Free Movement, Immigration Control and Constitutional Conflict

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European Court of Justice decision of 25 July 2008, Case C-127/08, *Metock* et al. v. *Minister for Justice, Equality and Law Reform* – EU citizens and their third-country family members – ECJ largely reverses *Akrich* case-law – Dividing line between national and Community competences on immigration – 'Reverse discrimination' not a matter of concern for Community law – Analysis of repercussions of decision on EU and national legal orders

Introduction

The control of immigration is generally seen as one of the central prerogatives of national sovereignty. EC law obligations regarding the free movement of EU citizens have already diminished national sovereignty over this issue significantly, but member states and the Community share power as regards the immigration of third-country nationals, with member states retaining the power to act as long as the EC has not legislated. But there is an obvious overlap where third-country nationals are family members of EU citizens. In that case, where is the dividing line between national and Community competence? After much confusion on this issue resulting from prior case-law, the groundbreaking judgment of the Court of Justice in *Metock* has ruled definitively that the Community free movement rules apply, with national immigration law playing no role.[1] The Court has therefore answered a 'question of the utmost constitutional importance'[2] decisively in favour of the Community.

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[1] Case C-127/08, judgment of 25 July 2008, not yet reported.

[2] *See* B. Olivier and J.-H. Reestman, case note on *Jia*, 3 *EUConst* (2007) p. 463.

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Background

*The pre-*Akrich *case-law on free movement and family reunion*

The rules concerning the entry and residence of third-country national family members of EU citizens (the 'EC free movement family reunion rules') are largely set out in Directive 2004/38, which member states were obliged to apply from 30 April 2006.[3] Previously the rules were set out in a number of different Community measures.[4] The Court of Justice had delivered a number of judgments on these provisions. In particular, it had ruled that the EC free movement family reunion rules only applied to EU citizens who had moved their residence to another member state.[5] The consequence was that the entry and stay of third-country national family members of a national of the host member state (e.g., an American spouse joining a Dutch citizen residing in the Netherlands) is in principle purely a matter for *national* law, since this is a 'purely internal' situation. Although the EC subsequently gained the competence to harmonise immigration law more generally, this power has only been used as regards family reunion with sponsors who are third-country nationals,[6] not sponsors who are nationals of the home member state.

However, the Court had recognised an important exception to this rule: the EC free movement family reunion rules also applied to persons who moved to another member state and then sought to return to their home member state with their family members ('returnees'). The Court's reasoning was that an EU citizen might be deterred from leaving his or her country of origin in order to exercise free movement rights in another member state if, upon his or her subsequent *return* to that country of origin, the rules governing his or her entry or residence in that home State were not equivalent to the EC free movement family reunion rules, in particular as regards the right of the migrant's spouse and child to enter and stay in the host State in accordance with the EC rules.[7] The precise parameters of this principle were not entirely clear, in particular as regards: how long an EU citizen would have to stay in another member state in order to benefit from the application of the EC free movement family reunion rules; whether the *Singh*

[3] *OJ* 2004 L 229/35.

[4] *See* the measures repealed by Art. 38 of Directive 2004/38 (ibid.).

[5] See, for instance, Joined Cases 36 and 36/82 *Morson and Jhanjan* [1982] *ECR* 3723.

[6] Directive 2003/86 (*OJ* 2003 L 251/12), adopted pursuant to Art. 63(3)(a) TEC. It should be noted that the Commission's original proposal for this Directive would have extended the EC free movement family reunion rules to the admission of family members of home State national sponsors (*see* COM (1999) 638, 1 Dec. 1999, Art. 4), but the Council deleted this provision from the Directive.

[7] Case C-370/90 *Surinder Singh* [1992] *ECR* I-4265, paras. 19-21.

rule also applied if the family was created in the *second* member state;[8] whether the *Singh* rule would apply if the EU citizen who had moved to another member state had not done so for the purpose of taking up work or self-employment in another member state, but rather was only providing or receiving services, or was not exercising *economic* activities in another member state;[9] and to what extent a member state could refuse application of the *Singh* rule on the grounds that the marriage was a 'sham' or was an abuse of EC free movement law.[10] The importance of the *Singh* rule was that EU citizens who faced a national law regarding family reunion with third-country nationals which was more restrictive than the EC free movement family reunion rules could consider avoiding the application of the national law concerned by moving to another member state for a period, and then enjoying the benefits of the EC rules as regards family reunion on their return to their home State.[11]

The Court of Justice also limited the application of the 'purely internal' rule by ruling in the *Carpenter* case that EU citizens who resided in their *own* member state but who provided services in another member state could assert a right to family reunion based on the Treaty, on the grounds that 'the separation of [the spouses] would be detrimental to their family life and, therefore, to the conditions under which [the EU citizen] exercises a fundamental freedom; the EU citizen could be deterred from exercising that freedom by obstacles raised in his country of origin to the entry and residence of his spouse' (referring to *Singh*).[12] The Court has also made clear that free movement rights are being exercised even if an EU citizen has never in fact moved between member states, as long as the EU citizen has the

[8] On the facts of *Singh*, the family had been created in the UK by means of marriage, presumably in accordance with UK immigration law, before the departure to another member state (*see* para. 3 of the judgment).

[9] The point arises because the Court's judgment only referred to Arts. 48 and 52 EEC (now Arts. 39 and 43 TEC) and the relevant secondary legislation, although it should be noted that this legislation also applied to persons providing or receiving services in another member state. The *Singh* judgment also pre-dated the formal creation of EU citizenship and the deadline to apply EC legislation conferring free movement rights for non-economic purposes.

[10] In para. 24 of the judgment, the ECJ ruled that member states could take steps to prevent abuse of EC law, but did not seem to think that this was relevant in the circumstances. The concept of an 'abuse' of EC law still remains unclear some years later: *see* K.E. Sorensen, 'Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?', 43 *CMLRev.* (2006) p. 423. In para. 12 of the judgment, the Court noted that the *Singh* marriage had not been alleged to be a 'sham', implying *a contrario* that a 'sham' marriage would not benefit from EC free movement law, but there was no further explanation of this point.

[11] The Court expressly stated in *Singh* (para. 23) that national law could be *more generous* as regards the entry and stay of foreign spouses of a member state's own citizens, but it is not entirely clear from the judgment whether the Court was only referring here to purely internal situations, to *Singh* returnees, or to both.

[12] Case C-60/00 *Carpenter* [2002] *ECR* I-6279, para. 39.

nationality of another member state – even if that EU citizen also holds the *dual* nationality of the *home* member state.[13]

It had always been generally assumed that the EC free movement family reunion rules applied regardless of the point when the family joined the EU citizen concerned, i.e., whether the family relationship predated or postdated the citizen's move to another member state.[14] But what if the family member had breached the host member state's immigration law? The Court of Justice had long ruled that the right to residence for *EU citizens* was conferred directly by Treaty Articles and EC legislation, rather than national law, with the consequence that EU citizens who met the Community criteria for entry and residence could assert free movement rights, regardless of whether they had fully complied with national immigration law rules such as reporting requirements or obtaining a residence permit. In such a case, member states could penalise the EU citizen for breaching its law but these sanctions had to be proportionate and could not amount to expulsion of the person concerned.[15] In *MRAX*,[16] the Court of Justice confirmed that these principles applied equally to third-country national family members of EU citizens, who could not be expelled merely because their entry and residence was irregular for various reasons.[17] Similarly, in the *Carpenter* case, the irregular migration status of the third-country national family member concerned, who

[13] *See* Case C-148/02 *Avello* [2003] *ECR* I-11613 and C-200/02 *Chen and Zhu* [2004] *ECR* I-9925. It is clear from the latter case that this rule also confers rights on at least some family members of the EU citizen concerned.

