a Member State other than Ireland who is residing and working in Ireland and the other spouse is a non-EU national. It is common ground that the marriages

were genuine, not marriages of convenience. All four couples were married in Ireland. Each non-EU national spouse applied for a residence card from the Minister as the spouse of a Union citizen residing and working in Ireland.

17. These applications were refused by reason of the failure of the non-EU national to provide evidence that he had been lawfully resident in another EU Member State prior to arrival in Ireland as required by Regulation 3(2), supra.

18. The applicants in each case challenge the validity of the decision of the Minister to refuse the application for a residence card. They contend that Directive 2004/38/EC does not permit Ireland to include, as it has done in its implementing regulations, a requirement that a spouse of a Union citizen provide evidence of lawful residence in another EU Member State prior to arrival in Ireland. The applicants contend that such provision in the Irish regulation is invalid.

19. The national court took the view that, in order to rule on the applications for certiorari, it needed to know whether the requirement in Regulation 3(2) of prior lawful residence was compatible with Directive 2004/38/EC. It therefore stayed its proceedings and referred the following question for a preliminary ruling.

"(1) Does Directive 2004/38/EC permit a Member State to have a general requirement that a non-EU national spouse of a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order that he or she be entitled to benefit from the provisions of Directive 2004/38/EC.

(2) Does article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national who is:

(i) a spouse of a Union citizen who resides in the host Member State and satisfies a condition in article 7(1)(a), (b) or (c)

and

(ii) is then residing in the host Member State with the Union citizen as his/her spouse

Irrespective of when or where their marriage took place or when or how the non-EU national entered the host Member State.

(3) If the answer to the preceding question is in the negative does article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national spouse of a Union citizen who is:

(i) a spouse of a Union citizen who resides in the host Member State and satisfies a condition in article 7(1)(a), (b) or (c); and

(ii) resides in the host Member State with the Union citizen as his/her spouse; and

(iii) has entered the host Member State independently of the Union citizen; and

(iv) subsequently married the Union citizen in the host Member State.

C. ARGUMENTS OF THE PARTIES TO THE MAIN PROCEEDINGS

1. ARGUMENTS RELATING TO THE REQUIREMENT OF PRIOR LAWFUL RESIDENCE

1.1 Arguments of the Minister

20. The Minister submits that the prior lawful residence requirement in article 3(2) of the 2006 Regulations is permitted by Directive 2004/38/EC since that Directive is only concerned with the movement of Union citizens and their family members within the territory of the Member States and not with the entry of such persons into the territory of Member States from outside.

21. He argues that the Member States retain competence in relation to the admission of non-EU nationals from outside of the territory of Member States into a Member State. He submits that if Directive 2004/38/EC is interpreted as meaning that non-EU nationals who are not already lawfully resident in a Member State enjoy an automatic right to enter and reside within the host Member State on the basis of family relationship alone, it would undermine the Member States' powers to control immigration at their external border.

22. The Minister submits that this division of competences is confirmed by the judgment of the Court of Justice in *Secretary of State v Akrich* (Case C-109/01, [2003] ECR I-9607) and, in particular, paras 49 and 50 of the judgment which provide:

> "49. However, Regulation No 1612/68 covers only freedom of movement within the Community. It is silent as to the rights of a national of a non-Member State, who is the spouse of a citizen of the Union, in regard to access to the territory of the Community.
>
> 50. In order to benefit in such a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated."

23. He contends that his entitlement to rely upon *Akrich* as permitting him to confine the scope of Directive 2004/38/EC to those family members who were lawfully resident in another Member State prior to coming to Ireland, is not diminished by the judgment in *Yunying Jia v Migrationsverket* (Case C-1/05, [2007] ECR I-1).

24. He submits that the judgment of the Court of Justice in *Jia* must be understood as not requiring Member States to make the grant of residence pursuant to Directive 2004/38/EC subject to prior lawful residence in another Member State but not preventing a Member State from doing so if it so wishes. The question asked in *Jia*,

as interpreted by the Court of Justice, was whether Community law requires a Member State to impose a condition of lawful residence and that the Court did not address the question as to whether Directive 73/148/EEC (which was at issue in those proceedings) permits a Member State to impose a condition of lawful residence. The Minister does not consider that the judgment of the court of Justice in *Eind* (Case C-291/05, [2007] ECR I-0000) alters this position.

25. In accordance with the principles set out by the Court of Justice in *Akrich* and *Jia*, he submits that Directive 2004/38/EC, whilst it does not require Member States to impose a condition of prior lawful residence in another Member State for family members of a Union citizen who seeks entry or residence pursuant to Directive 2004/38/EC, does leave to Member States a choice or discretion to impose such a condition if they so wish.

1.2 Arguments of the applicants

26. The applicants submit that Directive 2004/38/EC governs the entry into the territory of Member States of family members of a Union citizen who is residing in a host Member State. They submit that this follows from a consideration of the enabling EC Treaty provisions (in particular Article 18) and of Directive 2004/38/EC and, in particular, its articles 1, 3, 5, 6, 7(1) & (2), 10, 27 and 35 when construed in accordance with the Treaty and the recitals to the Directive, in particular recitals (1), (3), (5), (6), (11) and (22).

27. They submit that the fundamental right is that of the Union citizen which derives from the EC Treaty and not from Directive 2004/38/EC. The rights of the Union citizen include a right to move and a separate and distinct right to reside in another Member State. The right of the family member is consequential to and dependant on the right of the Union citizen and in the case of a spouse derives from the family relationship alone. The applicants rely on the judgments of the Court of Justice in *Mouvement Contre le Racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v.*

Belgian State (Case C-459/99), [2002] ECR I-6591 ("MRAX") and *Commission of the European Communities v. Spain* (Case C-157/03), [2005] ECR I-2911 ("*Commission v. Spain*").

28. They submit that the requirement of lawful residence as stated by the Court of Justice in *Akrich* (at paras 49 and 50) in relation to Council Regulation (EEC) No. 1612/68 does not now apply to the interpretation of Directive 2004/38/EC for a number of reasons:

(1) *Akrich* was concerned with an implied right to return to a home Member State derived from the express right of free movement in Regulation (EEC) No. 1612/68. This did not include the distinct right to reside in another Member State referred to in Directive 2004/38/EC and deriving from Article 18 of the Treaty.

(2) The Court of Justice in *Jia* confirmed that *Akrich* does not have general application. This limited application of the lawful residence requirement in *Akrich* was confirmed in particular by the judgment of the Court of Justice (at paras 36, 41 and 45) in *Eind.*

(3) Directive 2004/38/EC was adopted on 29 April 2004, after the judgment of the Court in *Akrich.* Recital (3) states that it is to "strengthen the right of free movement and residence of all Union citizens". The applicants submit that articles 5 and 7 of the Directive in particular, are inconsistent with an implied requirement of prior lawful residence for a non-EU family member.

(4) *Akrich* should properly be considered as an "abuse of rights" case. Article 35 of Directive 2004/38/EC now expressly enables Member States to take measures to prevent abuse of rights or fraud in accordance with the conditions set out therein. Article 3(2) of the 2006 Regulations is not such a provision.

29. The applicants submit that Directive 2004/38/EC cannot be interpreted as leaving Member States a discretion or choice to include a general requirement of prior lawful residence in another Member State for family members of Union citizens seeking either entry or residence in Ireland. They contend that the scheme of the Directive, as appears from article 1(a) and (c), is that it lays down the conditions governing the exercise of the right of free movement and residence within the territory of Member States by Union citizens and their family members and the limits which may be placed on those rights by Member States. Further, the applicants submit that articles 5, 7 and 10 set out exhaustively what Member States may require of a family member who seeks either entry or residence. They submit that there is nothing in those articles which permits individual Member States to introduce an additional substantive requirement, as Ireland seeks to do in article 3(2) of the 2006 Regulations.

