Neutral Citation Number: [2007] IEHC 216

THE HIGH COURT

JUDICIAL REVIEW

[2006 No 758 JR]

BETWEEN

S. K. AND T.T.

APPLICANTS

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM AND IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Hanna delivered on the 28th day of May, 2007

1. This is an application for judicial review on behalf of the applicants to whom leave to bring this application was granted in the form of the amended statement of grounds. The said leave was obtained from Finlay Geoghegan J. on the 31st July, 2006.

2. The first named applicant claims that he has a right of residency in this jurisdiction, being married to an EU citizen who is resident and working in Ireland. The applicants complain that the instrument under which the first named applicant's right of residency was refused, The European Communities (Freedom of Movement of Persons) Regulations 2006, S.I. No. 226/2006, is *ultra vires* Directive 2004/38/EC which deals with the rights of citizens of the European Union and their family members to move and reside freely within the territory of the Member States. Specifically, the applicants contend that the requirement in the said Regulations, that a spouse or family member who is a national of a non-EU state be lawfully resident in another Member State before entering Ireland either with or without a view to joining a spouse who is a national of another EU state, goes beyond the provisions of the Directive to such extent as would require primary legislation to be enacted into law. Further, the applicants argue, in the given circumstances of S.K.'s case, refusal of the right of residency and his removal from the State to the Kingdom of Belgium is contrary both to their respective rights under the Irish Constitution and under the European Convention of Human Rights and Article 8 thereof in particular.

3. The first named applicant is a citizen of India. The second named applicant is a national of Estonia, a Member State of the European Union. The applicants were married in this State on 18th May, 2006, having been in a relationship, according to the applicants, since 2003. Unsurprisingly, the description of the applicants' prior relationship is not challenged since it occurred mostly out of the jurisdiction. Further, no issue has been raised with regard to the validity in legal terms of the marriage.

Background facts

4. The relevant history of the case is as follows. Whilst still a minor aged fifteen, the first named applicant applied for asylum in Belgium and was refused. He then somehow or other entered the United Kingdom and resided there illegally for a period of approximately three years. It was during this time, we are told, that the relationship between the applicants grew. According to applicants' solicitor, Mr. Derek Stewart, who swore an affidavit on behalf of and on the instructions of the applicants, the applicants formed an intention to marry when in the United Kingdom and he was instructed that some contact was made with the Home Office in the UK on their behalf, seeking permission for their marriage. Mr. Stewart in para. 6 of his affidavit sworn on 27th June, 2006, says as follows:-

> "It seems that in frustration with the length of time it was taking to regularise their position and formalise their marriage, the applicants travelled to Ireland in or about January, 2006, with the intention of the second named applicant finding employment in the State, formalising their marriage and setting up their family home here."

5. What the difficulties and delays were in the United Kingdom are not specified. Nor is any single item of correspondence to or from the British Home Office exhibited. Nor is there any evidence that the frustration which they felt caused them to visit a solicitor to enquire as to the reason for the alleged delay and possible steps to do something about it.

6. In any event, the applicants then entered this State, set up home here and an asylum application was made by the first named applicant on 15th February, 2006. I should observe at this point (and I will return to it later) that, in his application for asylum, he made no reference to his unsuccessful application for asylum in Belgium or the fact that he was illegally resident in the United Kingdom for a period of three years prior to coming to this State.

7. Upon applying for asylum in this jurisdiction, he was given an information leaflet which advised him, *inter alia*, that he could make written representations to the Refugee Applications Commissioner. This particular leaflet was a leaflet presented to applicants for such status, informing them of their various rights. It is not in issue that the applicant was aware that he could have his case examined did he wish to do so.

8. Thereafter, the applicants say that they set up home together and the second applicant secured employment at a service station in the midlands prior to their marriage on 18th May, 2006.

9. This, according to the respondents, was part of the applicants' overall plan to circumvent the immigration laws of this State. The first named applicant was a person who would in ordinary circumstances require a valid visa to enter the State. It was the applicants' intention and understanding that their marriage would obviate the need for an asylum application because the first named applicant would then have the status of a spouse from a non-Member State of a national of a Member State of the EU and would thus be entitled to residency in Ireland.

10. In the meantime, the first named applicant's fingerprints, which had been taken when he arrived in this country, were checked by means of a Eurodac search and this revealed that the first named applicant had previously applied for asylum in Belgium. The Irish immigration authorities then made a take back request to Belgium on 2nd May, 2006. A letter from the Belgian authorities dated 31st May, 2006, indicated that the Belgian authorities were agreeable to taking the first named applicant back, pursuant to Article 16(1)(e) of the Council Regulation (EEC) No. 343/2003. This Article provides that:-

> "The Member State responsible for examining an application for asylum under this Regulation shall be obliged to: … take back … a third country national whose application it has rejected and who is in the territory of another Member State without permission."

11. Mr. Stewart tells us that the applicants proceeded to lodge papers with the first named respondent, for the purpose of mounting

an application for residency on the basis of their marriage and the fact that the second named applicant was an EU national who was employed in the State. The applicants instructed Mr. Stewart that their original marriage certificate, original birth certificates with translations, a copy extract from the first named applicant's passport and a copy of the second named applicant's passport were delivered by hand to the first named respondent's offices at 13-14 Burgh Quay, Dublin 2, in early June, 2006.