[14] As noted above, the Court did not make any express reference to this point in *Singh*. In *Gul* (Case 131/85 [1986] *ECR* 1573), the Court again made no reference to this issue; it is clear that the third-country national family member in that case was originally admitted pursuant to national immigration law, and this probably predated the family relationship with an EU citizen (paras. 3 and 4 of the judgment). The position in the *Diatta* case (Case 267/83 [1985] *ECR* 567) is not clear, but the Court made no reference to this issue. In the *Baumbast* case, it is perfectly clear that the marriage between the EU citizen and the third-country national took place within the host state (para. 16 of the judgment), but the Court had no doubt that the free movement rules applied (Case C-413/99 [2002] *ECR* I-7091). However, in the connected *R* case the marriage had taken place in the member state of origin of the EU citizen (para. 23 of the judgment). In *Carpenter*, the family was also formed within the host member state (para. 13 of the judgment, n. 12 *supra*). The *MRAX* judgment clearly applied, at least in part, to the legal position following marriages between EU citizens and third-country nationals within the *host State* (Case C-459/99 [2002] *ECR* I-6591, paras. 33, 63 and 73). The *Kaba* case concerned a third-country national who married an EU citizen inside the *host state* (*see* Case C-356/98 *Kaba I* [2000] *ECR* I-2623, para. 13), but this was not material to the judgment.

[15] *See* for instance, Case C-363/89 *Roux* [1991] *ECR* I-273, and the case-law cited in para. 28 of that judgment. *see* now Arts. 5(5), 8(2), 9(3), 25 and 26 of Directive 2004/38.

[16] *See supra* n. 14. *See* earlier Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] *ECR* 723, para. 25.

[17] However, *see* the contrary interpretation of *MRAX* by C. Schlitz, '*Akrich*: A Clear Delimitation without Limits', 12 *MJ* 3 (2005) p. 241 at p. 246.

had married the host State national who was providing services in other member states after overstaying her visa in the United Kingdom, was only one factor taken into account by the Court when ruling that it would be a breach of the human rights of the family concerned to expel her.[18]

However, only a year after the *MRAX* and *Carpenter* judgments, the Court appeared to take the opposite position, in the case of *Akrich*.

The Akrich *case*

Akrich concerned a Moroccan man who had repeatedly breached national (UK) immigration law before marrying a UK citizen in the United Kingdom. His wife then exercised her EC free movement rights by moving to Ireland with her third-country national husband and working there.[19] The family then sought to return to the United Kingdom, relying on the *Singh* judgment, but the UK government refused to admit the husband on the grounds that the couple's move to Ireland was 'no more than a temporary absence deliberately designed to manufacture a right of residence for Mr Akrich on his return to the United Kingdom and thereby to evade the provisions of the United Kingdom's national legislation, and that Mrs Akrich had not been genuinely exercising rights under the EC Treaty as a worker in another member state.'[20]

The issue was referred to the Court of Justice, which started out by reiterating the *Singh* judgment. But the Court then stated that the EC legislation:

> … 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*.[21]

> So, '[i]n order to benefit in a situation *such as that at issue in the main proceedings* from' EC free movement legislation, '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'.[22]

The Court then ruled that this interpretation was 'consistent with the structure' of EC free movement rules because the EC legislation aimed to protect the continued right to live together (following the exercise of free movement rights) with

[18] *See supra* n. 12, para. 44.
[19] Case C-109/01 [2003] *ECR* I-9607.
[20] *See* para. 37 of the judgment.
[21] Para. 49 of the judgment (emphasis added).
[22] Para. 50 of the judgment (emphasis added).

those family members who already have a 'right to remain' in a member state, whereas conversely 'the absence of … a right' for an EU citizen to be joined in another member state by a family member who did not have the right to remain with that EU citizen in the first place 'is not such as to deter' the EU citizen from exercising free movement rights.[23] These principles apply *mutatis mutandis* to returnees.[24]

Furthermore, the Court clarified the concept of 'abuse' of EC law in these circumstances, ruling that the motive of the couple for moving to Ireland or seeking to move back to the United Kingdom was irrelevant as regards establishing an 'abuse'.[25] However, there would be an 'abuse' if the EC free movement family reunion rules 'were invoked in the context of marriages of convenience entered into in order to circumvent the provisions relating to entry and residence of nationals of non-member states'. This concept of 'marriages of convenience' was not further clarified.[26] Finally, the Court stated that in such a situation, the member state concerned was still obliged to have regard to Article 8 of the ECHR, and the relevant jurisprudence of the European Court of Human Rights on the right to family life as regards family reunion.[27]

With the greatest respect, the *Akrich* judgment probably qualifies as the worst judgment in the long history of the Court of Justice. It is profoundly flawed on procedural grounds; it apparently overturned prior case-law without adequate explanation or clarification; its scope is fundamentally unclear; the key aspects of the legal analysis are inconsistent with prior case-law, and highly unconvincing; and the reference to human rights is unclear and unprincipled.

Taking these points in turn (except the procedural points),[28] first of all, the *Akrich* judgment appeared to suggest a radical (or rather, reactionary) re-interpretation of the scope of EC free movement family reunion rules. On the face of it, the Court implicitly overturned prior case-law holding that the irregular immigration status was irrelevant (*MRAX*) or marginal (*Carpenter*) to the exercise of free movement family reunion rights, making it instead essential to the (non-)existence of those rights.[29] For example, comparing *Akrich* and *Carpenter*, it seems that the

[23] Paras. 52-53 of the judgment.

[24] Para. 54 of the judgment.

[25] Paras. 55-56 of the judgment.

[26] Para. 57 of the judgment.

[27] Paras. 58-60 of the judgment.

[28] For detailed criticism on this point, *see* S. Peers, 'Family Reunion and Community Law', in N. Walker (ed.), *Towards an Area of Freedom, Security and Justice* (OUP, 2004), p. 143 at p. 152-153.

[29] It might be presumed, on the other hand, that *Akrich* and *Singh* could implicitly be distinguished on the ground that in the latter case, the family member had already been lawfully resident in the UK before the move to another member state and subsequent return to the UK. For more on the contradictions between the cases, *see* Schlitz (n. 17 *supra*) p. 247-249; E. Spaventa, case note on *Akrich*, 42 *CMLRev.* (2005) p. 225 at p. 231-237 and N. N. Shuibhne, 'Derogating from the Free Movement of Persons: When can EU Citizens be Deported?', 8 *CYELS* (2005-06) p. 187 at p. 204.

Akrich family would have been better off if they had *never left* the United Kingdom, as long as Mrs. Akrich *provided services* to Ireland (and/or other member states) rather than moving there and taking up work. Or alternatively, the Carpenter family would have been *worse* off if they had *moved* to Ireland – since Mrs. Carpenter could not then have returned to the United Kingdom, even if she had been permitted to reside in Ireland at all. True, Mr. Akrich had a more turbulent immigration history than Mrs. Carpenter, including a criminal record, but the Court appeared to rule in *Akrich* that persons without prior lawful residence in a member state fall outside the scope of the free movement rules *per se*. Mr. Akrich's criminal record was clearly not serious enough to justify a refusal of entry to the United Kingdom on public policy grounds.

