

VIEW OF ADVOCATE GENERAL

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of 11 June 2008¹

1. The present reference, which is being dealt with under the accelerated procedure provided for in Article 104a of the Court's Rules of Procedure, concerns the scope of the right of residence of nationals of non-member countries who are family members of a Union citizen. The issue is a sensitive one because it involves drawing a dividing line between what is covered by the provisions on Union citizens' freedom of movement and residence and what comes under immigration control, a matter over which the Member States retain competence in so far as and to the extent that the European Community has not brought about complete harmonisation. The constitutional significance of the subject explains the liveliness of the debate, with no less than 10 Member States intervening in support of the respondent in the main proceedings to challenge the interpretation put forward by the applicants in the main proceedings and the Commission of the European Communities. It is also true that the positions adopted previously by the Court have helped fuel the debate since there does not appear to be clear consistency in the line taken in case-law. The questions on the interpretation of Directive 2004/38/EC² which have been referred in the present

cases thus provide the Court with a good opportunity to clarify this matter.

I — The facts in the main proceedings and the questions referred

2. The present reference for a preliminary ruling was made by the High Court (Ireland) in the course of proceedings on four applications for judicial review of the refusal to grant a residence card to a national of a non-member country married to a Union citizen established in Ireland. In each of the four cases a national of a non-member country entered Ireland directly and made an application for asylum which was refused. Following his arrival in Ireland, the applicant married a national of another Member State who was established and working in Ireland. Following the marriage he applied for a residence card as the spouse of a national of a Member State lawfully resident in Ireland. The applicant was refused such a card by the Minister for Justice on the ground that he was unable to provide evidence that he had been lawfully resident in another Member State prior to arrival in Ireland, as required by the Irish regulations adopted to transpose

1 — Original language: French.

2 — 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. The applicants therefore challenged those ministerial decisions to refuse them residence cards, claiming that the condition of prior lawful residence in another Member State imposed by the Irish legislation, non-compliance with which was the reason for the contested refusals, is contrary to Directive 2004/38.

II — Assessment

A — Compatibility of the requirement of prior lawful residence in another Member State with Directive 2004/38

3. Therefore, in order to be able to examine the merits of the proceedings brought against the refusals to grant residence cards, the referring court considers that it is necessary essentially to ask the Court of Justice whether the benefit of the provisions of Directive 2004/38, or more specifically of the right of residence for the non-EU national spouse of a Union citizen, can be subject to the condition that he must have been lawfully resident in another Member State before coming to the host Member State. This forms the subject of the first question referred. Even if the answer were no, it would remain to be determined whether the nationals of non-member countries could, in the present case, nevertheless be refused the benefit of the provisions of Directive 2004/38, since Article 3(1) thereof reserves the right to rely on its provisions to family members who ‘accompany’ or ‘join’ a Union citizen, and the nationals in question did not marry until after they arrived in Ireland. Hence the second and third questions referred which essentially concern the effect of the date of the marriage on the applicability of Directive 2004/38. I will examine these two points in turn.

4. The question whether Directive 2004/38 permits the benefit of the right of residence which it grants to non-EU nationals who are the family members of a Union citizen to be subject in the host Member State to the condition that they must have previously been lawfully resident in another Member State requires consideration of the scope of application of that legislation: does it apply only to families which were established in a Member State before moving to the host Member State? In other words, does Directive 2004/38 guarantee for non-EU nationals who are family members of a Union citizen only freedom of movement within the territory of the Union or also, in certain cases, access for them to the territory of the Union?

5. Directive 2004/38 does not provide an explicit answer. It merely confers, in Articles 6, 7 and 16 thereof, a right of residence on a Union citizen’s family members who are not nationals of a Member State, ‘accompanying or joining the Union citizen’. Since an analysis of the text provides no assistance, it is necessary to refer to its objectives. Directive 2004/38 seeks to guarantee the ‘primary and individual right to move and reside freely

within the territory of the Member States' conferred on Union citizens directly by Article 18 EC.³ It is therefore in the light of the fundamental right of Union citizens to move and reside that the provisions of that directive must be interpreted. The rights that it provides for must be understood in functional terms in such a way that they are given the full scope necessary to ensure the effectiveness of Union citizens' right to move and reside, but no more. In other words, it is a question of determining whether full and complete enjoyment by a Union citizen of his right of residence means that the right of residence of non-EU national members of a Union citizen's family, which is a right consequential to and dependent on that of the Union citizen,⁴ includes a right to enter the territory of the Union.