30. The applicants submit that the limits which may be placed by Member States on entry and residence of family members of a Union citizen are those decisions and measures authorised by article 27 and article 35 of Directive 2004/38/EC. Article 3(2) of the 2006 Regulations is not a measure made pursuant to article 27 or article 35 of the Directive, as it is a Regulation with general application.

31. The applicants contend that Directive 2004/38/EC does not permit of differing substantive requirements in different Member States. The applicants referred in this context to the Immigration (European Economic Area) Regulations 2006 made to implement Directive 2004/38/EC in the United Kingdom which contains no prior lawful residence requirement similar to that in article 3(2) of the 2006 Regulations.

32. The applicants rely on the response given to Petition 0646/2006 of Hanna Sobczak (Polish) to the European Parliament (in which reliance is placed on the Court of Justice's judgment in *Jia*) to the effect that article 3(2) of the 2006 Regulations:

"would appear to be contrary to Community law as the right of residence in Ireland cannot be made conditional upon having resided legally in another Member State before arriving in Ireland. The Commission services envisage drawing the attention of the Irish authorities to this judgment and require that the Irish legislation fully complies with Community law."

2. ARGUMENTS RELATING TO THE REQUIREMENT THAT THE FAMILY MEMBER ACCOMPANY OR JOIN THE UNION CITIZEN

2.1. Arguments of the Minister

33. The essential submission made on behalf of the Minister is that the non-EU nationals do not come within the scope of the Directive in accordance with article 3(1) because at the time the non-EU national entered Ireland, he was not a family member of a Union citizen. The Minister submits that where a Union citizen is residing in a Member State other that his own, a family member may only be regarded as accompanying him in the host Member State if the family member enters the host Member State at a time when he is already a family member of a Union citizen who is either moving to the host Member State or already residing therein.

2.2. Arguments of the applicants

34. The applicants contend that at the date of application for the residence card, the non-EU nationals were persons who came within the scope of article 3(1) by reason of the following:

(i) The Union citizen was residing in Ireland with a right of residence for a period longer than three months pursuant to article 7(1);

(ii) The non-EU national was a family member of the Union citizen, being her spouse;

(iii) The non-EU citizen was at that time accompanying the Union citizen in Ireland within the meaning of article 3(1).

35. The applicants refer to the application of the Directive, in article 3(1), to Union citizens who "move to or reside" in a Member State other than their own. They submit that the Directive applies to a Union citizen whilst residing in a Member State other than his or her own. Hence, if at any time whilst s/he is so residing, the Union citizen acquires a family member, by marriage or otherwise and that person is with them in the host Member State (regardless of how they came to be there), they are a family member who is then accompanying the Union citizen in the host Member State.

36. The applicants also rely upon the distinct right of residence of the Union citizen in the host Member State for a period longer than three months if he or she satisfies the conditions in article 7(1)(a), (b) or (c) of Directive 2004/38/EC.

37. The applicants, finally, rely upon the terms of article 7(2) in relation to the right of residence of the non-EU national spouse. This provides:

> "The right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c)."

38. The applicants submit that the right of residence is conferred on the family member who is accompanying the Union citizen in the host Member State and is not in any way dependent upon the circumstances in which the non-EU family member came to enter the host Member State.

39. The applicants submit that their contentions are supported in particular by the judgment of the Court of Justice in *MRAX*.

D. ANALYSIS

1. THE FIRST QUESTION

40. By its first question, the national court asks whether the Directive permits a Member State to require that that a third country national spouse of a Union have been lawfully resident in another Member State in order to avail him or herself of the provisions of the Directive.

41. A purely textual analysis of the Directive suggests strongly that this cannot be the case. Article 3(1) states simply that the Directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national and to their family members who accompany or join them. By virtue of Article 2(2), the expression "family members" includes the spouse.

42. Leaving to one side for the moment the meaning of the expression "who accompany or join them", which will be examined in the context of the second and third questions, there is nothing in the wording of Article 3(1) to suggest that a Member State is entitled to require, as a generally applicable condition precedent, that the spouse (if a third country national) be lawfully resident in another Member State prior to coming to the host State.

43. Similarly, a contextual examination of other provisions of the Directive leads to the same conclusion. For example, Article 10(2) lists the documents which must be presented in order for the family members of a Union citizen to acquire a residence card. In the case of spouses, the only documents that may be required are a passport, proof of the existence of the family relationship (such as a marriage certificate) and proof that the Union citizen in question is resident in the host Member State. The documents which must be produced are listed exhaustively and there is no room to infer that Member States are entitled to require any further documents, such as a document proving prior lawful residence in another Member State.

44. The Directive contains a number of provisions permitting the Member States to restrict the right of entry or residence of persons entitled under the Directive on the basis of a limited and defined number of grounds. Article 27 lists the familiar grounds of public policy, public security and public health and incorporates the principle that any such measures must be related to the conduct of the person in question (with the exception of public health grounds).

45. More specifically, Article 35, entitled Abuse of Rights, allows the Member States to adopt measures to refuse, terminate or withdraw any right conferred by the Directive in case of abuse of rights or fraud, such as marriages of convenience. That provision

stipulates inter alia that any such measure must be proportionate and subject to the procedural safeguards set out in Articles 30 and 31. Those articles lay down procedural safeguards that must be complied with in the case of decisions addressed to individuals as opposed to measures of general application, which in turn suggests that the measures referred to in Article 34 must likewise be specific measures to deal with individual cases. In the instant cases, had the authorities had evidence that the marriages that the applicants had contracted were sham marriages, they could have taken individual decisions against the applicants on the basis of Article 35. However, evidence that the marriages were sham is totally lacking and, indeed, the national court has been at pains to underline that all the marriages are genuine. Thus, no decision could have been taken on the basis of Article 35. This implies that Member States are not entitled, by the adoption of general measures which would undoubtedly strike at some cases of fraud, to circumvent the safeguards laid down by Article 35 in conjunction with Articles 30 and 31.

46. However, the Minister argues that the general requirement of lawful prior residence is authorised on the basis of general principles flowing from the judgment of the Court in *Akrich*, supra. The applicants retort that the scope of the *Akrich* judgment has been cut down by subsequent case law, in particular the judgments in *Jia* and *Eind*.

47. This difference of opinion raises two questions. The first is how to distil the correct principle flowing from the above three, and indeed other, judgments and the second is to examine to what extent these judgments, which concern the interpretation of Regulation 1612/68, are still good law in the context of Directive 2004/38.

48. In *Carpenter*, the applicant in the main proceedings was a third country national who had been given leave to enter the United Kingdom for six months and had married a United Kingdom citizen after her leave to stay had expired. The Court held that Article 49 of the EC Treaty, read in the light of Article 8(1) of the European Convention on Human Rights, precluded refusal of a right of residence to

the applicant in the circumstances of the case, in which the applicant's husband required her assistance in order effectively to avail himself of his entitlement to provide services in other Member States. The fact that the applicant was unlawfully resident in the United Kingdom at the time that she married was not considered by the Court to be relevant.

49. In *MRAX*, the Court was not dealing with a specific factual situation but with the legality of a circular issued by the Belgian Ministers for the Interior and Justice respectively. Although not all the points arising in that case are relevant to the instant case, it is significant that the Court held that where a third country national had entered the territory of a Member State unlawfully and had subsequently married a Community national, the Member State was not entitled to expel the third country national spouse from the territory of that Member State. The Court appears to have regarded it as axiomatic that the right of residence was conferred directly by Community law on the spouse in those circumstances.