12. By letter of 2nd June, 2006, the first named applicant was advised that the office of the Refugee Applications Commissioner had determined that Belgium was the country responsible for dealing with his application for asylum pursuant to the provisions of the Dublin Convention known as "Dublin II". Article 8 of that Convention provides that:

> "Where no Member State responsible for examining the application can be designated on the basis of the other criteria listed in this Convention, the first Member State with which the application for asylum was lodged shall be responsible for examining it."

13. The first named applicant was duly notified of the determination to transfer him to the Kingdom of Belgium. He did not challenge this determination and a transfer order dated 14th June, 2006, was made transferring him to Belgium. A letter of 20th June, 2006, informed the applicant of the making of the transfer order and requesting his attendance at the Garda National Immigration Bureau on 26th June, 2006, to make arrangements for his removal from the State.

14. In the meantime, the first named applicant had written to the office of the Refugee Applications Commissioners by letter dated 15th June, 2006, which said letter was received on 19th June, 2006. The letter states as follows:-

> "Re: Withdrawal of my application for asylum.
>
> Your Ref: 69/398/06
>
> To whom it may concern,
>
> I am writing (sic) my application for asylum in this State. I have married an EU national and made an application for a resident's card as a non-EEA family member.
>
> Will you kindly acknowledge receipt of this letter?
>
> Yours faithfully
>
> S.K.."

15. Up to this point the applicants had no legal representation in the State. The second named applicant had, of course, the same rights as any other EU citizen to reside and work in this State. As for the first named applicant, he brought his presence to the attention of the authorities by applying for asylum, albeit that this had the effect of maintaining him in the State while his asylum application was being processed. However, serious questions arise with regard to a significant shortfall in terms of openness of disclosure and truthfulness in his application, to which I shall return.

16. The first named applicant sought legal advice and this he received from Mr. Stewart, who wrote a letter on 23rd June, 2006, which, Mr. Stewart tells us, was delivered by hand to the first named respondent's office. It informed the said respondent that the first named applicant had abandoned his claim for asylum and was applying for residency on the basis of his marriage to an EU national. Mr. Stewart contended, that the issue of the first named applicant's removal for the purpose of an examination of a claim that no longer existed was redundant. Mr. Stewart invited the authorities to inform either himself or his client that it was no longer necessary for the first named applicant to attend at the Garda Immigration Bureau Headquarters as had been requested of him. Mr. Stewart advised his client that it would be unlikely that there would be any attempt to enforce the transfer order. He was re-enforced in this belief in that the first named applicant had fourteen days within which to bring an application for judicial review from the date of the communication of the transfer order and that this time had not yet run. There was no reply to Mr. Stewart's letter.

17. By letter dated the 26th June, 2006, a complete application for residency on the basis of marriage to an EU national was submitted to the first named respondent.

18. When the first named applicant attended at the Garda National Immigration Bureau he was arrested and detained and brought to Cloverhill Prison. He was subsequently released consequent upon an application for injunctive relief which was heard and ordered by Murphy J. on 28th June, 2006.

19. By letter dated 7th July, 2006, which the first named applicant says he received on 12th July, 2006, S.K. was advised that his application for residency on the basis of marriage to an EU citizen working within the State had been unsuccessful. The reason given for this decision was that he had not submitted evidence that he had been lawfully resident with his spouse in another EU Member State before coming to Ireland.

20. The order of Murphy J. was made on 28th June, 2006, and was returnable for Monday 3rd July, 2006, in the asylum list. On the return date the first named applicant was released pursuant to an order under Article 7(9) of the Refugee Act (s. 22) Order, 2003 (S.I. No. 423/2003), and the interim injunction was continued on consent pending further order. An application was then made to amend proceedings and to join Ireland and the Attorney General following the decision made by the first named respondent to refuse the application for residency. An order granting leave on foot of the amended statement of grounds was made by Finlay Geoghegan J. on 31st July, 2006. Opposition papers were filed in October, 2006.

21. In an affidavit filed in reply to the affidavits sworn by Mr. Stewart and the first named applicant, Mary Sayers of the EU Treaty Rights Section expresses the view that the applicants set about an elaborate plan with a view to thwarting or bypassing the immigration law of this country. It is alleged that the application for asylum was in the nature of a holding operation. The first named applicant had previously resided in the United Kingdom for a period of approximately three years. When he applied for asylum on the 15th February, 2006, he was provided with an information leaflet for applicants for refugee status in Ireland which contained information on the effects of Council Regulations No. 343/2003. The applicant was informed by this leaflet that it was open to him to make written representation to the Refugee Applications Commissioner on the possibility that his case might be examined under the Regulations. He chose not to do so.

22. Ms. Sayers identifies what would appear to be significant shortcomings in terms of truthfulness and openness on the part of the

first named applicant in his application form.

(i) He did not disclose his previous application for asylum in Belgium nor the fact that he subsequently resided illegally in the United Kingdom for a period of approximately three years.

(ii) He stated that he never travelled outside his country of origin before, which is clearly untrue.

