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**Citation:** Fahey, E. (2009). Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in Metock. *Legal Issues of Economic Integration*, 36(1), pp. 83-89.

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## Going Back to Basics: Re-embracing the Fundamentals of the Free Movement of Persons in *Metock*

Case C-127/08, *Metock & others v Minister for Justice, Equality & Law Reform*, Judgment of the European Court of Justice of 25 July 2008, nyr

By Dr. Elaine Fahey\*

### Introduction

The ability of Member States to determine the rights of third country nationals to move, reside with and join their European Union (EU) citizen spouses might be thought to go to the heart of Member State sovereignty to control immigration matters. Despite the introduction of Directive 2004/38/EC,<sup>1</sup> European Union law had been silent on key issues as to the entry and residence rights and the case law of the European Court of Justice (ECJ) had only recently begun to shape the contours of the conditions of such entry. A major issue raised by the recent decision of the ECJ in *Metock*<sup>2</sup> as to whether national law or secondary Community law governs such entry and residence requirements, in light of the *Akrich*<sup>3</sup> and *Jia*<sup>4</sup> decisions of the ECJ, where the requirement of having a “prior lawful residence” in another State prior to entry to the host State for such individuals was first introduced by the ECJ (*Akrich*) but then later refined (*Jia*). In *Metock*, the ECJ has dramatically recast its own case law, has re-embraced the fundamentals of the free movement of persons in a manner consistent with the protection of the individual and is the subject of consideration here.

### Legal Background to *Metock*: the *Akrich* Decision

The case law of the ECJ on the rights of movement and residence of third country national spouses and family members to join Member State citizens prior to *Metock* was replete with tensions as to whether national law or Community law should govern the circumstances of the first point of their entry into the Community.<sup>5</sup> Much of the case law of the ECJ on this particular issue notably was delivered temporally prior to Directive 2004/38/EC and its transposition

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<sup>1</sup> Directive 2004/38/EC 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.

<sup>2</sup> C-127/08 *Metock & others v. Minister for Justice, Equality & Law Reform*, judgment of the Court of 25 July 2008, nyr.

<sup>3</sup> Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] E.C.R. I-9607

<sup>4</sup> Case C-1/05 *Yunying Jia v Migrationsverket* [2007] 1 C.M.L.R. 41.

<sup>5</sup> Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] E.C.R. I-9607; Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] E.C.R. I-6591; Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] E.C.R. I-6279; C-503/03 *Commission of the European Communities v Kingdom of Spain* [2006] E.C.R. I-1097; Case C-1/05 *Yunying Jia v Migrationsverket* [2007] 1 C.M.L.R. 41.

deadline, although the Directive largely codifies the case law of the Court.<sup>6</sup> Directive 2004/38/EC was enacted so as to provide for a panoply of rights for Union citizens, their spouses and dependents, including rights of entry and residence, but remained silent as to the precise conditions for entry and residence of third country national spouses of EU citizens.<sup>7</sup> The ECJ introduced a requirement in its controversial decision in *Akrich*<sup>8</sup> that third country national spouses seeking to join an EU citizen and reside with them must have had a "lawful" first point of entry into the Community, a condition not codified in the Directive.<sup>9</sup> In *Akrich*, the Moroccan spouse of a British citizen who had been deported twice from the UK for illegal entry, had been deported finally to Ireland at his request. Mrs. Akrich sought to join him in Ireland and contended that he should qualify for a right of residence in the UK pursuant to the famous *Surinder Singh*<sup>10</sup> judgment of the ECJ. The ECJ in *Akrich* held that in order to benefit from the *Surinder Singh ratio*, it was necessary for Mr. Akrich to have been lawfully resident in another Member State.<sup>11</sup> Rights of residence accruing from *Surinder Singh* would not accrue where a marriage of convenience had been contracted into and where the marriage was not genuine. The ECJ concluded that the Akrich applicants would not have been "dissuaded" from exercising their free movement rights given that Mr. Akrich was not lawfully present in the EU at the first point of entry in the Community, a conclusion the subject of extensive criticism.<sup>12</sup>