More broadly, the apparent requirement of prior lawful residence in another member state implicitly overturned judgments in which it had clearly been assumed that EC free movement family reunion rules applied regardless of whether the family relationship was established in the host member state (*Baumbast*, *Kaba*) or in another member state. This interpretation would also remove from the scope of the rules cases where the family relationship was created outside the EU – i.e., cases where a French national married an American citizen in the United States of America, and then sought to exercise free movement rights in the United Kingdom.[30] However, any conclusions about the relationship between *Akrich* and the previous case-law could only be tentative, since the Court made no attempt to explain the relationship between the new judgment and that prior jurisprudence.[31]

Furthermore, the scope of the *Akrich* judgment was fundamentally unclear. The judgment could either be broadly interpreted as excluding all family members *without prior lawful residence* in a member state from the scope of the EC free movement family reunion rules, or be narrowly interpreted as excluding only those who had previously been *unlawfully resident* in a member state from the scope of those rules.[32] As a variation on the second option, the judgment could be interpreted as only applying to cases in which an unlawful resident sought to use EC free movement law to move to another member state, then move back later on to 'cure' the illegality of the residence status – i.e., as a stratagem to avoid, and ultimately circumvent, the applicable national law.

[30] Such cases clearly fall within the scope of EC free movement law at least as far as the EU citizen is concerned, even if the citizen was resident immediately previously in a non-member state: *see* Case C-138/02 *Collins* [2004] *ECR* I-2703. *See also* the comments of A.P. van der Mei, case note on *Akrich*, 6 *EJML* (2004) p. 277 at p. 279, and D. Martin, case note on *Jia*, 9 *EJML* (2007) p. 457 at p. 460, who also points to the wording of Art. 1 of Reg. 1612/68.

[31] Nor did the Opinion of the Advocate-General. His later opinion in *Jia* noted the contradictions in the case-law but did not expressly suggest a solution, although the opinion would have implicitly entailed overturning the more liberal judgments.

[32] *See* further Spaventa (n. 29 *supra*).

In any event, whatever the scope of the judgment, what did a requirement of a prior lawful (or unlawful) residence mean? This crucial point was not explained further. So, for example: it might even be open for the Irish government to claim that Mr. Akrich was not legally on the territory; it is not clear what would happen if the Akrich family wished to move to a third member state; and it is questionable whether the UK government could still refuse the entry of Mr. Akrich after many years of residence with his wife in Ireland.[33]

It is also unclear as to whether or not the *Akrich* judgment turns on a distinction between national and Community competence, with member states retaining competence to control the initial admission of a third-country national to their territory, and Community law applying thereafter. This was the thrust of the analysis by the Advocate-General,[34] but the Court did not expressly explain its reasoning by reference to the division of competence, but rather by the 'silence' of the EC legislation and the deterrence issue.[35] However, since the Court *did not rule out* an analysis based on a division of competence, it remained open for member states to argue that such a national competence existed. If it did, then the question arose whether the EC was competent (and if so, on what legal basis) to address the issue if it wished to.[36] This issue was obviously salient because Directive 2004/38, which contains different wording in relation to family members, was adopted shortly after the judgment.[37] If the judgment did intend to raise the competence issue, it is problematic on the grounds that a) the EC is surely competent to address this issue, moreover on the basis of its free movement competence, given the inextricable link between the free movement of EU citizens and the movement of their family members; and b) moreover, the EC *has already exercised* this competence, as demonstrated by a literal interpretation of the relevant EC legislation, as discussed next.

This brings us to the substance of the Court's analysis. Here, the *Akrich* judgment is also out of synch with the usual approach of the Court to interpreting the rules on the free movement of EU citizens, in which the Court rules out the existence of any *implied* limitations on free movement rights besides those ex-

[33] *See* R. White, 'Conflicting Competences: Free Movement Rules and Immigration Laws', 29 *ELRev.* (2004) p. 385 at p. 391-393, and Shuibhne (n. 29 *supra*) at p. 204-205.

[34] *See also* the analysis of the judgment by R. White, ibid.

[35] Paras. 51-54 of the judgment.

[36] The question would arise whether the correct 'legal base' was the free movement provisions or the immigration provisions of the EC Treaty, with important consequences for decision-making rules, the Court of Justice's jurisdiction, and the facility of some member states to opt out of the legislation.

[37] Art. 3(1) of the Directive refers to family members who 'accompany or join' the EU citizen, whereas Art. 10(1) of Reg. 1612/68 referred to family members who 'install' themselves with the worker.

pressly permitted by the Treaty or the secondary legislation.[38] In *Akrich*, the Court ruled that Article 10 of Regulation 1612/68 concerned only free movement within the EC, and was 'silent' on the question of the initial entry of a third-country national family member into the EC. But in fact Article 10 of the Regulation refers simply to the admission of a family member to join a worker who is employed in another member state – which was precisely the position of Mr. Akrich in Ireland, and (following *Singh*) upon *return* to the United Kingdom, by analogy. While the Regulation set out a condition relating to accommodation of family members, it made no reference to any condition relating to their prior residence in another member state. So why make one up? The question of the *initial* admission of Mr. Akrich to (stay to) join a UK citizen in the United Kingdom was outside the scope of Article 10 of the Regulation more fundamentally because the position of Mrs. Akrich was then outside the scope of *EC free movement law* entirely, but the subsequent movement of the Akrich family is obviously not. The 'deterrence' argument which the Court goes on to make therefore misses the point, since a literal interpretation of the Regulation settles the issue without needing to rely on such an interpretation.[39]

In any event, the Court's deterrence argument is profoundly unconvincing, with great respect. The Court's statement that the absence of a right to bring a family member to another member state (and subsequently return with that family member), in a case where the family member is denied the right to stay in the first member state, is not a deterrent to free movement, is utterly absurd. The *whole point* of moving to Ireland in this case was to avoid the more restrictive national law on family reunion; it is unlikely that the Akrich family would have moved there otherwise. Indeed, the more restrictive the national family reunion law as compared to the free movement family reunion rules, the greater the incentive to move to another member state, and so the greater the deterrent to moving if that advantage is withdrawn.

As for the reference to human rights in the judgment,[40] this was both unclear and unprincipled. Since the Court has consistently ruled that human rights are only applicable within the scope of EC law, why were they mentioned in a judgment which apparently concludes that the position of Mr. Akrich is *outside* the

[38] For instance, *see Gul*, para. 14; *Diatta*, paras. 16 and 17; and *Baumbast*, para. 74.

[39] *See* further Martin (n. 31 *supra*), at p. 460. The same points can be made in response to the criticism of the *Jia* judgment by A. Tryfonidou, 'Jia or "Carpenter II": the edge of reason', 32 *ELRev.* (2007) p. 908. The position in *Akrich* (as regards the interpretation of Reg. 1612/68) and *Jia* can be distinguished from *Singh*, *Carpenter* and *Eind* because in the latter cases, the literal wording of the EC legislation does not cover the cases in question, so a reliance on the 'deterrent' argument instead of a literal interpretation is not problematic *per se*.