50. However, in *Akrich*, decided the following year, the Court was confronted with the situation of a third country national who had twice been deported from the United Kingdom and who, having clandestinely returned to that country, had married a United Kingdom citizen and had subsequently been deported to Ireland. He subsequently applied for entry clearance as the spouse of a returning UK citizen. The Court held that Regulation 1612/68 covered only freedom of movement within the Community, not access thereto, and that, in order to benefit from the rights granted by Article 10 thereof, the third country national spouse must be lawfully resident in one Member State to which the Union citizen is migrating or has migrated (paragraphs 49 and 50). Applied to the precise circumstances of that case, this statement appears to mean that the applicant must have been lawfully resident in the United Kingdom before his spouse migrated to Ireland; the Court did not raise the point that his residence in Ireland does not appear to have been regarded as

illegal by the Irish authorities. The implicit but inescapable conclusion would appear to be that if an applicant in Mr Akrich's position marries in the United Kingdom and is not granted lawful residence in that country on the basis of national law, he cannot acquire the status of a family member of a Union citizen even if he accompanies or joins his spouse when she moves to another Member State in the exercise of her right of free movement.

51. However, the Court qualified this restrictive interpretation by stating that the motives which may have prompted the couple to leave the United Kingdom and subsequently to return there were of no relevance so long as the Community citizen had sought to pursue an effective and genuine activity in another Member State.

52. The Court also held that provided the marriage was genuine, the Member State (in casu the UK) would be obliged to take into account Article 8 of the ECHR in assessing any application to enter and remain in that Member State.

53. Subsequently, in *Jia*, the Court was confronted with the situation of an application for residence made by the Chinese parents in law of a German citizen, resident with her spouse in Sweden; the applications were made during a short visit to Sweden during the period of validity of a short stay visa. Having been asked by the national court whether Article 10 of Regulation 1612/68 required the third country nationals to be lawfully within the Community as a condition for obtaining the right of residence in a Member State, the Court reformulated the question as asking whether Member States were required in such circumstances to make the grant to a family member of a residence permit subject to the condition that the family member have been previously lawfully resident in another Member State. The Court answered that question in the negative. In so doing, it distinguished *Akrich* on the grounds that the family member was not unlawfully resident in a Member State, nor was she seeking to evade national immigration illicitly.

54. Finally, in *Eind*, the situation concerned the family member of a Netherlands national who had resided and worked in another Member State in which the family member had been granted a residence permit on the basis of Article 10 of Regulation 1612/68. The Court held that, in those circumstances, when the Netherlands citizen returned to the Netherlands, the family member fell within the scope of Article 10 of Regulation 1612/68, even if she had had no right of residence on the basis of national law before the Netherlands national had exercised his right of free movement. Somewhat surprisingly, the Court did not cite *Akrich* or *Jia* in its judgment, despite the fact that Advocate General Mengozzi in his Opinion had been at pains to stress that the condition of prior lawful residence mentioned in *Akrich* was closely linked to the particular facts of that case and not generally applicable.

55. In the Commission's view, it is important to lay down a clear and workable rule which will give appropriate guidance to national authorities and to Community nationals and their families alike.

56. The Commission considers, in the light of the judgment in *Jia*, that the condition of prior lawful residence laid down by the Court in *Akrich* should be interpreted restrictively. Indeed, in *Jia*, the Court held that the condition of "prior lawful residence" could not be applied to situations where the applicant has not been residing unlawfully in a Member State or seeking to evade national immigration legislation illicitly.

57. It also follows from the earlier case law (in particular *MRAX*) that where the Community citizen has already availed himself of his right of free movement and subsequently married, Community law directly confers rights on his or her spouse from the moment of marriage. It is only where, before exercising his right of free movement, the Community citizen has – while still registered in his home Member State – married the third country national that national immigration law is relevant.

As *Akrich* shows, where a third country national is illegally resident in one Member State with a view to evading the immigration legislation of that Member State and marries a citizen of that Member State the initial illegality of the situation cannot be cured, by virtue of Community law, by the Community citizen exercising his or her rights of free movement and subsequently returning to the Member State of which he or she is a citizen.

58. However, it is important in this context to stress that, in the light of earlier judgments, in particular *Carpenter* and *MRAX*, even the fact of illegal residence in a Member State at the time that the marriage is celebrated is irrelevant where the right of residence as a spouse is conferred directly by Community law, as is the case where the third country national marries, in Member State B, a citizen of Member State A who is residing in Member State B in the exercise of his or her Community law rights.

59. In the light of the above, the Commission proposes that the Court should answer the first question as follows:

60. Directive 2004/38 does not permit a Member State to lay down as a general requirement that a third country national spouse of a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order to benefit from the provisions of Directive 2004/38.

2. QUESTIONS 2 AND 3

61. By its second question, the national court is asking essentially whether Article 3(1) of the Directive applies to the third country national spouse of a Community citizen who satisfies one of the conditions in Article 7(1) (a), (b) or (c) irrespective of when or where the marriage took place or when or how the third country national entered the host Member State.

62. The crucial point with regard to this question is whether the words "their family members...who accompany or join them" in the host Member State means that the third country national must have acquired the status of a family member before coming to the host Member State. The Minister contends that where a third country national comes to the Member State before he is a family member of a Union citizen and subsequently acquires that status, he cannot be said to have joined or accompanied the Union citizen. By contrast, the applicants in the main proceedings argue that where, as in this case, a Union citizen is already resident in another Member State, if he subsequently acquires a family member, that member can be said to be accompanying him.

63. In the Commission's view, and in the light of its observations on the first question, the contention of the Applicants is to be preferred.

64. In the first place, it is true that the expression "accompany or join" is formulated predominantly with the situation in mind in which the Union citizen and the spouse are already married before coming to the host state. However, the meaning of the word "accompany" is ambiguous. It can be interpreted in the sense of "being the companion of someone" who is already in the host state rather than meaning "to travel with someone" to that state. In *MRAX*, the Court held that, by virtue of Article 10 of Regulation 1612/68, which used the expression "right to install themselves", a residence card could not be refused to a third country national who had married after entering the host country illegally or while staying there illicitly. In the absence of clear language, it cannot be inferred that the legislature, when enacting the Directive, intended to exclude from its scope a category of spouses who enjoyed rights under Regulation 1612/68. Indeed, the terms of Recital 5 of the Preamble to the Directive states that "the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality".

65. Secondly, in response to the point that the rights conferred by the Directive may not be used simply in order that a third country national may acquire the right of residence in a Member State, it must be recalled that Articles 27 and following, in particular Article 35, allow Member States to take measures to prevent an abuse of the rights conferred by the Directive, in particular where sham marriages are concerned. That provision provides adequate safeguards to prevent abuse by third country nationals of such rights.

66. In the light of the above, the second question should be answered in the affirmative and the third question does not therefore call for a reply.

Certified copy of the original

Dominique MAIDANI Michael WILDERSPIN

Agents for the Commission

Observations

Case C-127/08 *

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To: The Court of Justice

of the European Communities,

Luxembourg

WRITTEN OBSERVATIONS

of the Netherlands Government, submitted pursuant to Article 104a of the Rules of Procedure of the Court of Justice of the European Communities,

in Case C-127/08

Metock and Others

In the aforementioned case, the Netherlands Government, represented by Corinna Wissels and Caroline ten Dam, Head and member, respectively, of the European Law Section of the Legal Affairs Directorate of the Ministry of Foreign Affairs, The Hague, has the honour of submitting the following observations for the consideration of the Court.

I. Introduction

1 By order for reference of 14 March 2008, the High Court (Ireland) ('the referring court') referred questions to the Court of Justice under Article 234 EC concerning the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77) ('Directive 2004/38').

2 The questions arose in a dispute between (i) Metock and Others, Ikogho and Others, Chinedu and Others, Igbo(n)anusi and Others (hereinafter referred to as 'Metock and Others') and (ii) the Minister for Justice, Equality and Law Reform ('the Minister') concerning the Minister's rejection of the applications by Metock and Others for a residence card.

3 By order of 17 April 2008 the President of the Court of Justice decided, in accordance with Article 23b of the Protocol on the Statute of the Court of Justice and Article 104b of the Rules of Procedure of the Court of Justice, to apply the accelerated procedure.