6. The intervening Member States cannot validly invoke against this approach, and the response which may result from it, the vertical constitutional division of competences. Although it is true that in principle the Member States remain competent for immigration control, and thus the admission of nationals of non-member countries from outside the territory of the Community, it cannot consequently be deduced that Directive 2004/38 relates only to the movement between Member States of Union citizens and their family members and not to the access of those family members to the territory of the Union. It is established case-law that the Member States must exercise their national competences consistently

with Community law and, in particular, the fundamental freedoms of movement.⁵ It has thus been expressly ruled that requirements relating to compliance with Union citizens' right to freedom of movement and residence could constrain the Member States' exercise of their powers,⁶ in particular those which they have in relation to immigration control.⁷

7. In order to contest the applicability of Directive 2004/38 to the entry of non-EU national members of the family of a Union citizen into the territory of the Community, it is equally not possible to refer legitimately to the organisation of Community powers under the various legal bases provided for in the EC Treaty. Admittedly, only Title IV of the EC Treaty permits the adoption of Community legislation on immigration and external border controls,⁸ whilst Directive 2004/38 is based on Title III of the EC Treaty. However, the directive directly governs only the rights of Union citizens, and those of their family members are covered only in so far as they are accessories to the former rights. The fact that the directive may thereby have an effect on immigration

3 — See Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 84.

4 — See Case C-291/05 *Eind* [2007] ECR I-10719, paragraphs 23, 24 and 30.

5 — See Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29.

6 — See Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33; Case C-148/02 *Garcia Avello* [2003] ECR I-11613, paragraph 25; Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 22; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 33; Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 22; and Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 24.

7 — See Case C-459/99 *MIRAX* [2002] ECR I-6591. See also Case C-157/03 *Commission v Spain* [2005] ECR I-2911.

8 — For an example, see Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), which confers a right to family reunification on nationals of non-member countries.

control does not encroach upon the power under Title IV since its main purpose is merely to guarantee the exercise of the right of Union citizens to move and reside.

8. It therefore remains to determine whether the full effect of the rights attached to Union citizenship means that the right of residence conferred on the family members of a Union citizen by Directive 2004/38 may, under certain circumstances, include a right of access to Community territory. To that end it is firstly necessary to point out the repeated emphasis which both the legislature⁹ and the Court¹⁰ place on the importance of protecting the family lives of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty. This connection of purpose established between the right to respect for family life and the freedoms of movement has in particular led the Court to hold that Article 52 of the EC Treaty (now, after amendment, Article 43

EC) and Directive 73/148/EEC¹¹ must be construed as requiring a Member State to grant leave to enter and reside in its territory to the spouse, of whatever nationality, of a national of that State who has gone, with that spouse, to another Member State in order to work there as an employed person as envisaged by Article 48 of the EC Treaty (now, after amendment, Article 39 EC), and returns to establish himself or herself as envisaged by Article 52 of the Treaty in the territory of his or her State of origin; in the view of the Court, a national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.¹² This connection of purpose also explains why the Court has ruled that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be construed as precluding a refusal, by the Member State of origin of a provider of services established in that State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a non-member country.¹³ Even in *Akrich*,¹⁴ in which the Court refused to grant, under Regulation No 1612/68, a right of residence in the Member State of origin to which a Union citizen had returned to

9 — After pointing out, in the fifth recital in the preamble thereto, that 'the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires ... that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family', 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), lays down, in Article 10 thereof, the right of family members, irrespective of their nationality, to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State. Recital 5 in the preamble to Directive 2004/38 points out, in very similar terms, that '[t]he 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'.

10 — See Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 38; *MRAX*, paragraph 53; Case C-157/03 *Commission v Spain*, paragraph 26; Case C-503/03 *Commission v Spain* [2006] ECR I-1097, paragraph 41; and *Eind*, paragraph 44.

11 — Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

12 — See Case C-370/90 *Singh* [1992] ECR I-4265.

13 — See *Carpenter*.