(iii) He stated that himself and the second named applicant first came to Moscow, then Belarus and after that he did not know how he was brought into this country.

(iv) He goes on to say that he left his country of origin (India) on 16th January, 2006, something that is manifestly untrue.

(v) He says that he did not apply for refugee status before, which is again untrue.

(vi) He says that he never lived in any other country other than his country of origin, which is untrue.

(vii) In a further form known as the ASY 1 form, he states that he travelled from India to Moscow to Belarus via an unknown destination to Ireland and that he had left on 16th January, 2006. Again, this is clearly untrue.

23. Ms. Sayers points out that once the first named applicant's application for asylum was to another Convention country, it was deemed withdrawn in Ireland by operation of law. Further, she points out that the first named respondent was not aware of the relationship between the first and second named applicants before making the transfer order to Belgium. The respondent was only informed of the fact of the marriage by letter dated 15th June, 2006, and received on 19th June, 2006, after the transfer order had been made. The letter was addressed to the office of the Refugee Appeals Commissioner but the matter was then being dealt with by the repatriation unit.

Findings

24. No oral evidence was heard in this case. I must therefore make my findings based solely on affidavit evidence including the uncontradicted affidavit of Ms. Sayers. It seems probable that the intention of the applicants has at all material times been to avoid or by-pass the provisions of Irish immigration law with a view to obtaining for the first named applicant a right of residency as the spouse of a citizen of a Member State of the European Union. I am satisfied that in order to achieve this end, the first named applicant engaged in deceitful and dishonest behaviour to the extent of lying about how he came to Ireland, lying about his personal circumstances, and concealing from the authorities, his failed attempt to obtain asylum in Belgium some three years previously.

25. It seems improbable that the second named applicant was not aware of the deceit in which the first named applicant was engaged.

26. However, it must be pointed out that no case was made that the marriage entered into between the applicants was other than a valid marriage. Expressly, it is not alleged that this was a marriage of convenience.

27. Such is the factual background against which this case must be considered.

Regulatory framework

28. One of the fundamental tenets of the European Union in general and of the Internal Market in particular is the free movement of persons. This began with the free moment of workers. As a consequence, broadly speaking, citizens of European Union Member States and their families have the same access to the labour market in any other Member State as the citizens of that State. The right to free movement of workers is enshrined in Council Regulation (EEC) No. 1612/68 on the free movement of workers within the Union. Under this regulation, family members of EU citizens enjoy free access to the labour market, regardless of their nationality.

29. The following are regarded as family members having free access to the labour market:

(i) A spouse or registered partner;

(ii) A child under the age of 21;

(iii) A child of the spouse of an EU citizen, where this child is under the age of 21;

(iv) A parent of an EU citizen, where this citizen is under the age of 21;

(v) A dependent relative in an ascending or descending line;

(vi) A dependent relative of the spouse of an EU citizen in an ascending or descending line;

(vii) A person living with an EU citizen in a common household;

(viii) A person who, for health reasons, is unable to look after himself without the personal care of the EU citizen.

30. Article 1(1) of Regulation (EEC) No. 1612/68 of the Council of 15th October 1968 on Freedom of Movement for Workers within the Community (OJ, English special Edition 1968 (II), p. 475 provides:-

"Any national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person and to pursue such activity, within the territory of another Member State in accordance with the provisions laid down by law, regulation or administrative action governing the employment of nationals of that State."

31. Article 10 provides:-

"(1) The following shall, irrespective of their nationality, have the right 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: (a) his spouse and their descendants who are under the age of 21 years or are dependants; (b) dependent relatives in the ascending line of the worker and his spouse.

(2) Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.

(3) For the purposes of paragraphs 1 and 2 the worker must have available for his family housing considered as normal for national workers in the region where his is employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States."

32. More recently, the European Parliament and the Council have adopted new legislation, namely Directive 2004/38/EC. This Directive amended Regulations (EEC) 1612/68 and repealed 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. The aim of the Directive appears to be to simplify the formalities for Union citizens and their family members to exercise and enjoy the right of free movement and residence irrespective of the nationality of the spouse or family member. There are some limits in place on the right of free movement where grounds of public policy, public security or public health arise.

33. The Directive embodies the right of Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport to leave the territory of a Member State to travel to another one and to enter its territory. No exit visa or equivalent formality may be imposed on the Union citizens and their family members. The Directive goes on, *inter alia*, to provide various rules affecting Union citizens and family members who are Union citizens themselves on the one hand and family members who are not nationals of a Member State on the other.

34. Who fulfils the definition of a family member? Further, who is intended to receive the benefit of the Directive? Articles 2 and 3 of the Directive respectively state as follows:-

"Article 2.

Definitions

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

2. "Family member" means:

(a) the spouse;

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

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

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

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

Article 3.

Beneficiaries

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

2. Without prejudice to any right to free movement and residence the persons concerned may have in their own right, the host Member State shall, in accordance with its national legislation, facilitate entry and residence for the following persons;

(a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependants or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen;

(b) the partner with whom the Union citizen has a durable relationship, duly attested.

The host Member State shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to these people."