By contrast, subsequently in *MRAX v Belgian State*,<sup>13</sup> the ECJ held that a Member State could not refuse entry to a third country national married to a Member State citizen because they were not in possession of a valid identity card or passport even though they were able to prove their identity or marriage by some other means, thereby emphasising the importance of proportionate treatment. In a similar vein, in *Commission v Kingdom of Spain*,<sup>14</sup> the ECJ recently held that the refusal of a visa to third country nationals by the Spanish authorities, solely because they appeared on the Schengen Information System (SIS) list of persons, would be in breach of Community law and would fail to respect their right to family life.<sup>15</sup> Rather, a

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<sup>6</sup> Which had to be transposed by April 30, 2006.

<sup>7</sup> On the Directive generally and recent case law, see Dougan "The Constitutional Dimension to the Case Law on Union Citizenship" (2006) 31 *European Law Review* 613; Barnard *The Substantive Law of the EU: The Four Freedoms* (2<sup>nd</sup> ed., Oxford, 2007) Ch. 15.

<sup>8</sup> Case C-109/01 *Secretary of State for the Home Department v Hacene Akrich* [2003] E.C.R. I-9607.

<sup>9</sup> In *Akrich*, the analysis was derived from Council Regulation (EEC) No 1612/68 of 15 October 1968 on the free movement of workers within the Community and not the more recent Directive.

<sup>10</sup> Case C-370/90 *The Queen v Immigration Appeal Tribunal & Surinder Singh, ex parte Secretary of State for Home Department* [1992] E.C.R. I-4265. It will be recalled that the ECJ held in *Surinder Singh* that Member State nationals and their spouses who had moved to a host Member State to reside there could not be met later with a refusal of entry to their spouse in their home State, as such a refusal would deter them from returning to their home State with their spouse and hence deter them from exercising their free movement rights.

<sup>11</sup> Although the point is a difficult one: see White, "Conflicting Competences: Free movement rules and immigration laws" (2004) 29 *European Law Review* 385 at 392, who states that, "Akrich's residence in Ireland was presumably lawful- there is certainly no suggestion in the opinion or judgments that the Irish authorities viewed it otherwise." However, it is not necessarily the case that an individual's presence by operation of law then entails a *lawful* presence in a State.

<sup>12</sup> See Arnull, *The European Union and its Court of Justice*, (2<sup>nd</sup> ed., Oxford, 2006) p.460; White "Conflicting Competences: Free movement rules and immigration laws" (2004) 29 *European Law Review* 385; Spaventa (2005) 42 *Common Market Law Review* 225.

<sup>13</sup> Case C-459/99 *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* [2002] E.C.R. I-6591. The decision pre-dates the Citizens Rights Directive and considers Directives 64/221, 68/360/EEC and 73/148/EEC and Regulation 2317/95.

<sup>14</sup> C-503/03 *Commission of the European Communities v Kingdom of Spain* [2006] E.C.R. I-1097.

<sup>15</sup> Case C-60/00 *Mary Carpenter v Secretary of State for the Home Department* [2002] E.C.R. I-6279 is also worthy of mention, as arguably one of the most controversial recent decisions of the ECJ in respect of its approach to non-discriminatory barriers and free movement and its most criticised. There, the ECJ held that the deportation of an illegal Philippines national, Mrs Carpenter, who had overstayed her visa, as the wife of a

strict construction had to be adopted of Member State justifications for such restrictions and they could not be refused a visa without verifying the alert from the SIS.