14 — Case C-109/01 [2003] ECR I-9607.

establish herself with her spouse who was a national of a non-member country, since he had not previously been lawfully resident in a Member State, it nevertheless required the competent authorities of the Member State of origin to assess the application by the spouse to enter and remain in their territory in the light of the fundamental right to respect for family life within the meaning of Article 8 of the European Convention,¹⁵ as the freedom of movement of the Union citizen was at issue.

9. If this approach is followed, then it must be acknowledged that interpreting Directive 2004/38 as meaning that the right of residence which it confers on nationals of non-member countries, who are members of the family of a Union citizen in the host Member State, does not guarantee them a right of access to the territory of the Community, that is to say applies only if they have previously been lawfully resident in another Member State, would infringe the right of the Union citizen to lead a normal family life and, therefore, his right to reside in the host Member State. In the cases in the main proceedings, the fact that Union citizens established in Ireland are unable to have their spouses join them from outside the Community is such as to undermine their free choice to reside in that Member State since it will tend to induce them to leave Ireland and go to a State, whether a Member State or not, where they will be able to live together with their spouses. Consequently, the effectiveness of the right of a Union citizen to reside

in a Member State other than his State of origin requires that the consequential right of residence conferred on non-EU national members of his family by Directive 2004/38 must be construed as entailing the right to join him, including directly from outside the Union. It follows that a Member State cannot legitimately require those family members to have previously been lawfully resident in another Member State in order to be able to rely on the provisions of that directive.

10. Such an interpretation of Directive 2004/38 is disputed by Ireland and the intervening Member States on the basis of the approach taken in *Akrich*,¹⁶ according to which the benefit of the right of residence conferred by Article 10 of Regulation No 1612/68 on a national of a non-member country, who is the spouse of a Union citizen and moves to a Member State to which the Union citizen has migrated, is subject to the condition of prior lawful residence in another Member State, since that regulation relates solely to freedom of movement within the Community and says nothing about the rights of that national of a non-member country who is the spouse of a Union citizen as regards access to the territory of the Community.

11. However, for a number of reasons, the approach taken in *Akrich* cannot have the general scope that the Member States ascribe to it. It conflicts with a trend in case-law, which makes the right of residence conferred by Community legislation on a national of a non-member country who is the family member of a Union citizen conditional solely on the existence of a 'family relationship'.

15 — European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

16 — Paragraphs 49 to 51.

That was the judgment of the Court before 2003.¹⁷ That has been the judgment of the Court ever since.¹⁸ It has inferred from this right of residence conferred directly by Community law solely on the basis of a family relationship that a Member State is unable to adopt measures to expel a non-EU family member of a Union citizen solely on the basis of a failure to comply with legal formalities concerning the control of aliens¹⁹ and that the issue of a residence permit to that member serves purely to acknowledge rights already conferred.²⁰

12. Furthermore, in *Jia*,²¹ the Court itself explicitly linked the condition of previous lawful residence formulated in *Akrich* to the specific factual circumstances of the case in the main proceedings, in which a national of a non-member country who was the spouse of a Union citizen had been residing unlawfully in a Member State and was seeking to evade national immigration legislation illicitly. Mr Akrich, who was married to a British national and did not have the right to remain in the United Kingdom, had in fact agreed to be deported to Ireland, where he joined his wife who had installed herself there shortly before, and intended to return to the United Kingdom with his wife by taking advantage of the right of residence conferred by Community law as the spouse of a citizen of the Union who had exercised her right to free movement.

13. Finally, account should be taken of the changes introduced by Directive 2004/38. Even if the approach in *Akrich* had a scope which was not limited to the specific circumstances of the case (abuse of rights), it was adopted under and in pursuance of Regulation No 1612/68. As stated in recital 3 in the preamble thereto, Directive 2004/38 seeks not only to codify but also to review the existing legislative instruments in order to ‘strengthen’ the right of free movement and residence of all Union citizens. Furthermore, whereas Regulation No 1612/68 concerned, to cite its title, only ‘freedom of movement’ for workers within the Community, Directive 2004/38 relates, in line with the right set out in Article 18 EC, to the right of Union citizens not only to ‘move’ but also to ‘reside’ freely within the territory of the Member States. In other words, freedom of movement for workers and the rules adopted pursuant thereto were essentially intended to remove obstacles to mobility for workers. Emphasis was therefore placed on the deterrent effect on leaving or entering a Member State which could be caused by the measures taken by the Member States. It is ultimately this view which inspired the ratio decidendi in *Akrich*. After pointing out that the scheme of the Community law provisions seeks to secure freedom of movement for workers within the Community, whose exercise must not penalise the migrant worker and his family, the Court in fact inferred from this that where a citizen of the Union, established in a Member State and married to a national of a non-member country without the right to remain in that Member State, moves to another Member State in order to work there as an employed person, the fact that that person’s spouse has no right under Article 10 of Regulation No 1612/68 to install himself with that person in the other Member State cannot constitute treatment which is less favourable than that which they enjoyed before the Union citizen made use of the opportunities afforded by the Treaty as regards movement of persons and,