II. Facts and Legal framework

4 For a description of the facts and legal framework, reference is made to the reference for a preliminary ruling.

III. Questions referred for a preliminary ruling

5 The referring court has submitted the following questions to the Court for a preliminary ruling:

'1. Does Directive 2004/38/EC permit a Member State to have a general requirement that a non-EU national spouse of a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order that he or she be entitled to benefit from the provisions of Directive 2004/38/EC?

2. Does Article 3(1) of Directive 2004/38/EEC include within its scope of application a non-EU national who is:

(i) a spouse of a Union citizen who resides in the host Member State and satisfies a condition in Article 7(1)(a), (b) or (c) and

(ii) is then residing in the host Member State with the Union citizen as his/her spouse irrespective of whether or where their marriage took place or when or how the non-EU national entered the host Member State?

3. If the answer to the preceding question is in the negative does Article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national spouse of a Union citizen who is:

(i) a spouse of a Union citizen who resides in the host Member State and satisfies a condition in article 7(1)(a), (b) or (c); and

(ii) resides in the host Member State with the Union citizen as his/her spouse; and

(iii) has entered the host Member State independently of the Union citizen; and

(iv) subsequently married the Union citizen in the host Member State?'

IV. Reply to the first question

Introduction

6 In these written observations the Netherlands Government will confine itself to the, in its view, most important question of law, which is contained in the first question.

7 By the first question, the referring court wishes to ascertain whether Directive 2004/38 allows a national requirement that a non-EU national must have been lawfully resident in another Member State prior to coming to the host Member State in order to benefit from the application of the provisions of that directive.

8 The Netherlands Government is of the opinion that this question must be answered in the affirmative for the following reasons.

Allocation of competences in the area of immigration

9 In the first place it is necessary to deal with the allocation of competences in matters of immigration *to* the Union and movement and residence *within* the Union. It is established that the area of immigration is not yet fully harmonised and that the Member States have retained the competence to lay down rules for the first admission of non-EU nationals on their territory and ipso facto to the territory of the European Union (see the Opinion of Advocate General Geelhoed of 27 April 2006 in Case C-1/05 *Jia*, points 2, 26, 64 and 66). As the Advocate General stated in point 32 of that opinion, as Community law stands today, it is clear that the Member States retain competence in respect of most aspects of immigration legislation. '*More specifically*', he states in point 33 of his Opinion, '*this entails that it is for the Member States to decide on the first admission to their territory of persons from non-Member States according to the criteria laid down in their national legislation.*' Of course, the Member States must, in taking decisions on immigration of non-EU nationals to their territory, have regard to the right to respect for family life within the meaning of Article 8 of the European Convention on the protection of human rights and fundamental freedoms. That right is part of the fundamental freedoms which, according to settled case law of the Court, confirmed by the preamble of the European Act and Article 6(2) EU, are protected in the Community legal order (see inter alia Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 41, and Case C-540/03 *Parliament* v *Council* [2006] ECR I-5759, paragraph 52).

10 There may be friction with the competences of the Member States in the area of immigration as soon as the free movement of persons is at issue (see inter alia points 2 and 26 of the Opinion of Advocate General Geelhoed in *Jia*, in which he states that a fundamental dilemma or a fundamental tension may arise). This is because Community law (currently Directive 2004/38) grants rights of entry and residence to Union citizens who make use of their right of free movement and residence within the Community and to members of their families, irrespective of the nationality of those family members.

11 In situations where the competences of the Member States may conflict with the protection conferred by Community law it is necessary to carefully consider the extent of that protection, both in the personal and substantive sense. Neither the personal nor the substantive scope of application of Directive 2004/38 are unlimited.

The personal scope of application of Directive 2004/38

12 In the second place, it is also necessary to carefully consider the demarcation of that scope of application, in the present case the personal scope. The first question

referred for a preliminary ruling essentially asks whether nationals of non-EU countries, as members of the family of a Union citizen, already fall within the personal scope of Directive 2004/38 *before they have lawfully resided in one of the Member States*. The main proceedings concern nationals of non-EU countries (Metock and Others) who, as spouses of a citizen of the Union who is residing in a Member State other than the Member State of which he or she is a national, are relying on Directive 2004/38 before they have lawfully resided in one of the Member States.

13 The personal scope of Directive 2004/38 is set out in Article 3. Article 3(1) defines the category of persons to which the directive applies ('*Beneficiaries*') as follows: '*... all Union citizens who move to or reside in a Member State other than that of which they are a national, and ... their family members as defined in point 2 of Article 2 who accompany or join them*'. Article 2, point 2, defines four categories of family member, including that of 'spouse', which is at issue in the present case. This definition applies both to family members who are nationals of a Member State and family members who are not nationals of a Member State.

14 On a literal interpretation, nationals of non-EU countries thus fall within the personal scope of Directive 2004/38 as soon as they are a 'family member' within the meaning of Article 2, point 2, and they accompany or join a citizen of the Union who moves to or resides in a Member State other than that of which he or she is a national. Directive 2004/38 does not lay down a requirement of prior lawful residence. Nor are Member States *obliged* to lay down that requirement (see, by analogy, Case C-1/05 *Jia*, para 33, which related to the Community law right that applied prior to the entry into force of Directive 2004/38).

15 The question which must be answered in the present case is whether Directive 2004/38 *precludes* the Member States from laying down such a requirement in its national immigration legislation. As previously stated, it is for the Member States to decide on the first admission of persons from non-member states into their territory in accordance with the criteria of their national legislation.

16 The text of Directive 2004/38 is silent in that regard. That is also logical, since Directive 2004/38, when describing the beneficiaries in Article 3(1) and Article 2, point 2, primarily takes the concept of '*family member*' as a starting point, irrespective of the nationality of that family member (see points 13 and 14 above). As follows from recital 5 in the preamble to Directive 2004/38 '*the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality*.' (emphasis added by the agents). Since family members may also be citizens of the Union, the question whether those family members are lawfully resident in the Union does not arise for that category of family members. The mere fact that the text of Directive 2004/38 states nothing in that connection with regard to family members

who are not citizens of the Union does not mean that Directive 2004/38 precludes a national requirement such as that at issue here, as will be explained below.

The case-law to date

17 In the Netherlands Government's view, the case-law is not yet sufficiently clear in that regard. On one hand, there are the judgments in Case C-459/99 BRAX [2002] ECR I-6591 (paragraph 74) and in Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911 (paragraph 28), in which the Court held that under Community law the right of a non-EU national who is married to a national of a Member State to enter the territory of the Member States derives from the family relationship alone.

18 On the other hand, there is the judgment in Case C-109/01 *Akrich* [2003] ECR I-9601, paragraph 50, in which the Court held that in order to benefit, in a situation such as that at issue in those proceedings, from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-EU country who is the spouse of a citizen of the Union must be lawfully resident in a Member State when he or she moves to another Member State to which the citizen of the Union is migrating or has migrated.

19 In *Jia* (cited above) the Court did not express a view on the question whether Directive 2004/38 *precludes* a national requirement such as that at issue here. The Court merely held there that Directive 2004/38 does not *require* such a requirement to be laid down.

20 The subsequent judgment of 11 December 2007 in Case C-291/05 *Eind* (not yet reported) does not shed any more light on the present case. In *Eind* the non-EU national concerned (the daughter of Mr Eind) was after all lawfully resident (in the United Kingdom) before she claimed the right under Community law to a residence permit in the Netherlands.

The aim of Directive 2004/38

21 Given that the text of Directive 2004/38 leaves room for interpretation on this point, the Netherlands Government considers that it is necessary above all to ascertain whether the aim of Directive 2004/38 demands that non-EU nationals fall within the personal scope of application of the directive as soon as they are 'family members' within the meaning of Article 2, point 2, and they accompany or join a Union citizen who moves to or resides in a Member State other than that of which he or she is a national. As the title of Directive 2004/38 makes plain (Directive 'on *the rights* of citizens of the Union and their family members *to move and reside freely* within the territory of the Member States') and as is also apparent from the first and second recitals in the preamble [1] to Directive 2004/38,

1 – '(1) Citizenship of the Union confers on every citizen of the Union a primary and individual right to move and reside freely within the territory of the Member States, subject to the

the aim of that regulation is to guarantee *the right to move and reside freely* within the territory of the Member States. This means that the national immigration law of the Member States may not deter free movement or render it unattractive. Obstacles must be removed.