35. I will return later to consider whether or not the first named applicant is an intended beneficiary of this Directive. The second named applicant, of course, is a member of an EU State and is entitled to remain here. The above Directive came into force the day of its publication in the Official Journal of the European Union, that being 30th April, 2004, and the Member States were required to transpose it by 30th April, 2006. With a view to enforcing the provisions of the Directive, the Minister for Justice, Equality and Law Reform acting under the powers conferred upon him by s. 3 of the European Communities Act 1972, made regulations entitled The European Communities (Free Movement of Persons) Regulations, 2006, (S.I. No. 226/2006) which came into effect at the end of April, 2006. Among the matters of controversy between the parties are the provisions of Regulations 3(1) and (2). They provide as follows:

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

(a) Union Citizens,

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

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

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

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

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

36. These provisions ground the refusal on the part of the first named respondent to grant residency to the first named applicant.

37. The applicants seek to impugn this Regulation upon the grounds, *inter alia*, that it does not truly transpose the Directive into Irish law. It is argued that the 2004 Directive contains no provision which would require, *inter alia*, that the first named applicant should lawfully be resident in another Member State prior to seeking to enter the State in the company of the second named applicant or seeking to join the second named applicant. The Directive is wholly silent in this regard, it is argued. The applicants argue that the Directive has not been properly transposed and there is no legal basis in accordance with Article 15(2) of the Constitution for said Article 3(2) of the Regulations and that the provision is *ultra vires* the first named respondent. The respondents, on the other hand, argue that S.I. No. 226/2006 does correctly transpose EU law into domestic law and this could properly be done by secondary legislation.

38. Perhaps I should briefly set out the legislative framework whereby the EU Directives are transposed into Irish law.

39. The S.I. No. 226/2006 was introduced by the first named respondent.

40. Vires of the Transposing Regulation

41. Article 15 (2) of the Constitution of Ireland, 1937, provides that:-

"1 The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

2 Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures."

42. Article 29, s. 4, sub-s. 10 of the Constitution of Ireland, 1937, provides:-

"No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State which are necessitated by the obligations of membership of the European Union or of the Communities, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, … from having the force of law in the State."

43. Article 189, para. 3 of the European Economic Community Treaty, 1957, (now Article 249 EC) provides:-

"A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

44. The 2006 Regulations were introduced by the first named respondent in exercise of powers conferred by section 3 of European Communities Act 1972 (hereafter "the Act of 1972") for the purpose of giving effect to the Directive.

45. Section 2 of the said Act provides that:-

"From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties."

46. Section 3 provides, *inter alia*, that:

"(1) A Minister of State may make regulations for enabling section 2 of this Act to have full effect.

(2) Regulations under this section may contain such incidental, supplementary and consequential provisions as appear to the Minister making the regulations to be necessary for the purposes of the regulations (including provisions repealing, amending, or applying, with or without modification, other law, exclusive of this Act)."

47. The respondents contend, contrary to what is asserted on behalf of the applicant's, that S.I. No. 226/2006 does derive from Directive 2004/38/EEC. That Directive was binding on the State from the moment it was adopted, as to the result to be achieved, and which, in the event of conflict, took precedence over domestic law. Relying on *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329, it is submitted that the measures incorporated in the Statutory Instrument are required to implement the Directive or what was incidental or supplementary thereto, or consequential thereupon. The respondents pointed to the case of *Secretary of State for the Home Department v. Hacene Akrich* C/109/01, a decision of the European Court of Justice. Shortly before this matter was heard, the Court of Justice handed down a judgment in the case of *Yunying Jia v. Migrationsverket (Migrations)* (case C-1/05). Mr. Shipsey S.C. on behalf of the applicants and Miss Moorehead S.C. on behalf of the respondents referred liberally to the opinion of Advocate General Geelhoed in the *Jia* case as identifying what would appear to be some inconsistencies in decisions of the Court of Justice represented by what he perceived to be a restrictive approach in the *Akrich* case to a more generous approach in other decisions. I think I may usefully adopt extracts from the Advocate General's opinion in the *Jia* case:-

"38. As indicated above, the Court's caselaw in this field is not entirely free from ambiguity. The Court has adopted both a generous and a restrictive approach to the conditions under which the rights granted in secondary Community legislation to third-country-national family members of Community citizens can be involved.

39. The generous approach was displayed in MRAX, where the Court stated that the right of a third-country national, married to a Member State national, to enter the territory of the Member States derives under Community law from the family ties alone. Although pointing out that Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148 permit the Member States to make the exercise of this right conditional on the possession of a visa (which is defined as an authorisation given or a decision taken by a Member State required for entry to its territory,) it observed that these same provisions require the Member States to grant the persons concerned every facility for obtaining the necessary visas. A policy of a Member State to send back at its borders a third-country-national spouse of a Community citizen who attempts to enter its territory without being in possession of a valid identity card, passport or a visa, where he is able to prove his identity and the conjugal ties and where there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health violates, *inter alia*, Article 3 of Directive 68/360 and Article 3 of Directive 73/148, read in the light of the principle of proportionality. Next, the Court ruled that on a proper construction of Article 4 of Directive 68/360 and Article 6 of Directive 73/148, a Member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third-country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully.