17 — See *MRAX*, paragraph 59.

18 — See Case C-157/03 *Commission v Spain*, paragraph 28.

19 — See *MRAX*, paragraphs 73 to 80.

20 — See Case C-157/03 *Commission v Spain*, paragraph 28.

21 — Case C-1/05 [2007] ECR I-1.

accordingly, is not such as to deter the citizen of the Union from exercising the rights in regard to freedom of movement conferred by Article 39 EC; conversely, where a citizen of the Union, established in a Member State and married to a national of a non-member country with a right to remain in that Member State, moves to another Member State in order to work there as an employed person, that move must not result in the loss of the opportunity lawfully to live together, which is the reason why Article 10 of Regulation No 1612/68 confers on such a spouse the right to install himself in that other Member State.²² At present Directive 2004/38 places equal emphasis on the right to reside freely within the territory of the Member States. It is therefore no longer only the mobility but also the stability and permanence of residence in another Member State that is intended to be secured. From this new standpoint, it is easy to see how requiring nationals of non-member countries who are family members of a Union citizen to satisfy a condition of prior lawful residence in order to benefit from the right of residence conferred by Directive 2004/38 might affect continued residence in the Member State which a Union citizen has freely chosen. If his family life changes and a family member is unable to rely on Community law in order to join him because he has not been lawfully resident in another Member State, the Union citizen will be induced to leave the territory of the Member State in which he had chosen to establish himself in favour of a State, whether a Member State or not, in which he will be able to reunite the family unit. Thus, the infringement of the right to lead a normal family life that would be caused by the requirement of prior lawful residence in another Member State would, as can be seen, affect the effectiveness of the right of residence. There is no reason to treat infringements of family life differently depending on

whether they hinder the freedom of a Union citizen to move to another Member State or the freedom to reside in another Member State. Therefore, since Directive 2004/38 must, like Regulation No 1612/68,²³ also be interpreted in the light of the fundamental right to respect for family life, it must be concluded that the benefit of the right of residence granted by Directive 2004/38 to nationals of non-member countries who are family members of a Union citizen cannot be made contingent on the prior lawful residence of those nationals in another Member State.

14. Finally, it hardly needs to be pointed out that the fact that the right of residence conferred by Directive 2004/38 on nationals of non-member countries who are family members of a Union citizen includes a right of access to the territory of the Community does not mean that that latter right may not be subject to limitations by the Member States. Those limitations are explicitly provided for. Article 27 of the directive refers to the traditional public policy restriction on the freedom of movement and residence of Union citizens and their family members, irrespective of nationality. Article 35 imposes restrictions in cases of abuse of rights or fraud. This is obviously aimed at the possibility of marriages of convenience, but abuse of rights may also be deemed to cover the

22 — See *Akrich*, paragraphs 51 to 54.

23 — See Case 249/86 *Commission v Germany* [1989] ECR 1263, paragraph 10, and *Baubast and R*, paragraph 72.

Akrich case of seeking to evade national immigration legislation illicitly. It should be noted that these limitations permitted by Directive 2004/38 mirror those which the Court authorised the Member States to impose, in connection with the freedom to provide services, on the right to respect for family life within the meaning of Article 8 of the European Convention.²⁴

15. Therefore, the answer to the first question should be that Directive 2004/38 does not authorise a Member State to make the benefit of the right of residence which it grants to nationals of non-member countries who are the family members of a Union citizen subject to the condition that those nationals must have previously been lawfully resident in another Member State.

