Neutral Citation Number: [2009] EWCA Civ 1060

Case No: C5/2008/2924

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ASYLUM AND IMMIGRATION TRIBUNAL
OA355582007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/10/2009

Before :

LORD JUSTICE RIX
LORD JUSTICE WALL
and
LORD JUSTICE AIKENS

- -

Between :

ZH (AFGHANISTAN)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Richard Drabble QC and Mr Alan Briddock (instructed by **Messrs Fisher Meredith, London**) for the **Appellant**
Mr Robert Palmer (instructed by **Treasury Solicitor, London**) for the **Respondent**

Hearing date: 1st July 2009

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Judgment

Lord Justice Aikens :

1. On 1 July 2009 this court heard an appeal by ZH, pursuant to ***section 103B*** of the ***Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"),*** against the decision of the Asylum and Immigration Tribunal ("AIT") to dismiss his appeal against the refusal by an Entry Clearance Officer ("ECO") in Islamabad of ZH's application for an European Economic Area family permit ("*EEA family permit*") under ***Regulation 12(1)*** of the ***Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations").*** Before us, the Respondent to the appeal ("the SSHD") had accepted that the reasoning in the Immigration Judge's decision and the Asylum and Immigration Tribunal's ("AIT") confirmation of that decision could not stand in the light of the judgment of the European Court of Justice ("ECJ") in ***Metock v Minister for Justice, Equality and Law Reform (Ireland)[1] – "the Metock case".*** However, Mr Robert Palmer, who appeared on behalf of the SSHD, submitted a Respondent's Notice and argued that the decision to refuse an EAA family permit could be upheld on other grounds on the facts as found in the tribunals below. This was disputed by Mr Richard Drabble QC, on behalf of ZH.

2. Having heard the arguments raised by the Respondent's Notice, we decided to allow the appeal and remit the matter to another AIT to reconsider the application anew, in the light of the decision in the ***Metock case.*** The court said that its reasons would be handed down in due course. These are my reasons for allowing the appeal and rejecting, for the present, the arguments raised in the Respondent's Notice.

The Facts

3. ZH is a national of Afghanistan. He was born on 20 July 1976. At some stage prior to 2002 ZH married in Afghanistan and he had a child by that wife. On 22 May 2002 he entered the UK illegally and claimed asylum. That application was refused on 1 October 2002. ZH made several attempts to appeal this decision and so he continued to live in the UK until 2006. During this time he met Irena Ziolkowska, a Polish national ("IZ" or "the Sponsor"), who is 17 years older than ZH. From August 2005 ZH lived with IZ and her son, who had come from Poland in May 2005.

4. In April 2006, ZH's wife and child in Afghanistan died. At about the same time ZH exhausted the various avenues of appeal on his asylum application and in June 2006 he was arrested as an absconder and detained. On 17 August 2006 he was removed to Afghanistan. He then moved to Pakistan.

5. Poland had become a member state of the European Union on 1 January 2005. On 6 September 2006 IZ, who was still living in the UK, was issued with an Accession State Worker Registration Card. IZ is a "worker" and so, for the purposes of ***Regulation 6(1)*** of the ***2006 Regulations***, is a "*qualified person*". In December 2006, IZ's son died. In April 2007 IZ travelled to Pakistan to see ZH.

6. On 14 May 2007 ZH and IZ were married in Pakistan. It is accepted by the SSHD that the ceremony was legal and that the marriage is to be regarded as legal for the general purposes of English law. IZ left Pakistan on 7 June 2007 and returned to the UK.

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1 ***Case C – 127/08, [2009] QB 318.***

7. In June 2007 ZH applied at the UK High Commission in Islamabad for an EEA Family Permit in order to rejoin his wife in the UK. Before the ECO made his decision he interviewed ZH. On 25 June 2007 the ECO refused the application, holding that ZH did not meet the requirements of ***paragraph 281*** of ***HC 395.*** Thus he was not satisfied that the parties intended to live together as spouses, that the marriage was subsisting or that the accommodation requirements of the Rules were met.