40. This ruling contrasts sharply with the Court's judgment in *Akrich,* in which it followed a more restrictive approach. This case involved a Moroccan national who had been unlawfully resident in the United Kingdom, had committed a number of criminal offences during his stay and, consequently, had been deported. Mr Akrich returned illegally to the United Kingdom, and married a British woman. After having worked in Ireland for six months, the couple attempted to return to the United Kingdom, invoking the rights granted to the spouses of Community workers by Article 10 of Regulation No 1612/68, as interpreted by the Court in *Singh*. Here, the Court emphasised that Regulation No 1612/68 covers only freedom of movement *within* the Community and that 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. In order to benefit, in a situation such as that at issue in the main proceedings, from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.

41. However, in *Commission v Spain*, which was decided more than a year after *Akrich*, in considering Spanish formalities to be complied with by third-country-national family members of migrant Community citizens prior to being able to apply for a residence permit, the Court again adopted the approach followed in *MRAX*. It repeated that the right to enter the territory of a Member State by a third-country-national who is the spouse of a national of a Member State derives from the family relationship alone. It concluded that a residence visa requirement imposed by Spanish legislation as a precondition for obtaining a residence permit and a refusal to issue such a permit to a third-country national who is a member of the family of a Community national, on the ground that he or she should first have applied for a residence visa at the Spanish consulate in their last place of domicile, constitutes a measure contrary to the provisions of Directives 68/360, 73/148 and 90/365. The Court did not refer to *Akrich* in its judgment.

42. There is, therefore, an apparent contradiction in the caselaw which results from the divergent approaches in *MRAX* and *Commission v Spain*, on the one hand, and *Akrich*, on the other hand. And, indeed, it is this difference in approach which prompted the Utlänningsnämnden to refer the case to the Court.

43. The basic question raised by *Akrich* is whether the rule laid down in that judgment only applies when it has been established by the national authorities that the third-country national concerned is unlawfully resident on the territory of a Member State. This would suggest that the rule applies not only when a person is legally resident, but even when the person is not unlawfully present on the territory of a Member State. In that case, following the *MRAX* approach, the family relationship with a migrant EU citizen would suffice to establish the right to enter and reside in a Member State.

44. This narrow reading of *Akrich* could be based on paragraph 50 of the judgment, where the Court explicitly refers to 'a situation such as that at issue in the main proceedings' as the context in which this rule applies. A pointer in the opposite direction, however, is its observation in the preceding paragraph in the judgment, where the Court states unequivocally that the relevant Community provisions only relate to freedom of movement within the Community and that they are silent in respect of admission to the territory of the Community.

45. In the light of these observations, it is fair to conclude that the law as it stands today in respect of the conditions under which third-country national family members of migrant EU citizens may invoke the rights granted to them by Regulation No 1612/68 and Directive 73/148 does not appear to be wholly consistent.

…

50. In *Akrich*, the Court first determined that a third-country national who is the spouse of a citizen of the Union who has exercised her right to free movement, but who is not lawfully resident in his spouse's Member State of origin, cannot invoke Article 10 of Regulation No 1612/68 to claim a right of residence in that Member State. Nevertheless, it qualified that judgment by pointing out that where the marriage is genuine, in deciding on whether to admit the third-country national concerned, despite his unlawful status under national immigration law, regard must be had to respect for family life under Article 8 of the ECHR. 'Even though the [ECHR] does not as such guarantee the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) [ECHR]. Such an interference will infringe the [ECHR] if it does not meet the requirements of paragraph 2 of that article ... .' Here, the Court adopted a more reticent approach than in *Carpenter* by leaving it to the national court to apply this test.

51. Finally, I would refer to the Court's judgments in *MRAX* and *Commission v Spain*, where it repeated its observation in *Carpenter* that it is apparent in particular from the Council regulations and directives on freedom of movement for employed and self-employed persons within the Community that the Community legislature has recognised the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty.

52. Having concluded at the end of the previous section that there is a certain degree of inconsistency in the caselaw regarding the law applicable to third-country-national family members of migrant Community citizens, the preceding observations suggest, in addition, that the outcome of these cases is to a large extent determined by the particular facts of each case. In an area such as immigration where decisions taken by the competent authorities affect the lives of individuals in a most fundamental manner, there is, however, a great need for clarity as to the scope of rights and predictability as to the manner in which the law is applied. In order to create greater transparency and to promote legal certainty, a more systematic and structural approach to the interpretation and application of the relevant Community provisions is required."

48. The Advocate General goes on to identify the precise problem with which we are dealing with here. He identifies what, in effect, is the proposition advanced on behalf of the applicant and the pitfalls which such an approach would present from the respondents viewpoint.

"67. To accept that third-country nationals who are not already lawfully resident within a Member State and who wish to join a national of a Member State who has exercised his freedom of movement enjoy an automatic right to enter and reside within the host Member State on the basis of the family relationship alone, without any intervention on the part of that Member State, would make it possible for them to circumvent national immigrations laws. Such an approach, therefore, undermines the Member States' powers in respect of controlling immigration at their external border."

49. In the words of counsel for the respondent, the Advocate General "put it up" to the Court of Justice to determine the issue.