B — *Effect of the date of the marriage on the benefit of the right of residence conferred by Directive 2004/38*

16. The second and third questions essentially ask the Court to rule on whether a national of a non-member country can rely on the provisions of Directive 2004/38 to obtain the right to reside in the host Member State with the Union citizen who is his spouse even if he entered the host Member State before marrying or even before the Union citizen came there. The question arises

because Article 3(1) of the directive reserves the benefit of the directive to Union citizens and 'to their family members ... who accompany or join them'. Should this wording not be considered to require the national of a non-member country to have obtained the status of family member before coming to the host Member State? Ireland believes that it should. Otherwise, how could the national of a non-member country be regarded as accompanying or joining the Union citizen as a family member?

17. However, the wording of Article 3(1) of Directive 2004/38 does not really support the argument of the respondent in the main proceedings. The word 'accompany', in particular, can indicate a movement and be understood as meaning to go with but can also have a static connotation and mean to be with. This double meaning is to be found in the equivalent of the English term 'accompany' used in the other language versions, whether it be the French word 'accompagner', the Spanish word 'acompañar', the Italian word 'accompagnare', or the Portuguese word 'acompanhar'. In order to remove the ambiguity in the wording it is therefore again necessary to develop a functional interpretation. In this regard, if the emphasis were placed solely on the mobility of EU nationals, that is to say on their freedom to move to another Member State, it could be claimed, quite aptly, that Community law does not guarantee a family member a right of residence in the host Member State of a migrant Union citizen where the family relationships

²⁴ — See *Carpenter*.

are not established until after the freedom of movement was exercised. In that case the fact that family reunification was prevented could have had no deterrent effect on the EU national's freedom of movement.

18. However, as is known, the rights attached to the status of Union citizen by Article 18 EC also include the right to reside freely within the Member States. Logically, Directive 2004/38, which seeks to regulate the exercise of Union citizens' fundamental right of movement and residence, applies, by virtue of Article 3 thereof, to all Union citizens 'who move to *or reside*' in a Member State other than that of which they are nationals. As I have already pointed out in replying to the first question, the permanence of the Union citizen's residence in the host Member State would be undermined if he were unable to live there with the members of his family. The point at which a person became a member of his family is of little importance as regards the effectiveness of his right of residence. The fact that the person who became a member of his family was already within the territory of the host Member State before the Union citizen arrived is likewise of little importance. Even if, as in the cases in the main proceedings, the national of a non-member country married the Union citizen only during the latter's residence in the host Member State, and even if he had already entered the host Member State at the time of the marriage, the refusal by that Member State to grant him a residence card as the spouse of a Union citizen, in preventing family life, would not have any less of an effect on the Union citizen's residence within its territory.

19. In the context of the right of residence attached to the fundamental freedom of movement for workers, the Court has ruled that a Member State is unable, without infringing the right of residence conferred on Community workers and, thus, the members of their families by Directives 68/360/EEC²⁵ and 73/148, to refuse to issue a residence permit to a national of a non-member country who has married a Community worker in the host country after entering it unlawfully.²⁶ What was true under the legislation prior to Directive 2004/38 is all the more true now. Again, that directive seeks to 'strengthen' the right of residence of all Union citizens. It must therefore be concluded that nationals of non-member countries can claim the benefit of the rights conferred by Directive 2004/38 on family members who 'accompany' the Union citizen within the meaning of Article 3 of that directive, irrespective of the date on which they became members of that citizen's family.

20. Therefore, the answer to the second and third questions should be that Article 3(1) of Directive 2004/38 applies to a national of a non-member country who is the spouse of a Union citizen residing in the host Member State, irrespective of when or where their marriage took place and irrespective of when or how the national of the non-member country entered the host Member State.

25 — Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (O), *English Special Edition 1968 (II)*, p. 485.

26 — See *MRAX*, paragraphs 63 to 80.

III — Conclusion

21. In the light of the above considerations, I propose that the Court should give the following answers to the questions referred by the High Court:

- (1) Directive 2004/38/EC does not authorise a Member State to make the benefit of the right of residence which it grants to nationals of non-member countries who are the family members of a Union citizen subject to the condition that those nationals must have previously been lawfully resident in another Member State.

- (2) Article 3(1) of Directive 2004/38 applies to a national of a non-member country who is the spouse of a Union citizen residing in the host Member State, irrespective of when or where their marriage took place and irrespective of when or how the national of a non-member country entered the host Member State.