More recently, in the decision of the ECJ in *Jia*,<sup>16</sup> it had appeared that the parameters of *Akrich* might have been refined. *Jia* concerned the Chinese mother (Mrs. Jia) of a Chinese national resident in Sweden with his German wife. Mrs. Jia had a valid visitor's visa and attempted to apply for a permanent residence permit at the end of her stay but was required to prove financial dependence by way of a document from her country of origin. Mrs. Jia, however, could not obtain such a document and thus did not satisfy a "lawful residence requirement" and in the course of the ensuing litigation as to her residence, a Swedish court referred several questions to the ECJ, broadly along two themes, as to whether the decision of the court in *Akrich* applied, specifically the "lawful residence" requirement as to Mrs. Jia and whether the Swedish authorities were correct to require documentary proof from her country of origin.<sup>17</sup>

Advocate General Geelhoed noted the apparent contradiction between *Akrich* and other case law of the Court arising from the variable "generous" and "restrictive" approach of the court to the area of immigration where competence lay with the Member States, operating in the shadow of the free movement of persons, an area of Community competence.<sup>18</sup> The Court, however, did not seek to acknowledge such a tension and held rather that Community law did not require a residence permit for third country national family members to be subject to a "lawful residence" requirement, limiting the *ratio* of *Akrich*, in the words of certain commentators "meticulously and explicitly," but notably without overruling the *Akrich* decision ratio itself.<sup>19</sup>

### Factual Background to *Metock*

The (Irish) European Communities (Freedom of Movement of Person) Regulations, 2006<sup>20</sup> purported to transpose Directive 2004/28/EC into Irish law. A requirement that the family member have "prior lawful residence" in another Member State before seeking to move and reside in the host State (Ireland) to join an EU citizen spouse, was provided for in Article 3(2) of the Regulations, and was the subject of the preliminary reference in *Metock*. Thus, the Irish Regulations attempted to take into account the decision in *Akrich*. The Irish regulations

Comment [BS1]: Regulations

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business man and service provider from the UK travelling to other Member States, was in breach of Article 8 ECHR, as her service provider husband would have been deterred from exercising his free movement rights had she not been entitled to stay in the UK.

<sup>16</sup> Case C-1/05 *Yunying Jia v Migrationsverket* [2007] 1 C.M.L.R. 41; Opinion of AG Geelhoed delivered on April 27, 2006.

<sup>17</sup> Mrs Jia further attempted to rely on Directive 73/148 on the abolition of restrictions on movement and residence of relative on ascending line of the spouse of a Member State national exercising their freedom of establishment.

<sup>18</sup> See para.2 of the Opinion, considering *Akrich* and *MRAX*, above and Case C-291/05 *Minister voor Vreemdelingenzaken en Integratie v R. N. G. Eind* [2007] ECR I-10719, where the Court held that the refusal by the Dutch authorities to grant to a Surinamese national and daughter of a Dutch national a residence permit subsequent to enjoying residence rights along with her Dutch father in the UK, on the basis that her father was not economically active on return to the Netherlands and that she had had no valid right of residence there beforehand, was in breach of Community law. Rather, barriers to family reunification like this could undermine the right to free movement.

<sup>19</sup> In the words of Olivier & Herman Reestman, "European Citizens' Third Country Family Members & Community Law" (2007) 3 *EuConst* 463 at 469; See also Elsmore & Staruo (2007) 44 *Common Market Law Review* 787.

<sup>20</sup> S.I. No. 226 of 2006. The Irish Regulations were worded identically to the provisions of the (UK) Immigration (European Economic Area) Regulations 2006, where a "lawful residence" requirement was also imposed. See also the (Danish) Aliens (Consolidation) Act, No. 945 of 1 September 2006, where a similar requirement was in force, compelling the EU national spouse in some instances to travel between Denmark and Sweden and beyond, so as to allow the third country national spouse reside outside Denmark to satisfy the requirement.