[40] *See* the comments on this issue in Schlitz (n. 17 *supra*) p. 249-251; Spaventa (n. 29 *supra*) p. 236-237; and Shuibhne (n. 29 *supra*) p. 205-206.

scope of EC law? Is the Court suggesting that in some way, despite its ruling on the immigration law aspects, the position of Mr. Akrich is nevertheless within the scope of EC law general principles, and if so, to what extent? It was even suggested that this part of the judgment 'took away' the leeway which had been 'given' to the member states as regards the application of a 'prior lawful residence' test,[41] although it seems that in practice a number of member states introduced more restrictive national laws in light of the *Akrich* judgment without any consideration of this aspect of the judgment.[42] In any event, it must be admitted that Article 8 ECHR provides little protection as regards the *initial admission* of family members (as distinct from their subsequent expulsion), because the jurisprudence of the European Court of Human Rights generally concludes that Article 8 is not engaged as long as the family members could enjoy a family life 'elsewhere', i.e., in the state of origin of the family member.[43]

*The post-*Akrich *case-law*

Inevitably, the questions raised by *Akrich* were referred again to the Court of Justice. First of all, in 2005 the Court ruled in the *Commission* v. *Spain* case that member states could not require a prior issue of a residence visa before admitting an EU citizen's third-country national family member, on the grounds that the EC legislation laid down exhaustive rules concerning the procedure for admission of family members, and that the right of entry of family members derived from the family relationship alone.[44] So the Court had returned to the traditional rule that any conditions placed upon the exercise of free movement family reunion rights had to be expressly provided for in EC legislation. Moreover, the judgment referred to *MRAX* and *Carpenter*, but not *Akrich*.

Next, in 2007, the *Jia* judgment concerned the Chinese parents of the Chinese wife of a German citizen who had already moved to Sweden.[45] Was there a requirement of prior lawful residence before the admission of the in-laws could be authorised?[46] The Court of Justice referred to the factual circumstances of *Akrich* (prior lack of lawful residence in the United Kingdom, and subsequent attempted

[41] *See* Spaventa, ibid., p. 238-239, and Shuibhne, ibid.

[42] *See infra* section 'Analysis'

[43] *See* van der Mei (n. 31 *supra*) p. 480. For a summary of the relevant case-law, *see* Peers (n. 28 *supra*), p. 145-149, and for criticism, *see idem*, p. 190-197. There is nothing in the *Akrich* judgment to suggest that the Court of Justice was demanding that a higher standard than the Strasbourg jurisprudence should apply.

[44] Case C-157/03 [2005] *ECR* I-2911.

[45] Case C-1/05 [2007] *ECR* I-1.

[46] The *Jia* case also concerned the definition of 'dependence' as regards such family members, but this issue is outside the scope of this paper.

return to the United Kingdom), and then replied that 'it is not alleged that the family member in question was residing unlawfully in a member state or that she was seeking to evade national immigration legislation illicitly. On the contrary, Ms Jia was lawfully in Sweden when she submitted her application [on the basis of a Schengen visa] and Swedish law itself does not preclude, in a situation such as that in the main proceedings, the grant of a long-term residence permit to the person concerned, provided that sufficient proof of financial dependence is adduced.' So '[i]t follows that the condition of previous lawful residence in another member state, as formulated in the judgment in *Akrich*, cannot be transposed to the present case and thus cannot apply to such a situation.'[47]

This judgment appeared *prima facie* to narrow the scope of the *Akrich* judgment to circumstances in which the third-country national concerned was *unlawfully* resident or seeking to evade national legislation, rather than simply *not lawfully* resident (see the discussion above). But on the other hand, the Court's reference to the family member's *lawful presence* in Sweden suggested that lawful presence was indeed an alternative condition, or perhaps even a cumulative condition (along with the lack of unlawful residence *et al.*), before the EC free movement family reunion rules applied.[48] Moreover, the judgment still left open the question of whether national law applied at the stage of initial entry for all family members, or whether EC free movement family reunion rules applied.[49] And since the Court seemed to suggest it was relevant that national law could have permitted the family member to obtain long-term residence status, it was even possible to interpret the judgment as meaning either that the family member concerned need not just be *lawfully present* to benefit from EC free movement family reunion rules, but also lawfully present *with a possibility of obtaining long-term residence status*.[50] Needless to say, the latter interpretation is vastly more restrictive than the former. And in any event, if national law applied to this issue in the first place, it could be amended in order to ensure that the relevant conditions could not easily be met. Also, the

[47] Paras. 31 and 32 of the judgment.

[48] On one interpretation, the Court required 'lawful residence': *see* Martin (n. 31 *supra*), p. 461.

[49] Compare with the opinion, which argued that national law applied, and moreover suggested a definition of 'lawful residence' of the family member by comparison with the definition of third-country national *sponsors* under the family reunion directive (n. 6 *supra*): holding a residence permit valid for at least a year, and having a reasonable prospect of obtaining long-term residence rights. On one interpretation, there are *three* possible interpretations of the judgment on this point: M. Elsmore and P. Starup, case note on *Jia*, 44 *CMLRev.* (2007) p. 787 at p. 793-798. Olivier and Reestman (n. 2 *supra* p. 470-472) argue that the Court necessarily accepted that EC law governed the initial entry of third-country nationals, but that national law could establish a lawful residence rule.

[50] Such a test would be very similar to the Advocate-General's opinion, although a condition of a *possibility* of obtaining long-term residence status is not quite as restrictive as his suggestion of a *reasonable prospect* of obtaining it.

question of whether the EC was competent to amend such national laws (and on which basis) was equally left open by the Court.[51]

Next, the Court of Justice decided *Eind*,[52] a case concerning a Dutch citizen who had moved to the United Kingdom, become reunited there with his third-country national daughter (entering directly from Surinam), and then returned to the Netherlands. Unlike in the *Surinder Singh* case, he did not take up employment in his home State but became reliant on benefits. The Court ruled that there was no requirement of the home member state to recognise a residence permit given to the daughter by another member state on the basis of EC free movement family reunion rules. Next, the Court addressed the twin questions of whether the family member had an EC free movement law right to reside in the host member state even though she lacked a right to reside in that member state under its national law, and whether it was relevant that her sponsor had not taken up employment in the host member state upon his return.[53]

First, the Court asserted that an EU citizen *could* be deterred from moving to another member state if he could not subsequently return to his home state with his family members, even if the family relationship was *created while in the host state*. This reasoning appears precisely to overturn the Court's analysis of a 'deterrent' effect in *Akrich*, and indeed to go further than *Singh*, which (on the facts of that case) only noted a deterrent effect where (implicitly) the family had already been established in the home member state before moving to another member state.[54] Moreover, since the EU citizen sponsor had the unconditional right to return to his home state, his lack of employment there was immaterial as regards his daughter's right to accompany him.[55] Furthermore, the Court took the view that the sponsor's right to return to his home state was actually *conferred by Community law*, not (only) national law.[56] The daughter's position was (as in the *Singh* case) governed by the EC free movement family reunion rules, 'by analogy',[57] even

[51] The opinion strongly implied that the EC was competent to address the issue, but on the basis of its *immigration* competence. *See also* the discussion by Olivier and Reestman (n. 2 *supra*) p. 472-474.

[52] Case C-291/05 [2007] *ECR* I-10719.

[53] As noted above, the question was left open in *Singh* as to whether the sponsor has to be exercising economic activities for the *Singh* rule to apply – although the facts of *Eind* only concern the (non-) exercise of economic activities in the *home* state, rather than in the host state. In the meantime the *Carpenter* judgment had implicitly answered the question (by analogy) of whether the *Singh* rule applies to service providers (if not necessarily service recipients).