22 The Netherlands Government nevertheless considers that, *provided the free movement of persons is not deterred*, there is no impairment of Community rights, and competence of the Member States in the area of immigration is not curtailed. Member States must prevent the *loss* of rights by Union citizens (see Advocate General Geelhoed in *Jia*, cited above, point 71). Thus, in a situation in which a Union citizen established in a Member State who is married to a non-EU national with a right of residence in that Member State, and who goes to another Member State in order to work in employment there, that change of location must not lead to the *loss* of the possibility of lawfully living together (see, *Akrich*, cited above, paragraph 52).

23 On the other hand, in a situation in which the Union citizen established in a Member State, married to a non-EU national who does not have a right of residence in that Member State, goes to another Member State in order to exercise his right of free movement and residence, the refusal by the authorities of the host Member State to grant residence to that national does not deter the Union citizen from exercising the rights of free movement awarded to him by the Treaty (see also, by analogy, *Akrich*, cited above, paragraph 53). His movement within the Union will not, after all, lead to the *loss* of the possibility of living lawfully together with the non-EU national concerned. (This, in comparison with the situation in *Eind*, cited above, in which the daughter of Mr Eind did indeed live lawfully with her Netherlands father in the United Kingdom before she relied on the Community law right, as the daughter of a returning Netherlands national, to obtain a residence permit for the Netherlands. In that situation there was indeed a case of deterrent effect, because the possibility of living together lawfully in a family relationship would have been *lost* as a consequence of the use made of free movement, see paragraph 36 of that judgment).

24 In the present case, Metock and Others have had no right of residence in any Member State at the time when they joined their spouses, who have made use, as Union citizens, of the right to free movement. There is thus no *loss* of the possibility of living together in a family relationship as a consequence of the use of free movement by the spouses of Metock and Others. The fact that Metock and Others cannot derive rights from Directive 2004/38 in the host country (Ireland) could not have deterred their spouses, Union citizens with the nationality of

limitations and conditions laid down in the Treaty and to the measures adopted to give it effect.

(2) The free movement of persons constitutes one of the fundamental freedoms of the internal market, which comprises an area without internal frontiers, in which freedom is ensured in accordance with the provisions of the Treaty.'

another Member State, from exercising their rights of free movement. In the present case, the Netherlands Government does not see any ground whatsoever to conclude that enjoyment of the right of free movement by the Union citizens concerned (the spouses of Metock and Others) is impaired by the refusal of the Irish authorities to give Metock and Others a residence permit.

25 If Metock and Others could indeed derive rights from Directive 2004/38 simply by virtue of the fact that they are family members of Union citizens who are exercising their right of free movement, that would be tantamount to giving those Union citizens a preferential right compared with Union citizens who do not move within the Community. This would thus be tantamount to creating a *bonus* (and thus not the mere removal of obstacles) to Union citizens who use their rights of free movement, namely in the form of rights of residence for their family members who are nationals of non-EU countries. The Netherlands Government considers that the principle of effectiveness does not require Directive 2004/38 to be interpreted so widely that Member States have an obligation to *favour,* in that sense, Union citizens who use their rights to free movement and residence. The Member States are indeed obliged not to impair the useful effect of Directive 2004/38. As set out above, the aim of Directive 2004/38 is to ensure the right of free movement for Union citizens and their family members. This is apparent from the legal basis (Articles 18, 40, 44 and 52 EC) of the Directive. The complete achievement of that aim is, however, not called into question if the Member States are entitled to impose a requirement such as that at issue here in regard to family members who are non-EU nationals, since this does not impair their free movement within the Union but only relates to the first admission into the Union.

26 If the Member States do not wish to impose that requirement, this should not, moreover, mean that non-EU nationals without a right of residence in the European Union can avoid national immigration legislation. By way of example, the Netherlands Government here refers to the situation in which a non-EU national, who has been refused a residence permit in the Netherlands or, a fortiori, been classified by the Netherlands immigration authorities as an undesirable alien, marries a Netherlands citizen, then goes to a neighbouring Member State and thereafter returns together with the Netherlands national to the Netherlands and reapplies for a residence permit there on the basis of Directive 2004/38.

27 The Netherlands Government concludes then too that Directive 2004/38 allows a national requirement that the non-EU national must have resided lawfully in another Member State before coming to the host Member State in order to benefit from the application of the provisions of that directive.

Arguments of Metock and Others

28 Finally the Netherlands Government wishes to address some of the arguments put forward, according to the order for reference, by Metock and Others in support of

their case. Thus they submit that for a number of reasons the judgment in *Akrich* is not relevant to the answer to the question in point. First, they state that *Akrich* concerned a *right of return to the home Member State* (see paragraph 53(1) of the [summary of the] order for reference). The Netherlands Government points out that it can indeed be inferred from the judgment in *Akrich* (in paragraphs 53 and 54 of that judgment) that a Union citizen established in a Member State, whether going to another Member State in order to work in employment there or returning to the Member State of which he or she is a national in order to work in employment there, may not in either situation be deterred from exercising those rights of free movement.

29 Moreover Metock and Others submit that the judgment in *Akrich* does not have general application (see paragraph 53(2) of the [summary of the] order for reference). It is true that in paragraph 50 of the judgment in *Akrich* the Court of Justice talks of a '*situation such as that in the main proceedings*'. However, the considerations of the Court as to the deterrent nature of a restrictive interpretation of Regulation 1612/68 in paragraphs 53 and 54 of the judgment are formulated in very general terms and are not solely applicable to the facts in the main proceedings.

30 Next, Metock and Others submit that the requirement of prior lawful residence conflicts with Articles 5 and 7 of Directive 2004/38 (see paragraph 53(3) of the [summary of the] order for reference). The requirement of prior lawful residence is said to amount to an additional substantive requirement (see paragraph 54 of the [summary of the] order for reference). The Netherlands Government notes in that regard that Articles 5 and 7 grant substantive rights to categories of persons who fall within the personal scope as defined in Article 3(1) read in conjunction with Article 2, point 2, of Directive 2004/38. Whenever Member States do not wish to extend the circle of beneficiaries beyond what is necessary to achieve the aim of Directive 2004/38, by laying down a requirement of prior lawful residence, that does not impair the substantive rights which the Member States must guarantee to those beneficiaries by virtue of Directive 2004/38.

31 Moreover, it is argued by Metock and Others that the judgment in *Akrich* is not relevant to the present case because that case actually concerned 'abuse of rights'. They point in that connection to the fact that Article 35 of Directive 2004/38 provides for measures in this regard (see paragraph 53(4) of the [summary of the] order for reference). Here too, the Netherlands Government points out that the findings of the Court of Justice in the judgment in *Akrich* (paragraphs 53 and 54) concerning any deterrent effect of a restrictive interpretation of Regulation 1612/68 on the free movement of Union citizens had nothing to do with abuse and are formulated in very general terms. Furthermore, Article 35 of Directive 2004/38 does not relate to abuse whose object is to obtain a *first admission* into a Member State of the Union but purely to abuse whose aim is to obtain a *right of free movement and residence within* the Union. That is very clear from recital 28 in the preamble to Directive 2004/38, which states as follows: '*to guard against*

abuse of rights or fraud ... for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures.' (Our emphasis). Nor is that article intended to safeguard the powers of the Member States with regard to the *first admission* of non-EU nationals into the Union.

32 Finally, Metock and Others state as an argument (see paragraph 56 of the order for reference) that '*Directive 2004/38 does not permit of differing substantive requirements in different Member States*'. The Netherlands Government points out that this is simply the consequence of the fact that there has been no complete harmonisation in the area of immigration. It is for the Community legislature to put an end to these differences.