50. In its judgment, the court said at paras. 28 to 33 inclusive:-

"28. In order to answer that question, it is helpful to recall the facts *Akrich's* case.

29. The referring court in that case was seised of an action against the refusal of the United Kingdom authorities to grant a residence permit to Mr Akrich, a national of a non-Member State married to a United Kingdom national. Mr Akrich did not have the right of residence in the United Kingdom and he had agreed to be deported to Ireland where he joined his wife who had installed herself there shortly before. The couple intended to return to the United Kingdom by taking advantage of Community law so that Mr Akrich could enter that country as the spouse of a citizen of the Union who had exercised her right to free movement.

30 It was in the light of that situation that the referring court asked the Court of Justice what measures the Member States were entitled to take in order to combat steps taken by members of the family of a Community national who did not meet the conditions laid down by national law for entry and residence in a Member State.

31 In the case in the main proceedings, 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, the applicant was lawfully in Sweden when she submitted her application 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.

32 It 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.

33 The answer to Question 1(a) to (d) must therefore be that, having regard to the judgment in *Akrich's* case. Community law does not require Member States to make the grant of a residence permit to nationals of a non-Member State, who are members of the family of a Community national who has exercised his or her right of free movement, subject to the condition that those family members have previously been residing lawfully in another Member State."

51. It appears, therefore, that the Court in *Jia* is at pains to distinguish the facts of that case from the facts in *Akrich*, emphasising, importantly, the lawfulness of Ms. Jia's presence in Sweden and the fact that she was not seeking to evade national immigration laws. The approach of the Court in the *Akrich* case cannot be transposed into the *Jia* case and cannot apply to such a situation. The court did not seek to disturb the approach of the court in *Akrich* or demur from it having regard to its particular factual background.

52. It seems to me that neither can the circumstances surrounding the present application fit the circumstances in the *Jia* case. Therefore, for the purposes of dealing with this application, the *Jia* decision should be left to one side. The facts of *Akrich* bear close resemblance to this application and it seems to me that the appropriate manner in which this application should be viewed would be to follow the view of the Court as enunciated in the *Akrich* decision.

53. As already noted, Mr. Akrich, a national of Morocco, was married to a citizen of the United Kingdom who was working in Ireland. He was deported from the United Kingdom to Ireland at his request. The case was considered under Regulation 1612/68. The issue was whether he would be entitled under that Regulation to return to the United Kingdom after a period of months on the basis that he was now married to an EU national.

54. When the matter was opened to me, the applicant's argument proceeded on what appeared to be a supposition that the marriage between Mr. Akrich and his wife was one of convenience. This was not the case either in the *Akrich* case nor is there any suggestion that such is the nature of the marriage between the applicants in this case. The court ruled as follows:-

"1. In order to be able to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation (EEC) No 1612/68 of the Council of 15th October, 1968 on freedom of movement for workers within the community, a national of a non-Member State married to 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.

2. Article 10 of Regulation No 1612/68 is not applicable where the national of a Member State and the national of a non-Member State have entered into a marriage of convenience in order to circumvent the provisions relating to entry and residence of nationals of non-Member States.

3. Where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their

legal situation by the competent authorities of the latter State.

4. Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation No 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the European Convention for the protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November, 1950, provided that the marriage is genuine.

55. The Court stated at paras. 48 to 54 inclusive:-

"48. The same consequences flow from Article 39 EC if the national of the Member State concerned envisages a return to that Member State in order to work there as an employed person. Consequently, where the spouse is a national of a non-Member State he must enjoy at least the same rights as would be granted to him by Article 10 of Regulation No 1612/68 if his or her spouse entered and resided in another Member State.

49. However, Regulation No 1612/68 covers only freedom of movement within the Community. It is silent as to the rights of a national of a non-Member State, who is the spouse of a citizen of the Union, in regard to access to the territory of the Community.

50. In order to benefit in a situation such as that at issue in the main proceedings from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-Member State, who is the spouse of a citizen of the Union, must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.

51. That interpretation is consistent with the structure of the Community provisions seeking to secure freedom of movement for workers within the Community, whose exercise must not penalise the migrant worker and his family.

52. Where a citizen of the Union, established in a Member State and married to a national of a non-Member State 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 spouse the right to install himself in that other Member State.

53. Conversely, where a citizen of the Union, established in a Member State and married to a national of a non-Member State 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 less favourable treatment than that which they enjoyed before the citizen made use of the opportunities afforded by the Treaty as regards movement of persons. Accordingly, the absence of such a right 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.

54. The same applies where a citizen of the Union married to a national of a non-Member State returns to the Member State of which he or she is a national in order to work there as an employed person. If the citizen's spouse has a valid right to remain in another Member State, Article 10 of Regulation No 1612/68 applies so that the citizen of the Union is not deterred from exercising his or her right to freedom of movement on returning to the Member State of which he or she is a national. If, conversely, that citizen's spouse does not already have a valid right to remain in another Member State, the absence of any right of the spouse under Article 10 aforesaid to install himself or herself with the citizen of the Union does not have a dissuasive effect in that regard."

