

## CASE C-127/08 *METOCK and Others*

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In an important new judgment on rights of free movement, the ECJ clarified the extent of Member States' competence to control the right of third country nationals to enter the Community for the first time.

In a preliminary ruling with wide ramifications, the Grand Chamber of the European Court of Justice ("the ECJ") in *Metock* has provided important clarification to its case law as to the circumstances in which a third country national (ie: from outside the Community) can claim a right to reside for the first time in the Community. In a series of cases before the ECJ, Member States have asserted that control of immigration into the Community remains a matter of Member State's competence. The Court's existing case-law was inconsistent in this regard. Ten Member States intervened in *Metock*. The ECJ has decisively clarified the position, and concluded that Community law can confer such a right on third country nationals in some circumstances. The case is accordingly a landmark in the case law on free movement of persons.

Mr. Metock, and three other third country nationals with whom his case had been joined, had arrived Ireland from outside the European Union and had claimed asylum. The asylum applications of all four were unsuccessful. After their arrival, the four had married Union citizens who were residing in Ireland. In all but one of the cases, the Union citizen spouses had travelled to Ireland in exercise of their free movement rights before having met their future third country national partner.

The four applicants applied for residence cards as the family members of the Union citizens, under Directive 2004/38/EC on the right of citizens of the Union and their families to move and reside freely within the territory of the Member States ("the Residence Directive"). The Irish legislation implementing the Residence Directive required a family member of a Union citizen to demonstrate that they had been lawfully resident in another Member State prior to their entry into Ireland, if they were to benefit from a Community right to reside. Thus, the Irish legislation required in substance that third country nationals should already be lawfully within the Community before they could enjoy any rights derived from the Community rules on free movement. The applications were rejected, on the basis that the

applicants had entered Ireland from third countries, and could not demonstrate prior lawful residence within the Union.

In a judicial review of those decisions the High Court of Ireland referred three questions to the ECJ as to the interpretation of the Residence Directive. In essence, it asked:

- (1) Whether the Residence Directive permits Member States to maintain a prior lawful residence requirement, such as that in the Irish legislation;
- (2) Whether the requirement in Article 3(1) of the Residence Directive, that the family member "accompany or join" the Union citizen, includes persons in a situation such as the applicants' irrespective of when and where the marriage took place, and irrespective of when or how the third country national entered the host Member State;
- (3) If the answer to (2) was negative, whether Article 3(1) includes third country nationals who entered the host Member State independently of their spouse and subsequently married them there.

Ten Member States intervened.

In view of the "exceptional urgency" of the proceedings, the ECJ agreed to acceleration under Article 23(a) Statute of the Court of Justice and Article 104(a) Rules of Procedure. The case was therefore determined after hearing the Advocate General, but without an Opinion being submitted. It was decided a matter of weeks after the Order for Reference was lodged at the ECJ.

### *The Prior Lawful Residence Requirement*

The ECJ held that the Residence Directive applies to *all* family members who accompany or join their Union citizen spouse, and as such does not permit Member States to maintain a requirement of prior lawful residence within the Community. The Court held that the Residence Directive does not itself require prior lawful residence, but rather grants rights of entry and residence without any reference to such a condition. In particular, Article 10(2) is an exhaustive list of the documents which Member States may require third country national family members of Union citizens to produce, and it does not include documents that demonstrate prior lawful residence.

Some reconciliation of the ECJ's previous case-law was required in order to reach this conclusion. It is well-established that safeguarding the family life of Union citizens is necessary to ensure that there are no obstacles to the exercise of their fundamental freedoms. To that end, Regulation No. 1612/68 expanded the law on entry and residence of third country national spouses of nationals of Member States. However, the Court had held in Case C-109/01 *Akrich* [2003] ECR I-9607 that a third country national must have been lawfully resident in a Member State when he moved with his Union citizen spouse, in order to benefit from Community law rights of residence in the destination Member State. The Irish Government had argued that *Akrich*, and Case C-1/05 *Jia* [2007] ECR I-1, were consistent with Member States retaining a discretion to impose a prior lawful residence requirement. The Court concluded, however, that *Akrich* should be reconsidered. It was held not to be consistent with its decisions in Cases C-459/99 *MRAX* [2002] ECR I-6591 and C-157/03 *Commission v Spain* [2005] ECR I-2911, and these were to be preferred.

Controversially, the ECJ's conclusion that its interpretation of the Residence Directive was consistent with the division of competence between the Community and Member States. A number of Member States had argued that Member States retained exclusive competence in this regard. The ECJ held that in view of the potentially serious obstacle to the Union citizen's exercise of fundamental rights that would be entailed by certain Member States imposing a prior lawful residence requirement, the Community is competent to regulate third country national entry and residence where those third country nationals are family members of Union citizens.

The Court rejected the Irish Government's argument that Member States retain the competence to regulate first entry into the Community. At the oral hearing the Irish representative emphasised,

in particular, that a Directive based on Title III EC competences cannot subvert the competences preserved to Member States under Title IV EC, and in particular by the opt-out of Title IV maintained by Ireland, the UK and Denmark (under Protocol Nos. 4 and 5, 1997). The ECJ concluded, however, that if Member States were to regulate first entry of third country national family members of Union citizens, the resulting variation in treatment across the Community would be incompatible with the abolition of obstacles to the free movement of persons under Article 3(1)(c) EC. It would also lead to different treatment of spouses under the Residence Directive on the one hand, and Directive 2003/86/EC on the right of family reunification on the other, the latter of which requires the grant of entry and residence to third country national spouses lawfully resident in the host Member State.

The ECJ also rejected a 'floodgates' argument based on the need to control immigration and to examine individually the circumstances of applicants was not accepted. The Court considered that the number of persons who would benefit from this Community right of residence was limited by its restriction to family members. Further, the Residence Directive preserves the ability of Member States to refuse entry and residence on grounds of public policy, public security and public health (Chapter VI) and to adopt measures for refusing, terminating or withdrawing the rights in order to prevent abuse or fraud (Article 35). In respect of a reverse discrimination argument, the ECJ held that a national of the host Member State who could not claim a Community law right of residence for their third country national spouse was not discriminated against, as compared with the Union citizen residing in the same host Member State with their spouse, since the national falls outside the scope of Community law unless and until they exercised their right of free movement. There is thus no discrimination under Community law.

#### *Accompany or join*

The Court held that "accompany or join" in Article 3(1) includes third country nationals who reside with their Union citizen spouses in the host Member State, irrespective of whether the marriage took place before or after the Union citizen exercised their free movement rights, irrespective of whether the third country national entered the host Member State before or after the marriage, and irrespective of where the marriage was solemnised. The arguments of the Member States that those terms were directed at family relationships existing at the time when the Union citizen exercises their right of free movement were rejected. The Court considered that the purpose of the Directive requires that when Union citizens establish a family *after* moving to another Member State they should be permitted to have their family join them in the host Member State. Otherwise they would be deterred from continuing to reside there. Article 3(1) must therefore be interpreted widely, so as not to render the rights provided for ineffective.

In view of its answer to the second question, the Court did not need to answer the third.

#### *Conclusions*

The applicants thus succeeded in this case, notwithstanding the opposition of a large number of intervening Member States, and the objections of principle that they raised. The judgment marks a significant change in the scope of the EU rules on free movement.

*Tim Ward acted for the UK Government.*

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