[54] Paras. 33-37 of the judgment, particularly para. 37.

[55] Paras. 31 and 38 of the judgment.

[56] Para. 32 of the judgment; the Court also asserted that this interpretation was substantiated by the creation of the status of EU citizenship.

[57] Para. 39 of the judgment.

though her sponsor was *neither* on the territory of another member state *nor* a worker.

The daughter's lack of a national law right to reside in the Netherlands was also immaterial, since it was not laid down in EC legislation expressly or by implication, and the legislation could not be interpreted restrictively.[58] Again, this approach to interpreting that legislation was the exact opposite of the Court's approach in *Akrich*. Furthermore, the Court again argued that the EC legislature had linked family reunion for EU citizens with the elimination of obstacles to free movement (referring to *MRAX* and *Carpenter*).[59] Of course, interpreting the daughter's position in light of the EC free movement legislation might be questioned since she is not within the scope of the legislation (as distinct from the Treaty) in the first place.[60]

However, the judgment in *Eind* did not answer the key question of whether a prior lawful residence requirement is permitted as regards entry of third-country national family members of EU citizens – given that the daughter had been admitted to the United Kingdom on the basis of EC free movement law in the first place.[61]

The *Metock* judgment

The *Metock* case actually comprised four separate disputes concerning the immigration status of third-country national family members (spouses) of EU citizens in Ireland. In all four cases, an EU citizen resident in Ireland had married a third-country national who was *already* present before the marriage, and who had unsuccessfully applied for asylum there, although in some of these cases, the asylum decisions were still under appeal. The national court stated that none of the marriages was a 'marriage of convenience'.[62] Three of the EU citizens worked in Ireland, while the other was simply 'lawfully resident' (the Court does not explain on what basis). Each of the family members was either not lawfully resident in Ireland, or had not been previously lawfully resident in another member state. However, in the Court of Justice's judgment, nothing turned on these distinctions between the cases. The common issue linking all four cases was that the Irish government had refused a residence permit as the spouse of a Community na-

[58] Para. 43 of the judgment.

[59] Para. 44 of the judgment.

[60] The same point could be made of the parallel analysis in the *Carpenter* judgment, which the Court refers to here.

[61] The Court expressly stated that it was unnecessary to answer the relevant questions: para. 46 of the judgment.

[62] Para. 46 of the judgment.

tional to all four spouses, on the grounds that they did not meet a condition set out in the Irish rules transposing Directive 2004/38: prior lawful residence in another member state.[63]

Exceptionally, the Court decided to apply an accelerated procedure,[64] with the consequence that the *Metock* case 'leapfrogged' a very similar reference from an Austrian court, received by the Court of Justice in December 2007.[65]

The national court's first question was whether Directive 2004/38 precludes national legislation which requires a third-country national spouse of an EU citizen who has exercised free movement rights to have previously been lawfully resident in another member state, before benefiting from Directive 2004/38. The Court of Justice first examined the wording and purpose of the Directive. As for the literal wording, the Court first observed generally that 'no provision' of the Directive requires family members to have 'previously resided in a Member State',[66] and then went on to examine six different Articles of the Directive which make no reference to such a condition.[67] It follows that the Directive applies to all third-country national family members of EU citizens who have exercised free movement rights, conferring upon them 'rights of entry and residence', without any distinction based on prior lawful residence in another member state.[68]

Next, the Court argued that this interpretation is 'supported' by its own case-law on the previous legislation on the free movement of persons, which has been replaced by Directive 2004/38.[69] This line of analysis also examined the underlying *purpose* of the past and present legislation. The Court began by referring to a

[63] The relevant rule is set out in para. 16 of the judgment. For more on the national legal background, *see* E. Fahey, 'Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in Metock', 36 *LIEI* (2009) p. 83 at p. 86-87.

[64] For the reasons for this, *see* the order in the *Metock* case, dated 17 April 2008. For more on this issue, *see* S. Currie, 'Accelerated justice or a step too far? Residence rights of non-EU family members and the Court's ruling in *Metock v Minister for Justice, Equality and Law Reform'*, 34 *ELRev*. (2009) p. 310 at p. 315-319.

[65] Case C-551/07 *Sahin*. This case was subsequently decided by an order of the Court, essentially repeating the key elements of the *Metock* judgment (order of 19 Dec. 2008, not yet reported). A later case, referred in June 2008, which also raised similar questions to *Metock*, was withdrawn in light of the *Metock* judgment (*see* the order of 13 Oct. 2008 in Case C-276/08 *Rimoumi and Prick*, not yet reported).

[66] Para. 49 of the judgment.

[67] Paras. 50-54 of the judgment, referring to Arts. 2, 3, 5, 6, 7 and 10 of the Directive. In fact a number of other provisions of the Directive make no reference to any condition of prior lawful residence by family members: Arts. 1, 9, 11, 12, 13, 14, 17, 18 and 20. *See also* Art. 25 of the Directive. The reference to lawful residence as regards the acquisition of a permanent residence right (Art. 16(2)) could obviously be regarded as creating an *a contrario* effect. The absence of any reference to the lawfulness of residence in Art. 24 or Chapter VI of the Directive is also surely relevant.

[68] Para. 54 of the judgment.

[69] Para. 55 of the judgment.

half-dozen judgments on the prior legislation, including *Carpenter*, *MRAX* and *Eind*, in which it had argued that the EC legislature had linked 'the protection of the family life' to the elimination of obstacles to free movement rights.[70] While the Court then admitted that the *Akrich* judgment set out a requirement of prior lawful residence in a member state before a third-country national spouse of an EU citizen could move to another member state with that EU citizen, it then crucially ruled that: '[h]owever, *that conclusion must be reconsidered*. The benefit of such rights *cannot depend* on the prior lawful residence of such a spouse in another Member State.'[71]

The Court did not explain this conclusion further at this point, but concluded by asserting that this interpretation of the earlier legislation 'must be adopted *a fortiori* with respect to Directive 2004/38'. As the preamble to the Directive refers to the aim of 'strengthen[ing]' the right of free movement and residence of EU citizens, 'Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends and repeals'.[72]

Now, the Court moved on to its second point: the division of competences between member states and the Community.[73] Given that the Community has the competence to adopt measures ensuring free movement of EU citizens, and the link between free movement and family life,[74] it followed that within the scope of the *free movement* legal bases, the Community can regulate the 'conditions of entry and residence' of 'third-country national family members … where the fact that it is impossible for the Union citizen to be accompanied or joined by his family in the host Member State would be such as to *interfere* with his freedom of movement by *discouraging* him from exercising' free movement rights in that member state.[75] Free movement could be discouraged 'even if [an EU citizen's] family members are not already lawfully resident in the territory of another Member State.'[76] It follows that the EC was competent to regulate the entry of third-country national family members, even if they are not lawfully resident in the territory of another member state.[77]

Conversely, the Court then dismissed the argument of the Irish Minister of Justice and 'several' of the ten member states submitting observations that 'the

[70] Para. 56 of the judgment.

[71] Para. 58 of the judgment (emphasis added), referring to *MRAX* and *Commission* v. *Spain*.

[72] Para. 59 of the judgment. However, it has been rightly pointed out that the Court has later diverged from this position, in its judgment in Case C-158/07 *Forster* (judgment of 18 Nov. 2008, not yet reported): *see* Currie (n. 64 *supra*), p. 319-320, and C. Costello, '*Metock*: Free Movement and "Normal Family Life" in the Union', 46 *CMLRev.* (2009) p. 587 at p. 601-602.