8. The ECO gave reasons for his refusal. He decided that the marriage was one of convenience. He noted in particular: (i) IZ was 17 years older than ZH, Polish and a widow, and that she did not share the same religion as him; (ii) the marriage was contrary to the tradition in Pakistan whereby marriages are arranged by parents and the family and they are between people of a similar age with no previous marriages (particularly the bride to be); (iii) therefore this marriage went "against cultural norms"; (iv) there was little evidence to show that the couple had lived together in the UK before ZH's removal; (v) IZ might fully intend to live with ZH but "*in a subsisting marriage it is your [ie. ZH's] intention that must be paramount in deciding this application"*. The ECO concluded that the "*pivotal"* factor in ZH's decision to marry IZ was her location in the UK. Therefore the ECO stated that he was not satisfied that the marriage was "*intended to be permanent or that [ZH] will live together in the UK with [IZ]"*. For good measure, the ECO concluded that IZ had been working illegally in the UK before she obtained her Accession State Worker Registration Card and so IZ's "*disregard for the Immigration Rules"* cast further doubt on the intentions of both parties to live together permanently in the UK. The ECO also found that the accommodation requirements of the relevant Immigration Rule had not been satisfied.

9. ZH appealed this decision and the appeal was heard by Immigration Judge Kopieczek. He heard oral evidence from IZ. The judge dismissed the appeal on 20 March 2008, holding that he was not satisfied that ZH had established that he intended to live permanently with IZ: [59]. Therefore ZH did not fulfil ***paragraph 281(iii)*** of ***HC 395*** and so did not satisfy the requirements of ***Regulation 12(b)(ii)*** of the ***2006 Regulations.***

10. The judge gave full reasons for his determination. He did not agree with the ECO's view that because the marriage was inconsistent with the cultural norms of the appellant's society the marriage could not be said to be a genuine one: [35]. He said that the evidence, or lack of it, "*raises doubts about the genuineness of [ZH's] commitment to [the Sponsor]":* [41]. He accepted that the appellant and IZ were "*in a relationship"* before the appellant was removed from the UK in 2006: [42]. He also accepted that ZH's relatives attended the marriage in Pakistan: [43]. The judge stated that IZ had satisfactorily explained the circumstances in which she became registered as a worker under the Accession State Worker Scheme and why she did not register earlier: para [46]. He was also satisfied that she intended to live permanently with ZH as his spouse: [46]. However he was not satisfied that "…*the appellant has established that he intends to live permanently with the Sponsor as her spouse":* [47] and [59]. IJ Kopieczek made a further finding at [60]:

> *"If the marriage could be said to be subsisting even though the appellant does not intend to live permanently with the Sponsor as her spouse, I am not satisfied that the marriage subsists for*

> *any reason other than the appellant's desire to secure entry to the United Kingdom".*

11. The Immigration Judge concluded that the appellant had not established the requirements of the EEA Regulations and the Immigration Rules for the issue of an EEA Family Permit: [61].

12. On 29 May 2008 Senior Immigration Judge Waumsley ordered a reconsideration of the case. Then on 25 July 2008 the ECJ handed down its decision in the ***Metock case.*** The AIT (Deputy – President Arfon – Jones and Senior Immigration Judge Jordan) heard the reconsideration on 19 August 2008. They were referred to the ***Metock*** decision. However, in the Determination and Reasons that were promulgated on 17 October 2008, the AIT held that the Immigration Judge had not made a material error of law. The appeal was dismissed. Effectively, the AIT held that the decision of the ECJ in ***Metock*** was not relevant to the requirement of the Immigration Rules that the parties intended to live with one another permanently. Therefore, although ***Metock*** might bear on the application of the ***2006 Regulations*** in so far as they implemented the ***2004 Directive,*** that decision did not affect the requirements of the Immigration Rules for the purposes of gaining entry clearance. So the appellant could not rely directly on the ***2004 Directive*** to support an appeal against a refusal to grant an entry permit in circumstances where he did not fulfil the Immigration Rules referred to in ***Regulation 12(1)(b)(ii)*** of the ***2006 Regulations:*** see [41] of the AIT Reasons.

The background to the Directive 2004/38/EC of the European Parliament and of the Council ("The 2004 Directive").