Conclusion with regard to the first question

33 The Netherlands Government concludes with regard to the first question referred for a preliminary ruling that Directive 2004/38 permits a national requirement that a non-EU national must have been lawfully resident in another Member State prior to coming to the host Member State in order to benefit from the provisions of that directive.

VI. Conclusion

34 The Netherlands Government proposes that the Court reply in the affirmative to the first question referred for a preliminary ruling.

Corinna Wissels Caroline ten Dam

[signatures]

Agents

The Hague, 16 May 2008

Udenrigsministeriet
Juridisk Tjeneste

København, den 14. maj 2008
JTEU, journal 400.A.5-3-4-334.

Til

De Europæiske Fællesskabers Domstol

Justitskontoret

INDLÆG FRA DEN DANSKE REGERING

I DOMSTOLENS SAG

C-127/08

Metock e.a.

mod

The Minister for Justice, Equality and Law Reform

1. Indledende bemærkninger

1. "High Court" i Irland har stillet 3 spørgsmål i forbindelse med fire verserende sager til EF-Domstolen (herefter Domstolen) vedrørende fortolkningen af Rådets Direktiv 2004/38/EF af 29. april 2004 om unionsborgeres og deres familiemedlemmers ret til at færdes og opholde sig frit på medlemsstaternes område (herefter opholdsdirektivet).

2. De forelagte spørgsmål lyder:

(1) "Tillader direktiv 2004/38/EF, at der i en medlemsstat gælder et generelt krav om, at en tredjelandsstatsborger, som er ægtefælle til en unionsborger, skal have opholdt sig lovligt i en anden medlemsstat, inden han eller hun indrejser i værtsmedlemsstaten, for at kunne drage fordel af bestemmelserne af direktiv 2004/38/EF?"

(2)"Omfatter anvendelsesområdet for artikel 3, stk. 1, i direktiv 2004/38/EF en tredjelandsstatsborger, der er:

(i) ægtefælle til en unionsborger, som opholder sig i værtsmedlemsstaten, og opfylder betingelsen i artikel 7, stk. 1, litra a), b) eller c), og
(ii) som opholder sig i værtsmedlemsstaten som ægtefælle til unionsborgeren, uanset hvornår og hvor deres ægteskab blev indgået, og uanset hvornår og hvorledes tredjelandsstatsborgeren indrejste i værtsmedlemsstaten?

(3)"Såfremt det foregående spørgsmål besvares benægtende, omfatter anvendelsesområdet for artikel 3, stk. 1, i direktiv 2004/38/EF da en tredjelandsstatsborger, der er ægtefælle til en unionsborger, når denne er:

(i) - ægtefælle til en unionsborger, der opholder sig i værtsmedlemsstaten og som opfylder betingelserne i artikel 7, stk. 1, litra a), b) eller c), og
opholder sig i værtsmedlemsstaten med unionsborgeren som ægtefælle; og
(iii) er indrejst i værtsmedlemsstaten uafhængigt af unionsborgeren; og
(iv) efterfølgende giftede sig med unionsborgeren i værtsmedlemsstaten?

2. Sagernes faktiske omstændigheder og baggrund

3. De fire sagsøgere i de retssager, der er forelagt den irske High Court beskrives som ægtefæller, hvoraf den ene part i hvert ægtepar er tredjelandsstatsborgere (herefter ansøgerne), der indrejste i Irland som asylansøgere i årene 2004-2006 og blev alle meddelt endeligt afslag på asyl i årene 2005-2007. De irske myndigheder traf afgørelse om at udvise to af ansøgerne, og den ene ansøger blev som følge heraf udsendt i december 2007. De fire ansøgere er alle gift med unionsborgere (herefter hovedpersonerne), der er statsborgere i henholdsvis Storbritannien, Tyskland og Polen, har lovligt ophold i Irland, og tre af hovedpersonerne er arbejdstagere. Det ene par har efter det oplyste haft et familieliv i 13 år og har to fællesbørn, hvorimod de øvrige hovedpersoner først stiftede et familieliv med ansøgerne efter deres respektive indrejse i Irland.

4. Ifølge den forelæggende ret indgav alle par ansøgning om opholdsbevis efter EU-retten i Irland under henvisning til ægteskab (familiesammenføring). De irske myndigheder meddelte afslag herpå til ansøgerne under henvisning til den omstændighed, at ansøgerne ikke havde fremlagt tilstrækkelig dokumentation for, at de havde opholdt sig lovligt i en anden EU-medlemsstat forud for indrejsen i Irland. Det ene afslag var dog begrundet i, at ansøgeren havde ulovligt ophold i Irland på tidspunktet for ægteskabets indgåelse, grundet udvisningsafgørelsen. Ansøgerne indbragte afgørelsen for den forelæggende nationale ret.

3. Den danske regerings interesse i sagen

5. Den danske regering (herefter regeringen) afgiver indlæg i sagen af principielle grunde. Dels fordi regeringen finder, at det i lyset af nyere retspraksis fra Domstolen er væsentligt at få entydigt fastslået, at det er fuldt foreneligt med opholdsdirektivet, når en medlemsstat stiller krav om forudgående fast, lovligt ophold i et andet EU-land i forhold til en tredjelandsstatsborger, der ønsker familiesammenføring med en unionsborger, der

har udnyttet retten til fri bevægelighed (spørgsmål 1). Dels fordi sagen efter regeringens opfattelse alene skal vurderes efter opholdsdirektivet.

6. Regeringen bemærker, at der verserer en anden præjudiciel forelæggelse for Domstolen, C-551/07, Deniz Sahin. Sagens præjudicielle spørgsmål nr. 1.b. vedrører, ligesom spørgsmål nr. 1 i nærværende sag, spørgsmålet om hvorvidt en medlemsstat efter opholdsdirektivet kan stille som betingelse for, at en tredjelandsstatsborger, der er familiemedlem til en vandrende arbejdstager, kan påberåbe sig direktivets bestemmelser, at tredjelandsstatsborgeren opholder sig lovligt i en anden medlemsstat på det tidspunkt, hvor ansøgningen om opholdsret efter EU-retten indgives. Den danske regering har også i denne sag afgivet skriftligt indlæg.

4. Regeringens retlige stillingtagen

4.1. Spørgsmål 1 om opholdsdirektivet og krav til forudgående fast, lovligt ophold

7. Det er regeringens opfattelse, at væsentlige hensyn til medlemsstaternes muligheder for at regulere indvandring fra tredjelande afgørende taler for, at medlemsstaterne kan stille et krav om, at tredjelandsstatsborgeren i en familiesammenføringssituation skal være i besiddelse af en egentlig opholdstilladelse i et andet EU-land på det tidspunkt, hvor vedkommende ansøger om opholdstilladelse med henvisning til EU-retten i den medlemsstat, som unionsborgeren (den vandrende arbejdstager) er flyttet til.

8. Denne fortolkning er i overensstemmelse med dommen i sag C-109/01, Akrich, der blev afsagt af Domstolens plenum. Domstolen fandt for det første, at forordning nr. 1612/68 alene omfatter den frie bevægelighed inden for EU, og at forordningen er tavs omkring rettigheder med hensyn til adgang til EU's område for en tredjelandsstatsborger, der er gift med en unionsborger, jf. herved præmis 49. Domstolen fastslog herefter, at det er en betingelse for, at en tredjelandsstatsborger, der er gift med en unionsborger, kan blive omfattet af forordningens art. 10, at

vedkommende opholder sig lovligt i en medlemsstat på det tidspunkt, hvor han tager til den medlemsstat, som unionsborgen flytter eller er flyttet til, jf. præmis 50.

9. Regeringen forstår Akrich-dommen således, at Domstolen i fortolkningen af art.10 i forordning 1612/68 lagde afgørende vægt på, hvorvidt et afslag på opholdstilladelse til tredjelandsborgeren ville have en "afskrækkende virkning" på unionsborgerens mulighed for at udøve de rettigheder til fri bevægelighed, som gælder på grundlag af TEF art. 39.