[73] Para. 60 of the judgment.

[74] Paras. 61 and 62 of the judgment.

[75] Para. 63 of the judgment (emphasis added).

[76] Para. 64 of the judgment.

[77] Para. 65 of the judgment.

Member States retain exclusive competence, subject to Title IV of Part Three of the Treaty, to regulate the first access to Community territory of' third-country national family members.[78] If there were such exclusive competence, the free movement of EU citizens 'would vary from one Member State to another, according to the provisions of national law concerning immigration', with third-country national family members admitted in some member states and refused entry in others.[79] This would not be compatible with the objectives of the internal market as set out in Article 3(1)(c) TEC, characterised by the abolition of 'obstacles' to the free movement of persons, since an 'internal market' implies the same conditions as regards the entry and residence of EU citizens in all member states. Free movement therefore includes 'the right to leave any Member State, in particular the Member State whose nationality the citizen of the Union possesses, in order to become established under the same conditions' in any other member state.[80] Furthermore, this interpretation would result in the 'paradoxical' conclusion that third-country national *sponsors* of family members would be in a better position than EU citizen sponsors of third-country nationals, since a member state would have to admit spouses of the former group pursuant to the EC's family reunion directive even if they are not 'already lawfully resident in another Member State, but would be free to refuse the entry and residence of [an EU citizen's] spouse in the same circumstances.'[81]

The Court then addressed two final arguments concerning the national court's first question. It first addressed an argument concerning immigration control – which is of course the probable chief concern of those who were supporting a continuation of the *Akrich* principle. The Irish ministry and 'several' other governments referred to the 'strong pressure of migration', which necessitated the control of immigration at the 'external borders', presupposing an individual examination upon the first entry into Community territory.[82] In particular the Irish

[78] Para. 66 of the judgment.

[79] Para. 67 of the judgment. This statement, while fundamentally correct, is of course oversimplistic. There would not just be a distinction as regards whether family members were admitted or not, but also (even where the family members could in principle be admitted) a wide variation in the *conditions* (such as integration, resources and accommodation requirements) placed by member states upon admission, with the result that admission would be significantly *easier* in some member states than others. Also, the Court makes no mention of the question as to whether there would be a non-discrimination rule for EU citizens who have exercised free movement rights as compared to the family reunion rules applicable to a member state's own nationals. But even if this were the case, there would still be, as the Court says, a significant variation in the relevant rules.

[80] Para. 68 of the judgment.

[81] Para. 69 of the judgment.

[82] Para. 71 of the judgment. It is of course striking that the Irish ministry based an argument on the Community's external borders, given that it does not participate in the relevant rules. Moreover, given the degree of *communitarisation* of the external border rules, this line of argument undercuts the argument that *member states* retain competence over first entry of third-country nationals.

ministry argued that overturning *Akrich* would lead to a 'great increase' in the numbers able to obtain a residence right in the EC.[83]

In response to this, the Court replied first that not all third-country nationals would benefit from the application of Directive 2004/38, but only those who were family members of EU citizens who had exercised free movement rights.[84] Secondly, the Directive does not eliminate all control of third-country nationals, since there is a possibility to refuse entry and residence on grounds of public policy, public security and public health pursuant to the Directive, following an 'individual examination'.[85] Also, Article 35 of the Directive provides for member states to 'refuse, terminate or withdraw' rights in cases of 'abuse of rights or fraud, including marriages of convenience', subject to the principle of proportionality and procedural safeguards.[86]

The second final point was the argument by the Irish ministry and several other member states that the application of Directive 2004/38 to these cases would lead to 'unjustified reverse discrimination' against EU citizens who have not exercised free movement rights.[87] The Court simply reiterated its recent judgment reaffirming that EC free movement law only applies to cross-border situations,[88] with any resulting difference in treatment falling outside the scope of EC law.[89] In any case, the Court noted, all of the member states are subject to the provisions of Article 8 ECHR, regarding the right to family life.[90]

The second question of the national court concerned whether Directive 2004/38 is applicable to third-country national spouses, regardless of when and where the marriage to the EU citizen took place and the circumstances of that spouse's initial entry into the host member state. The Court began its response by referring to some general considerations in the preamble of the Directive, and re-iterating the *Eind* judgment to the effect that the Directive could not be interpreted restrictively and must not be deprived of its effectiveness.[91]

The Court then answered the national court's question by making three points. Firstly, on a literal interpretation, various provisions of Directive 2004/38 did not require that an EU citizen had already founded a family at the time of the move to the host member state.[92] The reference in the Directive to 'join[ing]' the EU citi-

[83] Para. 72 of the judgment.
[84] Para. 73 of the judgment.
[85] Para. 74 of the judgment.
[86] Para. 75 of the judgment.
[87] Para. 76 of the judgment.
[88] Para. 77 of the judgment, referring to Case C-212/06 *Government of the French Community and Walloon Government* [2008] *ECR* I-1683.
[89] Para. 78 of the judgment.
[90] Para. 79 of the judgment.
[91] Paras. 82-84 of the judgment.
[92] Para. 87 of the judgment.

zen implied that the family could be founded *after* the exercise of free movement rights.[93] This interpretation was consistent with the purpose of the Directive, which aimed to facilitate the 'fundamental right of residence' of EU citizens. Refusal to admit family members into the host member state after family formation would 'discourage' the EU citizen 'from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State *or in a non-member country*.'[94]

Secondly, the Court examined whether a third-country national who entered a member state *before* becoming a family member of an EU citizen could be regarded as 'accompany[ing]' or 'join[ing]' that EU citizen. The Court stated that '[i]t makes no difference' whether the third-country national had entered the host member state before or after becoming the family member of an EU citizen, since a refusal to permit the family member to stay 'is equally liable to discourage that Union citizen from *continuing to reside* in that Member State.'[95] So the family members must be considered as 'accompany[ing]' the EU citizen as long as they reside with the citizen, even if they entered before the EU citizen or before becoming the citizen's family members.[96]

The Court concluded its second point by confirming that once a third-country national becomes a family member of an EU citizen who has exercised free movement rights, the right of the person concerned can only be restricted in accordance with Articles 27 and 35 of the Directive.[97] By way of consolation, a member state can still impose some penalties upon a third-country national who breached national immigration law before becoming the family member of an EU citizen, but implicitly the expulsion of the person concerned is then ruled out unless the personal conduct of the person concerned has breached the high threshold for justifying a derogation from free movement rights on grounds of 'public policy' or 'public security'.[98] Finally, the Court made the brief third point that none of the provisions of Directive 2004/38 contain any requirements as to where the marriage took place.[99]

[93] Para. 88 of the judgment.
[94] Para. 91 of the judgment (emphasis added).
[95] Para. 92 of the judgment (emphasis added).
[96] Para. 93 of the judgment.
[97] Para. 95 of the judgment.
[98] Paras. 96 and 97 of the judgment, referring to *MRAX*. It must also follow that a person who has already been deported must be readmitted.
[99] Para. 98 of the judgment.