13. Before I can deal with the appeal, I should set out the relevant provisions of both the ***2004 Directive and*** the UK's ***2006 Regulations,*** which implemented the Directive. But first it is necessary to recall some of the history leading up to those provisions. In the 1990s, Member States of the European Union became concerned about two groups of principles which, in certain circumstances, could be in tension with one another. There are three main principles in the first group: the right to marry and found a family;[2] the ***ECHR*** principle that contracting states had a duty to respect the right for family life;[3] and the principle that states of the European Union should harmonize national policies on family reunification.[4] The second group of principles consisted of the right of all member states to maintain immigration policies and rules of entry and the right to have national policies to control the admission of third – country nationals. It was recognised by Member States that one way to circumvent those immigration policies was by so – called "marriages of convenience".

14. The Council of the European Union therefore passed a ***Council Resolution*** dated 4 December 1997 ("the ***1997 Resolution").*** The 1997 Resolution adopted a definition of a "marriage of convenience" for the purposes of the Resolution (para 1) and set out various factors which "*may provide grounds for believing that a marriage is one of convenience"* (para 2). I will set out paragraph 1:

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2 ***ECHR Art 12, Universal Declaration of Human Rights Art 16.***

3 ***ECHR Art 8.***

4 Resolution on the harmonization of national policies on family reunification (Copenhagen conclusions of 1 June 1993).

> *"For the purposes of this resolution, a "marriage of convenience" means a marriage concluded between a national of a Member State or a third – country national legally resident in a Member State and a third – country national, with the sole aim of circumventing the rules on entry and residence of third – country nationals and obtaining for the third – country national a residence permit or authority to reside in a Member State".*

15. The Resolution stated, in paragraph 3, that where there were factors that supported suspicions for believing that a marriage was one of convenience, then:

> *"Member States shall issue a residence permit or an authority to reside to the third – country national on the basis of the marriage only after the authorities competent under national law have checked that the marriage is not one of convenience, and that the other conditions relating to entry and residence have been fulfilled. Such checking may involve a separate interview with each of the two spouses".*

16. Paragraph 4 of the Resolution stated that if the authorities of Member States found that a particular marriage was one of convenience, then the residence permit or authority to reside that had been granted on the basis of the third – country national's marriage should *"…as a general rule be withdrawn, revoked or not renewed"*. Paragraph 5 stated that there should be a right of appeal on any decision to refuse, withdraw, revoke or not renew a residence permit or authority to reside.

The 2004 Directive.

17. On 29 April 2004, ***Directive 2004/38/EC*** of the European Parliament and of the Council was promulgated. This deals with the right of citizens of the European Union to move and reside freely within the territory of the Member States. It replaces the previous Regulation on the topic, applying to the workers and their family members which was ***Regulation (EEC) No 1612/68.*** The ***2004 Directive*** also repeals various other previous Directives.

18. The ***2004 Directive*** has 31 recitals, all after the opening word "*Whereas*". ***Recital 5*** refers to the right of all EU citizens to move and reside freely within the territory of the Member States. The recital states that this right:

> *"....should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality…'.*

19. ***Recital 28*** states:

> *"To guard against abuse of rights or fraud, notably marriages of convenience or any other form of relationships contracted for the sole purpose of enjoying the right of free movement and residence, Member States should have the possibility to adopt the necessary measures".*

20. The body of the Directive sets out various rights of citizens of the European Union and their family members. These are rights of exit and entry, rights of residence and rights of permanent residence. The Directive also has provisions on restrictions to the right of entry and the right of residence *"on grounds of public policy, public security or public health".*

21. For present purposes the relevant Articles of the Directive are ***Article 2*** (definitions), ***Article 3*** (defining who are the beneficiaries of the Directive), ***Article 27*** (restrictions on right of entry and right of residence on grounds of public policy etc.) and ***Article 35*** (headed *"Abuse of Rights").* The material parts of those Articles provide:

> *"Article 2*
>
> *Definitions*
>
> *For the purposes of this Directive:*
>
> *1) "Union Citizen" means any person having the nationality of a Member State;*
>
> *2)Family Member means:*
>
> *(a) the spouse*
>
> *....*
>
> *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.*
>
> *....*
>
> *Article 27*
>
> *General Principles*
>
> *1. Subject to the provisions of this Chapter, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security and public health. These grounds shall not be invoked to serve economic ends.*
>
> *2. Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*
>
> *The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interest of society. Justifications that are isolated from the particulars of*

the case or that rely on considerations of general prevention shall not be accepted…"

Article 35

Abuse of Rights

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the vase of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31."