implementing Directive 2004/38/EC were in fact the subject of a previous unsuccessful challenge in Ireland in *SK and TT v Minister for Justice*<sup>21</sup> and a Supreme Court appeal was pending in those proceedings when the Irish High Court in *Metock* decided to make a preliminary reference to the Court of Justice.<sup>22</sup> The High Court in *Metock* was faced with several third country national spouses of Union citizens who were refused residence in Ireland on account of their absence of “prior lawful residence” in another EU State.<sup>23</sup> All of the factual scenarios at issue were concerned with a “joining spouse” or partner who joined the Union citizen and then became their spouse. Certain of the third country national spouses had deportation proceedings issued against them or were already deported in one instance.<sup>24</sup> The applicants argued that the provisions of the Directive applied even when a third country national became a family member while residing in the host State (here Ireland), such that a restrictive interpretation of “prior lawful residence” could not be applied nor could the beneficiaries of the Directive be so restricted to those already married abroad. Three questions were referred by the Irish Court: firstly, as to the constitutional question of the competence of Member States to regulate free movement entry conditions; secondly, the ambit of the *Akrich* decision and its “prior lawful residence” condition and thirdly, the beneficiaries of the Directive and its provisions and specifically whether third country national spouses could benefit from the provisions of the Directive if they accompanied or joined the EU citizen spouse, irrespective of when and where the marriage took place.<sup>25</sup>

### The Judgment of the ECJ

The judgment of the Court was delivered pursuant to the accelerated reference procedure on account of the significance of the decision throughout the Union.<sup>26</sup> As to the validity of the *Akrich* decision and its introduction of a “prior lawful residence”, the Court acknowledged that no provision of the Directive made its application to family members of a Union citizen conditional on previous residence in another Member State and in an unusually explicit breach of precedent, held that the “prior lawful residency” requirement introduced in *Akrich*<sup>27</sup> had to be “reconsidered” and that the benefit of such free movement rights to the family members and dependants could not now depend on such a condition.<sup>28</sup> Rather, the Court reiterated the terms of Directive 2004/38/EC and its preamble that explicitly provided that the Directive would strengthen free movement rights rather than weaken them. The Community legislature was in

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<sup>21</sup> [2007] IEHC 216. *ST & TT* concerned an Indian citizen who had not declared his previous unsuccessful application for asylum in the UK on arrival in Ireland and who entered the State and married an Estonian national. There, the High Court held that the Irish Regulations validly implemented the case law of the Court of Justice and that the facts of the case were not analogous to *Jia*, where the Advocate General had suggested incongruence in the case law of the ECJ as to *Akrich*. See Fahey “Third country national spouses and the Citizens Rights Directive in Irish law” (2008) 11 *Irish Journal of Family Law* 32.

<sup>22</sup> The High Court in *Metock* elected not to follow the existing High Court decision finding the Irish Regulations to be valid.

<sup>23</sup> Four test cases out of fifty judicial review applications lodged in the Irish High Court in 2007: see *Metock v. Minister for Justice, Equality & Law Reform* [2008] IEHC 77, at para. 96

<sup>24</sup> No question of a marriage of convenience arose on the facts. Three of the third country national spouses could not work.

<sup>25</sup> The Commission argued in support of the applicants in their assertions as to the invalidity of the “prior lawful residence” condition. Ten member States intervened and supported the position of the Irish State.

<sup>26</sup> Pursuant to Article 104a of the Rules of Procedure of the Court of Justice. The decision of the Irish High Court to seek a reference was dated March 14, 2008 and the decision of the Court was delivered with much expedition on July 25, 2007.

<sup>27</sup> Paras. 50-51 of the judgment in *Akrich*.

<sup>28</sup> See paras. 58-59 of the judgment in *Metock*.

fact competent, under the Treaties, to regulate the conditions of entry and residence of family members of Union citizens. Directly addressing the constitutional question before it, the Court held that to allow the Member States exclusive competence to grant or refuse entry into and residence of their State would entail that free movement rights would vary across the Union. Moreover, the Court held that such a conclusion would not be compatible with the internal market. Member States still retained within the scope of the Directive the powers to refuse entry and residence on grounds of public policy, public security or public health.

As to the final question posed in respect of who could benefit from the terms of Article 3(1), the Irish Minister for Justice had submitted that a third country national spouse of a Union citizen could not be considered to be “accompanying” a Union citizen unless they were already a family member at the *time of arrival* in the host State, thereby denying validity to marriages subsequent to entry. The Court of Justice held that the timing of a marriage or place of establishment of a citizen and their family was irrelevant. No such limitation was possible nor did the Directive contain requirements as to where the marriage was solemnised.