Analysis

The *Metock* judgment is very welcome, in light of the highly problematic judgment in *Akrich* and the confusing jurisprudence thereafter. First of all, the Court has restored legal clarity to the relevant issues, including the issue of competence. For the reasons set out above, the Court's analysis of the competence issues is entirely correct.[100] As for the focus on the literal interpretation of the Directive, in principle the Court is right to return to its traditional rejection of implied limitations upon free movement, in order to secure both the full exercise of free movement rights and the protection of family life. While the Court's interpretation of the word 'join' in *Metock* does stretch the literal meaning of the word, nevertheless this can be justified in the circumstances, since in the event of a narrower interpretation, the families concerned could simply then have brought themselves within the scope of the Directive anyway, by moving to another member state and then returning to Ireland.

The Court's re-invocation of the 'deterrence' argument echoes its analysis in *Eind* (discussed above). This analysis was not necessary, as the Court could have relied wholly on a literal interpretation of the legislation; but it is nonetheless a convincing analysis as compared to *Akrich*.[101] An important point here is that the Court refers also to the possibility that an EU citizen might not just be deterred from moving to another member state (a point which would be relevant *mutatis mutandis* to returnees), but might even decide to move to a *third country*. This analysis is obviously affected by the 'elsewhere' thesis developed in the Strasbourg family reunion case-law,[102] although the Court of Justice diplomatically refrains here from mentioning that jurisprudence explicitly – perhaps to avoid any perception that it is criticising the Strasbourg court. While there is again a fairly unclear reference to member states' general human rights obligations,[103] this does not seem to be directed at persons outside the scope of EC law, unlike in the *Akrich* judgment.

As to the question of reverse discrimination, the Court was right to remind member states that they cannot have their cake and eat it too – i.e., they cannot insist upon national competence and then complain about the results which they have themselves created by the exercise of that competence. This surely applies *a fortiori* when the member states could have avoided any reverse discrimination in this case by means of exercising a different EC competence, i.e., by adopting the relevant provision in the family reunion directive as proposed originally by the

[100] *See supra* section 'The *Akrich* case'.

[101] *See* ibid.

[102] On that case-law, *see* Peers (n. 28 *supra*). On this point in the judgment, *see* Costello (n. 72 *supra*), p. 603-604.

[103] Para. 79 of the judgment.

Commission.[104] In particular the member states' objections to reverse discrimination are problematic when they have used their national competence not to *raise* the protection for their own citizens in purely internal situations, but to *lower* it.[105] In fact, some member states probably used the leeway afforded by the *Akrich* judgment precisely in order to reduce the family reunion standards for their own citizens, in the absence of a risk that the stricter national rules could simply be circumvented by exercising free movement rights. The practical ability of member states to prevent such circumvention has now obviously been curtailed again by *Metock*.

More generally, while the *Metock* judgment undoubtedly (re)introduces more reverse discrimination in EC free movement law, concerns about this phenomenon should be dismissed for three reasons. First of all, reverse discrimination is inherent in a system of divided competence as applied to free movement rules. It could only disappear if the EC either exercised vastly more competence in the relevant area, or vastly less; in either case, the argument for such a substantial change should be made on its merits, not simply as a means to avoid reverse discrimination. Secondly, while the *Metock* case (re)creates a distinction between on the one hand, an elite of mobile EU citizens with enhanced family reunion rights and non-moving nationals subject (possibly) to lower family reunion standards on the other hand, *Akrich* also created a distinction – between EU citizens who could move easily because their family members were also EU citizens, on the one hand, and those EU citizens who often could not do so because their family members were third-country nationals, on the other.[106] So the *Metock* judgment does not simply (re)create a distinction between classes of EU citizens – it *chooses between* one such distinction and another. Given the primordial importance of free movement to the Community legal order, the Court made the right choice. The broader point is that a criticism of *Metock* on the simple grounds that it (re)creates two classes of EU citizens as regards family reunion is conceptually confused, because without the judgment, two (different) classes of EU citizens would *still* exist. Different classes will exist in some form, as long as the EU does not establish uniform rules for family reunion for *all* EU citizens.

Thirdly, criticism of *Metock* for 'creating' reverse discrimination begs a underlying normative question – *why* is reverse discrimination considered so objectionable? As noted above, 'solving' the reverse discrimination 'problem' would involve either much more or much less exercise of EU competence; surely the issue of competences is a far more important issue for EU law, in hierarchical terms, than

[104] *See supra* n. 6.
[105] *See* Costello (n. 72 *supra*), p. 617.
[106] Cf. if the *Jia* Opinion had been followed (n. 49 *supra*).

the question of reverse discrimination. Similarly, the Court of Justice has ruled that protection of fundamental rights is a hierarchically superior principle of primary EC law;[107] so it should follow that we should give that principle primacy over concerns about reverse discrimination.[108] Finally on this point, the concern about reverse *discrimination* is simply misplaced – given that restrictive immigration rules often have the purpose or effect of reducing the number of people from a minority racial or religious background who reside in the country. Why be so concerned about reverse discrimination, when the rules in question allegedly contribute to racial or religious discrimination?

Next, the Court's strong emphasis on citizenship of the EU should also be noted, in particular given that that *Metock* was in effect the Court's first judgment on Directive 2004/38 (widely known as the 'citizenship' Directive), with only one prior judgment issued two weeks beforehand.[109] Throughout the judgment, the Court refers entirely to the *Union citizenship* of the individual sponsors concerned, rather than their particular status (worker, service provider, etc.) under EC free movement law.[110]

What are the practical implications of the *Metock* judgment? Press reports in Ireland indicated that some 1,500 decisions would be reviewed following the judgment.[111] According to the Commission,[112] similar rules were introduced in three other member states,[113] and there was similar administrative practice in seven other member states.[114] These rules, and any similar rules in other member states, will

[107] Joined Cases C-402/05 P and C-415/05 P *Kadi* and *Al Barakaat*, judgment of 3 Sept. 2008, not yet reported.

[108] On this point, as noted above, the *Metock* judgment not only increases the standard of protection as regards the right to family life of EU citizens who move; in practice it could also reduce member states' enthusiasm for enacting stricter national rules for their citizens who do not move within the EC, because circumvention could now again reduce the effectiveness of those rules.

[109] Case C-33/07 *Jipa*, judgment of 10 July 2008, not yet reported.

[110] As J.B. Bierbach notes (case note on *Eind*, 4 *EuConst* (2008) p. 344-362), the same is true of *Eind*, but in that case the person concerned was a returnee to his own member state, rather than a person covered by an EC free movement category as such. Cf. the *Jipa* judgment (ibid.).

[111] 'Residency refusal to 1,500 non-EU spouses for review', in *Irish Times*, 26 July 2008 (last accessed 14 April 2009).

[112] Report on the implementation of Directive 2004/38, COM (2008) 840, 10 Dec. 2008.

[113] The UK, Finland and Denmark. For Denmark, *see* 'EU States attack EU's top court', online at euobserver.com, dated 25 Sept. 2008 (on file with the author). For the UK, *see* Reg. 12(1) of the Immigration (European Economic Area) Regulations, online at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/annexa.pdf?view=Binary> (last accessed on 14 April 2009).

[114] AT, CZ, DE, EL, CY, MT and NL. On the Dutch rules, *see* para. 5 of the *Eind* judgment, and further the case note on *Eind* by Bierbach (n. 110 *supra*). For Austria, *see* para. 14 of the *Sahin* order (n. 65 *supra*).

have to be amended.[115] Any member states which were contemplating introducing such rules, which were perhaps waiting for clarification of the issues from the Court of Justice, will now be unable to do so.