56. The ruling therefore, was that the non-national spouse was not entitled to avail of the provisions of Regulation No. 1612/68 unless he was lawfully resident in another EU Member State. I am satisfied that it is this judgment that permits the consideration of whether or not a non-national spouse of a Member of an EU State was lawfully resident in another Member State. In my view S.I. No. 226/2006 reflects and gives effect to the 2004 Directive and the decision of the European Court of Justice in *Akrich*. I am of the view that the 2006 Regulations amount to an administrative implementation of the policies and principles of the 2004 Directive and take account of the scope and latitude afforded to individual Member States to enact and maintain the integrity of their respective immigration laws. I am not persuaded that the restrictive provisions of Regulation 3(2) of S.I. No. 226/2006 do other than make supplementary and consequential provision for the purposes of the Regulations having due regard both to the Directive and the jurisprudence of the Court of Justice as enunciated in *Akrich*. I am satisfied that the 2006 Regulations are *intra vires* and in accordance with law.

Does the first named applicant come within the intended scope of the Directive?

57. The question arises to whether or not the first named applicant comes within the scope of Directive 2004/38/EC and if so, is this fact reflected in the 2006 Regulations?

58. Clearly, at the applicants' alleged date of entry to this State they were not married nor had they contracted a registered partnership. Accordingly, whereas the second named applicant clearly fulfils the definition of "Union citizen", the first named applicant does not come within the definition of "family member" as set out in Article 2 of the Directive.

59. Ireland is the "host Member State" within the meaning of part 3 of Article 2, a status which obviously can only be achieved when the "Union citizen" moves to the Member State, in order to exercise his/her right of free movement and residence.

60. The intended beneficiaries of the Directive are clearly Unions citizens (such as the second named applicant) who have moved to or reside in a Member State other than that of which they are a national and to their family members who accompany or join them. The first named applicant was not such when the applicants entered Ireland. Clause 2 of Article 3 directs Member States to facilitate entry and residence*, inter alia*, of family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2, who, in the country from which they have come, are dependents or members of the household of a Union citizen having the primary right of residence or, for serious health grounds, strictly require the personal care of the family member by the Union citizen.

61. I think this helps us in identifying the intended scope of the Directive. Article 3 provides that the Directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national and to their family members, as

defined in point 2 of Article 2, who accompany or join them. The Directive also covers family members, irrespective of nationality, who, in the country from which they have come are dependents. It is clear, in my view, that the Directive is intended to apply to families which were established in a Member State prior to the move to the host Member State. It is intended to facilitate family members lawfully resident in another Member State who seek to join or accompany a spouse who is in employment or self-employment in the State i.e. the host State.

62. When the applicants came to Ireland they knew that the first named applicant was residing illegally in the United Kingdom having previously been refused asylum in Belgium. According to the affidavit filed on their behalf it would appear that it was the intention of the parties to formalise their relationship by marrying and residing within the State. It seems to me that the intention of the first named applicant in filing his asylum application was to buy time. He wanted to set up a temporary residence in the State with a view to the real aim, which was coming to live in this country, namely, to circumvent the immigration laws of this State. In ordinary circumstances, the applicant would require a valid visa to enter this State. He has not produced one, nor would it appear, has he applied for one. From the evidence before the court it would seem that the applicant has no valid legal right of residence in any EU Member State.

Constitutional Rights
63. On behalf of the applicants, Mr. Shipsey S.C. contended that the marital status enjoyed by the applicants since their marriage on 15th May, 2006, conferred upon them constitutionally protected rights. It is argued that the transfer order would result in the separation of the applicants and, as such, would be disproportionate and without lawful justification. It must be said that no consideration whatsoever was given to the marital status of the applicants when the transfer order was made, because the respondents simply did not know about it. Accordingly, in making the decision to transfer the first named applicant, proportionality could hardly arise. The applicants argue that they were being forced to live apart outside the jurisdiction of this State.

64. The applicants' argument dovetails into a further submission with regard to the applicants' right to respect for their private and family life under Article 8 of the European Convention of Human Rights and I will turn to this briefly. It would seem that Article 8 would not necessarily depend on the existence of a lawful marriage in order that its provisions might be invoked.

65. As a married couple under the Constitution it is clear that such a right is not absolute. In *Gashi v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Unreported, Clarke J., 3rd December 2004) referring the rights of the wife of a deported person and their Irish born child, Clarke J., says at p. 7 *et seq.*:-

> "However it is clear that both of them enjoy a non-absolute constitutional entitlement to live together as a family within the State but that the first named respondent may decide for good and sufficient reason that the husband be deported (or more accurately in this case remain outside the State by virtue of a refusal to revoke a deportation order) even though this affects the entitlements of the other parties provided that the first named respondent makes his decision having regard to all the circumstances of the case in a manner which is not disproportionate to the ends sought to be achieved.
>
> That the length of time during which a family has been established in the State may be a relevant circumstance in such a consideration is clear from the quotation with approval by Denham J. in the A.O. & D. L. case of a passage from the decision of the House of Lords in *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840 where Lord Philips held (in summarising the conclusions as to the approach of the Commission and the European Court of Human Rights in relation to potential conflicts between the respect for family life and the enforcement of immigration controls) that removal or exclusion of a family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 of the European Convention on Human Rights provided that there are no insurmountable obstacles to the family living together in the country to which the excluded member is to depart and even where this involves a degree of hardship for some or all members of the family but that nonetheless Article 8 is likely to be violated by the expulsion of a member of a family that have been long established in a State if the circumstances are such that it is not reasonable to expect the other members of the family to follow the member expelled. …
>
> It is also clear from the judgment of Denham J. referred to above that the interpretation of the balancing to be achieved in respect of family rights under Article 8 of the Convention is at least similar to the balancing exercise that needs to be engaged in where the family rights guaranteed by Article 41 of the Constitution are involved."