10. For det første fastslår Domstolen i præmis 52, at formålet med art. 10 i forordningen er at sikre, at en unionsborgers flytning fra én medlemsstat til en anden medlemsstat ikke medfører et tab af muligheden for at leve lovligt sammen med et nært familiemedlem.

11. For det andet fastslår Domstolen i præmis 53, at når en unionsborger, der er gift med en tredjelandsstatsborger, som ikke har opholdsret i denne medlemsstat, flytter fra denne medlemsstat til en anden, udgør det forhold, at unionsborgerens ægtefælle i henhold til forordningens artikel 10 ikke har ret til at etablere sig med unionsborgeren i en anden medlemsstat, ikke en mindre gunstig behandling end den, som de fik, før unionsborgeren gjorde brug af sin ret til fri bevægelighed og udgør således ikke en hindring for unionsborgerens ret til fri bevægelighed, jf. TEF artikel 39.

12. Efter regeringens opfattelse, fremgår det således klart af Akrich-dommen, at et forudgående fast, lovligt ophold i én medlemsstat, er en forudsætning for, at en tredjelandsstatsborger, der er gift med en unionsborger, kan støtte ret på de EU-retlige principper eller regler ved unionsborgerens flytning fra én medlemsstat til en anden.

13. Art. 10 i forordning nr. 1612/68 er ophævet af opholdsdirektivet fra 2004, som i art. 7 viderefører indholdet af bestemmelsen. Fortolkningen og analysen af art. 7, stk. 2, i opholdsdirektivet må således foretages i lyset af Domstolens tidligere retspraksis vedrørende art. 10 i forordning 1612/68.

14. I sag C-1/05, Jia, der blev afsagt af Domstolens store afdeling, blev der rejst spørgsmål

om fortolkning af Akrich-dommen. De faktiske omstændigheder i de to sager var imidlertid væsentligt forskellige, navnlig henset til at medlemsstatens regler i Jia-sagen ikke stillede krav i den konkrete situation om forudgående fast, lovligt ophold i forhold til tredjelandsstatsborgeren, ligesom der ikke var rejst spørgsmål om omgåelse af nationale bestemmelser om indvandring, jf. herved Jia-dommens præmis 31.

15. Domstolen fastslog på den baggrund, at betingelsen om forudgående fast, lovligt ophold som opstillet i Akrich-dommen ikke var relevant for Jia-sagen, og udtalte som svar på et spørgsmål fra den forelæggende ret, at EU-retten – henset til Akrich-dommen – ikke "pålægger" medlemsstaterne at betinge tildelingen af en opholdstilladelse til en tredjelandsstatsborger, som er familiemedlem til en unionsborger, der har gjort brug af retten til fri bevægelighed, af, at familiemedlemmet forinden har haft lovligt ophold i en anden medlemsstat, jf. præmis 33.

16. Denne konklusion i Jia-dommen kan efter regeringens opfattelse kun forstås derhen, at medlemsstaterne efter EU-retten *kan* (men ikke nødvendigvis *skal*) betinge tildelingen af en opholdstilladelse af, at tredjelandsstatsborgeren forinden har haft fast, lovligt ophold i en anden medlemsstat. Domstolen har således med Jia-dommen fastholdt, at reglerne om vandrende unionsborgeres ret til familiesammenføring forfølger formålet om fremme af fri bevægelighed for unionsborgere og kun er til hinder for nationale regler om tredjelandsborgeres opholdsret, hvis reglerne kan have eller har negativ betydning for unionsborgeres adfærd og valg i forhold til flytning fra én medlemsstat til en anden.

17. Også i den senere dom i sag C-291/05, Eind, der blev afsagt af Domstolens store afdeling, fastholdt Domstolen kriteriet om en afskrækkende eller demotiverende virkning i forhold til unionsborgerens valg, omend Domstolen under de konkrete omstændigheder lagde en forholdsvis lav "demotivationstærskel" til grund for vurderingen. Domstolen udtalte således i præmis 35-36, at den blotte udsigt til ikke at kunne fortsætte et samliv med en nær slægtning, som en unionsborger måtte indlede ved ægteskab eller familiesammenføring under et ophold i en anden medlemsstat end sin

egen, kan afholde den pågældende unionsborger fra at udnytte sin ret til fri bevægelighed og fraflytte sin egen medlemsstat. I sagen var der ikke tvivl om tredjelandsstatsborgerens forudgående faste, lovlige ophold i værtsmedlemsstaten, da samlivet med unionsborgeren blev indledt.

18. Det følger efter regeringens opfattelse af Jia-dommen, at et nationalt krav om fast, forudgående lovligt ophold i et andet EU-land er foreneligt med EU-retten, idet det er op til den enkelte medlemsstat at afgøre, om betingelsen bør stilles. Nærværende sag giver Domstolen mulighed for at fastslå dette princip klart og utvetydigt i en situation, hvor svaret på spørgsmålet – modsat situationen i Jia-sagen – vil gøre en afgørende forskel på resultatet af den underliggende sag.

4.2. Spørgsmål 2 og 3 om anvendelsesområdet for artikel 3, stk. 1, i opholdsdirektivet

19. Med spørgsmål 2 ønsker den forelæggende ret at få afklaret, hvorvidt en tredjelandsstatsborger, der er gift med en unionsborger, som opfylder betingelserne i opholdsdirektivet, er omfattet af anvendelsesområdet for artikel 3, stk. 1, i opholdsdirektivet – uanset hvornår og hvor ægteskabet blev indgået, og uanset hvornår og hvorledes tredjelandsstatsborgerens indrejste i værtsmedlemsstaten - når denne bor i værtsmedlemsstaten med unionsborgeren. Den forelæggende ret henviser i den forbindelse særligt til ordlyden af artikel 3, stk. 1, og artikel 7, stk. 2, idet ansøgerne har anført, at disse bestemmelser ikke indebærer et krav om, at familielivet skal være etableret inden indrejsen i værtsmedlemsstaten, og ej heller bestemte krav til ansøgernes opholdsgrundlag i værtsmedlemsstaten. I den forbindelse har ansøgeren gjort gældende, at medlemsstaterne ikke kan afkræve yderligere dokumentation for retten til ophold for tredjelandsstatsborgere, end den i opholdsdirektivet udtrykkeligt anførte.

20. Med det subsidiære spørgsmål 3 – der ønskes besvaret såfremt spørgsmål 2 besvares benægtende - ønsker den forelæggende ret at få Domstolens vurdering af, hvorvidt en tredjelandsstatsborger, der er gift - og i værtsmedlemsstaten samlever - med en

unionsborger, som opfylder betingelserne i opholdsdirektivet, er omfattet af anvendelsesområdet for artikel 3, stk. 1, i opholdsdirektivet, såfremt denne er indrejst i værtsmedlemsstaten uafhængigt af unionsborgeren, og ægteskabet først er indgået efter dennes indrejse i værtsmedlemsstaten.

21. Det er– som tidligere anført – regeringens grundlæggende opfattelse, at medlemsstaternes mulighed for at fastsætte en betingelse om et forudgående fast, lovligt ophold i et andet EU-land, har støtte i retspraksis, og en ordlydsfortolkning af de ovenfor anførte bestemmelser i opholdsdirektivet, peger ikke i retning mod at udelukke anvendelsen af denne betingelse. Kravet om et forudgående fast, lovligt ophold i et andet EU-land – der relaterer sig til ansøgerens opholdsretlige status i EU – er ud fra en formålsbetragtning, herunder lovgivers hensigt om at regulere den frie bevægelighed inden for EU og ikke tredjelandsstatsborgeres adgang til Fællesskabets område, fuldt foreneligt med opholdsdirektivets regler.