As to the scope of the judgment, although the facts only concerned persons who got married in the host member state, there is no reason to doubt whether the judgment applies to 'returnee' situations, given that the judgment expressly overturns *Akrich* (a returnee case) and that the Court had very recently (in *Eind*) reconfirmed and strengthened the rights of returnees pursuant to EC free movement law.[116] Equally there is no reason to doubt that an *Akrich* situation (still) cannot be considered an 'abuse' of free movement law, given that there is nothing in the judgment to suggest that the Court was reconsidering this aspect of the *Akrich* ruling.[117] One important question now re-opened by the *Metock* judgment is precisely *how much* EU citizens will have to exercise free movement rights in another member state before they can claim the status of returnees who enjoy free movement family reunion rights.

What options are left to member states to restrict the entry and residence of third-country national family member of EU citizens by other means, now that the 'prior lawful residence' rule has been overturned? First of all, member states might try to exercise greater control of the initial entry and residence of third-country nationals who have not yet become family members of EU citizens,[118] to the extent that Community immigration and asylum legislation in which they participate permits this.[119] Equally member states might take a harder line as regards the content or implementation of future EC immigration and asylum law, trying to reduce the possibility that asylum-seekers will come into contact with citizens of other EU member states.[120] If asylum-seekers are detained, for instance, they will hardly have much chance to develop a social life that might involve such contact – considering that their fellow detainees will be third-country nationals also, and the guards will likely have the nationality of the host member state. Member states might also try to place restrictions on the ability of third-country nationals

[115] The Irish rules were amended nearly immediately after the *Metock* judgment: *see* Statutory Instrument no. 310 of 2008, adopted on 31 July 2008, online at: <http://www.inis.gov.ie/en/INIS/SI%20310%20of%202008.pdf/Files/SI%20310%20of%202008.pdf> (last accessed 14 April 2009).

[116] *See also* Costello (n. 72 *supra*), p. 617-619.

[117] As Costello notes, the Court overturns only specific paragraphs of *Akrich* (ibid., p.599-600).

[118] Or similarly, member states will be less likely to *relax* controls than they would have been.

[119] It should be recalled that the UK and Ireland participate in most or all EC asylum law, but not in most or all legal migration measures. Denmark only participates *de jure* or *de facto* in Schengen-related measures.

[120] *See*, for instance, the proposed Directive on reception conditions for asylum-seekers and the proposed revision of the 'Dublin II' rules on allocation of asylum applications (COM (2008) 815 and 820, 3 Dec. 2008).

to marry EU citizens, but overly stringent restrictions will fall foul of the right to marry set out in Article 12 of the European Convention on Human Rights, possibly in conjunction with the ban on discrimination set out in Article 14 ECHR,[121] and/or the general principle of equality as set out in EC law.[122]

Would it be possible to reverse the *Metock* judgment by amending the citizenship directive? The judgment refers at several points to Treaty free movement rights, rather than the Directive,[123] suggesting that it might be necessary to amend the *Treaty* in order to overturn the judgment.[124] Even if it were possible to amend the Directive to overturn the judgment, there would need to be a proposal from the Commission, support from a qualified majority of member states, and the agreement of the European Parliament (EP).

As for the member states, the JHA Council has discussed the *Metock* judgment on several occasions. In September 2008, the Council welcomed an upcoming report on the citizenship Directive from the Commission, and noted that the Commission would then be prepared to 'present all appropriate guidelines or proposals which might prove necessary, *inter alia*, in order to combat any misuse, offences or abuse', and agreed to examine the issue immediately after the report. In November 2008, the JHA Council adopted conclusions on 'misuses and abuses' of free movement rights, stating that 'every effort must be made to prevent and combat any misuses and abuses', noting, *inter alia*, Article 35 of the citizenship Directive, requesting the Commission to present the planned guidelines and to 'consider all other appropriate and necessary proposals and measures' in order to prevent and combat abuse and misuse.

However, the Commission report on the national application of the Directive, when issued in December 2008, was strongly critical of member states, concluding in particular that the restrictions placed upon the entry and residence of third-country national family members, including the imposition of conditions not foreseen in the Directive (obviously including a 'prior lawful residence' requirement), were among the two most serious infringements of the Directive.[125] The

[121] *See*, for instance, *R (On The Application of Baiai and Others)* v. *Secretary of State For The Home Department* [2008] UKHL 2053.

[122] For example, more restrictive rules governing marriages with citizens of other member states, as compared to nationals of the member state in question, would arguably violate Art. 12 EC. Any other form of discrimination relating to marriage (on grounds of age, gender, religion, et al.) would also fall within the scope of the general principles to the extent that the relevant rules applied to EU citizens who have exercised free movement rights, and would arguably violate those general principles.

[123] *See* paras. 56 and 68 of the judgment. It should also be recalled that in *Carpenter*, *Singh* and *Eind*, the Court ruled that rights for family members could be derived directly from the Treaty, not merely from secondary legislation.

[124] *See* Costello (n. 72 *supra*) p. 605.

[125] COM (2008) 840, 10 Dec. 2008.

Commission promised to step up infringement proceedings against member states which breached the Directive, to work with groups of national experts to clarify the interpretation of the Directive, and to issue guidelines (as requested by the Council) on issues such as 'abuse'.[126] On the other hand, the Commission's report explicitly rejected the idea of amending the Directive in any respect.

The JHA Council then returned to the issue in February 2009, welcoming in particular the planned Commission guidelines, but not suggesting any further steps. It remains unclear whether there would be a qualified majority in the Council in favour of an amendment on this issue.

For its part, the European Parliament has backed the *Metock* judgment and called upon the Commission to enforce the judgment and member states to amend national laws where necessary.[127] Since the EP resolution was adopted by a large majority of MEPs,[128] it seems improbable to imagine that the EP would agree to amend the citizenship Directive to insert a requirement of prior lawful residence, even if the Commission proposed it.

In the absence of any amendment of the Directive, to what extent does Article 35 of the citizenship Directive allow member states to take action in relation to illegally resident third-country national family members? It seems clear from the judgment in *Metock*, coupled with the Court's analysis of the 'abuse' argument in *Akrich*, that Article 35 could only apply where an EU citizen is not in fact a citizen of a member state at all,[129] or where the family relationship between an EU citizen and a third-country national either does not in fact exist,[130] or (in the case of marriage) does not meet the essential criteria to be considered a genuine marriage. It will obviously be more difficult to prove the latter point, although the existence of a child or a pregnancy is surely conclusive proof that a marriage is in fact genuine. In any event as Baroness Hale eloquently explained in the *Baiai* judgment:[131]

> There are many perfectly genuine marriages which may bring some immigration advantage to one or both of the parties depending on where for the time being they wish to make their home. That does not make them 'sham' marriages.

[126] No such guidelines had been published by 1 April 2009.

[127] EP resolution on implementation of Directive 2004/38, adopted 2 April 2009, point 27.

[128] 500 in favour, 104 against and 55 abstentions.

[129] For instance, the Nov. 2008 JHA Council conclusions assume that Art. 35 would also apply to the presentation of false documents. This is correct, assuming that the person presenting a member state's passport as proof of citizenship is not in fact a citizen of any member state.

[130] *See* ibid., as regards the presentation of a false marriage certificate, if no marriage has in fact taken place, or a false birth certificate for a child, if no sufficient family relationship in fact exists with an EU citizen.

[131] Para. 35 of the speeches (n. 121 *supra*).