66. Since the balancing exercise under the Constitution is similar to that which is required under Article 8 it would be useful at this juncture to move straight to consideration of the applicants' Convention rights.

Convention rights
67. Article 8 of the European Convention of Human Rights provides as follows:-

> "Article 8
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

68. The respondents argue that such interference as might occur with the applicants' private and family life as a consequence of carrying out the transfer of the first named applicant to the Kingdom of Belgium would come within the rubric of para. 2 of Article 8. It is contended that a legitimate aim of the State, is to have regard to the integrity of the asylum and the immigration policy in the context of public order provided the principles of proportionality in respect of human rights are respected. It is argued that the case law of the European Court of Human Rights does not, in and of itself, guarantee a right to enter or remain in a particular country nor does it oblige a signatory State to accept the preferred State of residence of a married couple if one of the spouses does not have a legal right to remain in the State. The European Court of Human Rights accepts that the State does have the right to control the entry of non-nationals into its territory. Summarising the approach of the European Court of Human Rights on this issue in *R. (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840 Lord Philips says as follows at p. 861:-

> "1. A State has a right under International Law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

2. Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple.

3. Removal or exclusion of one family member from the state where other members of the family are lawfully resident will not necessarily infringe Article 8 provided there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.

4. Article 8 is likely to be violated by the expulsion of a member of a family that has long been established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow the member expelled.

5. Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious, militates against a finding that an order excluding the latter violates Article 8.

6. Further interference with the family rights justified in the interests of controlling immigration will depend on (i) the facts of the case and (ii) the circumstances prevailing in the state whose action is impugned."

69. The applicants referred to several decisions of the European Court of Human Rights (for example *Boultif v. Switzerland*, [2001] 33 E.H.R.R. 1179 and *Yildiz v. Austria*, 36 E.H.R.R. 553), cases where a ban on residence was judged by the court, *inter alia*, to be disproportionate even in circumstances where the parties affected by such residential ban were guilty of criminal offences.

70. Section 3(1) of the European Convention on Human Rights Act, 2003 provides:-

> "3(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions."

Conclusions

71. The first named respondent is, without doubt, an "organ of the State". Thus, in performing the executive function of making the transfer order, the first named respondent could not actively disregard or shut his eyes to a potential breach of a person's rights under the Convention. However, the question of compatibility has to be viewed on an individual, case by case basis and viewed against the backdrop of the jurisprudence of the European Court of Human Rights. Thus, for example, in viewing the actions of the Minister, one must have due regard to the rights of the State to govern its own immigration policies in accordance with the Constitution and the European Court of Human Rights and to maintain the integrity of same.

72. When the transfer order was signed, as already noted, the Minister was not aware that the applicants were married. Retracing our steps, the first named applicant entered the jurisdiction of this State illegally. He did not disclose that he had failed in his asylum claim in Belgium and I am satisfied that the asylum application which he made upon entry to the State was made solely for the purpose of obtaining such entry and staying here. His dishonesty in making his application for asylum is something which should, in my view, properly weigh in the balance in considering the applicants' constitutional and Convention rights. Were it not for his right to process his asylum application, he had no right, whatsoever, to reside in the State. It is probable that the second named applicant was fully aware of this state of affairs.

73. When the first named applicant applied for residence as a spouse of a citizen of a Member State, the application was considered under S.I. No 226/2006 and was refused. There is no apparent infirmity in that decision. The State was not obliged to permit the first named applicant to reside here simply because the applicants wished that such be the case.

74. The consequence is that the first named applicant would be transferred to another European Union country where, as proclaimed in the preamble of the Dublin II Regulation, rights of all nationals, and the rights of all parties under the European Convention of Human Rights, will be respected. This, of course, will include his rights under Article 8. The first named applicant made no submissions to the Refugee Appeals Commissioner under Article 3(2) of the Dublin II Regulation which permits a derogation that a Member State may examine an application for asylum notwithstanding that another Member State may be responsible for examining the application. The applicant could have argued that his application should be examined in this State rather than Belgium. He chose not to do so.

75. The first named applicant, who has no right to remain within this jurisdiction, is being transferred to a jurisdiction that will acknowledge, respect and have due regard to his rights under the European Convention on Human Rights, including his rights under Article 8 of the Convention. The Kingdom of Belgium is an appropriate place for his application to be dealt with. There is no evidence that there is any difficulty in the second named applicant joining her husband in Belgium and residing with him there until such time as his asylum application is finally determined. So too will her rights as an EU citizen be respected.

76. Circumstances may arise, for example, where a married person or persons might be removed to a jurisdiction where such couples' rights might not be vindicated, but that is not the case here.

77. I dismiss this application.