### The significance of *Metock*

The importance of the *Metock* decision cannot be underestimated in terms of its constitutional re-enforcement of the centrality of free movement and Union competence in this area to the European project. Moreover, the choice of the ECJ not to follow its decision in *Akrich* in favour of the rights of the individual marks a dramatic about-turn in its own jurisprudence. The *Akrich* decision constituted a difficult decision for the Court at the margins of public security and policy and notably involved Ireland in both *Akrich* and *Metock*, an island State isolated from mainland Europe with all of the attendant challenges resulting from its water borders. The *Akrich* applicants had sought to exploit existing free movement law and the Court had responded accordingly, applying an awkward caveat to its then existing case law, a caveat that it has now sought to overcome.

One cannot help but be struck also by the fact that the *Surinder Singh* judgment may at its root be more problematic than *Akrich* ever was. The efforts being made in *Akrich* to generate a “cross border” free movement point of law and the attendant rights flowing there from seem wholly misplaced given that key aspects of free movement law related to *Surinder Singh* such as the “wholly internal” and “*de minimis*” rules are in a state of flux or at least mired by academic debate, a fuller consideration of which remains outside the scope of this work.<sup>29</sup> The free movement of persons and the Community legislator may be the victors of the battle but one wonders if the ECJ can ever win the war where many of the fundamental tenets of its case law in the area of the free movement of persons are so fragile and artificial. A major difficulty with the *Metock* decision may prove to be its factual matrix arising not from a nefarious character like Mr. *Akrich* joining his EU spouse through deportation but rather Union citizens who were married in Ireland and unable to have their spouse legally reside with them there. And, why should sympathetic applicants determine the precise boundaries of EU law? The

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<sup>29</sup> Nic Shuibhne “Free Movement of Persons and the Wholly Internal Rule: Time to Move On?” (2002) 39 *Common Market Law Review* 731; Nic Shuibhne *Regulating the Internal Market* (Edward Elgar Publishing, 2006); Sorenson “Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?” (2006) 43 *Common Market Law Review* 423; Tryfonidou “Reverse discrimination in purely internal situations: An incongruity in a Citizens’ Europe” (2008) 35 *Legal Issues of Economic Integration* 43; Tryfonidou “*Jia* or “*Carpenter II*”: The edge of reason” (2007) 33 *European Law Review* 908.

applicant in the now infamous decision of the ECJ in *Carpenter*<sup>30</sup> also evoked tremendous sympathy before the ECJ and it seems impossible not to acknowledge how the ECJ has been influenced by very human factors to the detriment of first principles. The decision in *Metock* is expected to affect several thousand third country national spouses of EU citizens and the Irish government is now reported to be lobbying for an amendment to the provisions of Directive 2004/38/EC.<sup>31</sup>

## Conclusion

*Metock* may suggest a return to basics and first principles for the ECJ but the case law of the Court in respect of EU citizens and their spouses seems likely to continue to generate controversy. The emphasis by the ECJ on the key principles of Directive 2004/38/EC so as to guide its case law on points of law beyond the precise terms of the Directive is an important evolution in its jurisprudence, instead of the alternative scenario of the Court becoming the handmaiden of the Member States and re-writing the terms of Directive 2004/38/EC. The extent to which the ECJ goes "back to basics" and reviews key principles of free movement law remains the critical issue in the era of the Court operating in the shadow of the ratification crisis surrounding the EU post-Lisbon.

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<sup>30</sup> See above fn. 5.

<sup>31</sup> See *The Irish Times* September 22, 2008. As a result of the decision of the Court of Justice in *Metock*, the Department of Justice in Ireland revoked the "prior lawful residency" requirement and advertised in national newspapers to the effect that applicants who applied after 28 April 2006 for an "EU Fam card" and were refused on account of the prior residence requirement would have their application reviewed. A similar outcome is evident in Denmark where the "lawful residence" requirement was recently suspended and is under review after *Metock*: see <http://www.denmark.dk>.