22. Omstændigheder som opregnet i spørgsmål 2: tidspunktet og stedet for ægteskabets indgåelse samt tidspunktet for og omstændighederne ved tredjelandsstatsborgerens indrejse i værtsmedlemsstaten kan inddrages i forbindelse med anvendelsen af artikel 3, stk. 1, og artikel 7, stk. 2, i opholdsdirektivet. Hvis en medlemsstat efter national ret har givet en tredjelandsstatsborger adgang til medlemsstaten f.eks. i form af opholdstilladelse som au-pair, og tredjelandsstatsborgeren herefter indgår ægteskab med en EU-borger, der opholder sig i medlemsstaten i medfør af den frie bevægelighed, er der ikke efter EU-retten noget til hinder for, at medlemsstaten giver tilladelse til familiesammenføring. Dette ændrer imidlertid ikke på det faktum, at betingelsen om et forudgående fast, lovligt ophold i en anden medlemsstat er i overensstemmelse med EU-retten.

23. Det forhold, at opholdsdirektivets bestemmelser vedrørende dokumentationskrav, jf. artikel 10, stk. 2, litra a)-f), i opremsningen af dokumenter, ikke udtrykkeligt henviser til dokumentation, der relaterer sig til opholdsgrundlaget i et andet EU-land, er efter

regeringens opfattelse ikke et argument for, at betingelsen om et forudgående fast, lovligt ophold ikke bør stilles. Betingelsen har – som tidligere anført – klar støtte i retspraksis, og opholdsdirektivets bestemmelser om dokumentationskrav, må fortolkes i overensstemmelse hermed. Det bemærkes dog, at oplysninger om tredjelandsstatsborgeres opholdsgrundlag sædvanligvis fremgår af et gyldigt pas, jf. artikel 10, stk. 2, litra a.

24. Regeringen finder det vigtigt at få fastlagt en entydig definition af begrebet "fast, lovligt ophold". Hertil bemærker regeringen, at et ophold, der alene er af processuel karakter, ikke kan konstituere et fast, lovligt ophold i en medlemsstat. Opholdet må således være baseret på et egentligt opholdsgrundlag, det vil sige i form af en opholdstilladelse.

25. Regeringen henviser i den forbindelse til generaladvokat Geelhoeds forslag til afgørelse i Jia-dommen. Generaladvokat Geelhoed foretog en nærmere undersøgelse af kriteriet om lovligt ophold, modsat Domstolen, der som anført ovenfor ikke fandt det nødvendigt henset til de konkrete omstændigheder i sagen. Der er således ikke tale om, at Domstolen underkendte generaladvokatens overvejelser på dette punkt. Generaladvokatens nærmere vurdering af begrebet "lovligt ophold" forekommer efter regeringens opfattelse at være et relevant bidrag i forhold til nærværende sag.

26. I forslagets pkt. 77 anfører generaladvokaten således, at der ikke kan være tale om et lovligt ophold, når "beslutningen udtrykkeligt og klart kun giver opholdstilladelse for en kortere periode, eller såfremt den er begrænset til et bestemt formål", og at "det vil være i strid med sådanne tilladelsers selve funktion at betragte dem som tilstrækkeligt grundlag for at opnå en langtids- eller permanent opholdstilladelse." De anførte betragtninger gælder i høj grad for tredjelandsstatsborgere i udsendelsesposition, som dem der foreligger i den nærværende sag.

27. Regeringen finder, at spørgsmålet om ansøgernes evt. opholdsret alene skal vurderes i forhold til opholdsdirektivet, herunder særligt reglerne om arbejdskraftens frie

bevægelighed, som er relevant for denne sag. Ansøgerne har som tredjelandsstatsborgere ikke egne rettigheder som unionsborger, men kan under visse betingelser aflede nogle EU-rettigheder fra deres respektive ægtefæller, hvoraf hovedparten utvivlsomt har status af vandrende arbejdstager med lovligt ophold i Irland.

28. Regeringen bemærker dernæst, at opholdsdirektivet efter sit formål og indhold i princippet gør udtømmende op med de tilfælde, hvor en unionsborger og en beslægtet tredjelandsborger kan udlede en ret til ophold for tredjelandsborgeren under henvisning til princippet om arbejdskraftens frie bevægelighed. Opholdsdirektivet regulerer således udtrykkeligt retten til ophold for familiemedlemmerne til en vandrende arbejdstager i opholdsstaten eller i visse situationer den vandrende arbejdstagers (unionsborgerens) oprindelsesmedlemsstat. Det har således formodningen imod sig, at et familiemedlem til en vandrende arbejdstager, der ikke kan støtte ret på opholdsdirektivet, skulle kunne støtte ret på andre EU-retlige principper eller regler.

29. Regeringen gør derfor principalt gældende, at en vurdering under TEF art. 39 ikke er relevant, hvis Domstolen når frem til, at medlemsstaterne kan opretholde et krav om et forudgående fast, lovligt ophold, idet EU-lovgiver udtømmende har gjort op med opholdsretstilfældene for en tredjelandsstatsborger gift med en vandrende arbejdstager i opholdsdirektivet.

30. Såfremt Domstolen mod forventning skulle nå frem til, at en vurdering efter TEF art. 39 er påkrævet, såfremt betingelsen om et forudgående fast, lovligt ophold kan opretholdes, gør regeringen subsidiært gældende, at det bærende element for vurderingen også i denne sammenhæng må være kriteriet om en faktisk eller hypotetisk afskrækkende/demotiverende virkning i forhold til arbejdskraftens frie bevægelighed.

31. Unionsborgerne og de vandrende arbejdstagere i nærværende sag har som nærmere redegjort ovenfor ikke forud for deres beslutning om at udøve deres ret til fri bevægelighed fra deres egen medlemsstat til Irland haft nogen berettiget forventning om

i Irland at kunne indlede og opretholde på ubestemt tid et familieliv med asylansøgere fra et tredjeland i Irland. Nægtelse af opholdstilladelse til ansøgerne i den aktuelle situation kan således hverken faktisk eller hypotetisk have haft, fået eller få nogen demotiverende/afskrækkende virkning på unionsborgernes udnyttelse af deres rettigheder som unionsborgere og vandrende arbejdstagere.

5. Konklusion

32. På ovenstående baggrund foreslår regeringen, at Domstolen besvarer de omhandlede spørgsmål således:

> *"1. Efter opholdsdirektivet kan en medlemsstat stille som betingelse for, at en tredjelandsstatsborger, der er familiemedlem til en vandrende arbejdstager, kan påberåbe sig direktivets bestemmelser, at tredjelandsstatsborgeren opholder sig lovligt i en anden medlemsstat på det tidspunkt, hvor ansøgningen om opholdsret efter EU-retten indgives.*

> *"2 og 3. Omstændigheder som opregnet i spørgsmål 2: tidspunktet og stedet for ægteskabets indgåelse samt tidspunktet for og omstændighederne ved tredjelandsstatsborgerens indrejse i værtsmedlemsstaten kan inddrages i forbindelse med anvendelsen af artikel 3, stk. 1, og artikel 7, stk. 2, i opholdsdirektivet. Hvis en medlemsstat efter national ret har givet en tredjelandsstatsborger adgang til medlemsstaten f.eks. i form af opholdstilladelse som au-pair, og tredjelandsstatsborgeren herefter indgår ægteskab med en EU-borger, der opholder sig i medlemsstaten i medfør af den frie bevægelighed, er der ikke efter EU-retten noget til hinder for, at medlemsstaten giver tilladelse til familiesammenføring. Dette ændrer imidlertid ikke på det faktum, at betingelsen om et forudgående fast, lovligt ophold i en anden medlemsstat er i overensstemmelse med EU-retten.*

København, den 14. maj 2008.

Jonas Bering Liisberg

Den danske regerings befuldmægtigede*

Kontorchef

Bolette Weis Fogh

Den danske regerings befuldmægtigede*

Vicekontorchef

* Der henvises til generalfuldmagt af 2. februar 2007.

* Der henvises til fuldmagt sendt til Domstolen d. 13. maj 2008.