The 2006 Regulations

22. The ***2006 Regulations*** implemented the ***2004 Directive*** in the UK. For the purposes of this case it is only necessary to set out the definitions of "*spouse"* and "*EEA family permit"* given in ***Regulation 2(1),*** part of the definition of "*Qualified person"* and *"Family member"* set out in ***Regulations 6(1)(b)*** and ***7(1)(a)*** and parts of ***Regulation 11,*** (Right of admission to the UK) and ***Regulation 12 (***Issue of an "*EEA family permit*"). A decision made under the ***2006 Regulations*** that concerns a person's entitlement to be admitted to the UK or to be issued with a residence card or other document connected with admission to the UK is defined in ***Regulation 2(1)*** as an "*EEA decision"*.

23. ***Regulation 26*** provides for appeal from an "*EEA Decision"*. A person claiming to be a "*family member"* of an EEA national may not appeal under the Regulations unless he produces either an *EEA family permit* or "*other proof that he is related as claimed to an EEA national"*.[5] Subject to exceptions which are not relevant in this case, a person cannot make in the UK an appeal against an "*EEA Decision"* to refuse to admit him to the UK; he must appeal "out of country".[6]

24. The terms of the material provisions of the ***2006 Regulations*** are:

"***General interpretation***

2. – (1) In these Regulations –

"EEA family permit" means a document issued to a person, in accordance with Regulation 12, in connection with his admission to the United Kingdom…

....

"spouse" does not include a party to a marriage of convenience;

....

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5 ***Regulation 26(3)(a) and (b).*** An appeal lies to the AIT: ***Regulation 26(6),*** but in the case of a refusal to issue an *EEA family permit,* it is (subject to exceptions nor relevant here) an "out of country" right of appeal: ***Regulation 27(1)(c).***

6 ***Regulation 27(1)(a).***

"Qualified Person"

6. – (1) In these Regulations, "qualified person" means a person who is an EEA national and in the United Kingdom as –

(a) a jobseeker;

(b) a worker

....

Family Member

7.-1 Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person –

(a) his spouse or civil partner;

....

Right of admission to the United Kingdom

11.-(1) An EEA national must be admitted to the United Kingdom if he produces on arrival a valid national identity card or passport issued by an EEA state.

(2) A person who is not an EEA national must be admitted to the United Kingdom if he is a family member of an EEA national, a family member who has retained the right of residence or a person with a permanent right of residence under regulation 15 and produces on arrival –

(a) a valid passport;

(b) an EEA family permit, a residence card or a permanent residence card.

(3) An immigration officer may not place a stamp in the passport of a person admitted to the United Kingdom under this regulation who is not an EEA national if the person produces a residence card or permanent residence card.

(4) Before an immigration officer refuses admission to the United Kingdom to a person under this regulation because the person does not produce on arrival a document mentioned in paragraph (1) or (2), the immigration officer must give the person every reasonable opportunity to obtain the document or have it brought to him within a reasonable period of time or to prove by other means that he is –

(a) an EEA national;

> *(b) a family member of an EEA national with a right to accompany that national or join him in the United Kingdom; or*
>
> *....*
>
> ***Issue of EEA family permit***
>
> *12. – (1) An entry clearance officer must issue an EEA family permit to a person who applies for one if the person is a family member of an EEA national and –*
>
> *(a) the EEA national –*
>
> *(i) is residing in the UK in accordance with these Regulations; or*
>
> *(ii)will be travelling to the United Kingdom within six months of the date of the application and will be an EEA national residing in the United Kingdom in accordance with these Regulations on arrival in the United Kingdom; and*
>
> *(b) the family member will be accompanying the EEA national to the United Kingdom or joining him there and –*
>
> *(i) is lawfully resident in an EEA State; or*
>
> *(ii)would meet the requirements in the immigration rules (other than those relating to entry clearance) for leave to enter the United Kingdom as the family member of the EEA national or, in the case of direct descendants or dependent direct relatives in the ascending line of his spouse or his civil partner, as the family member of his spouse or civil partner, were the EEA national or the spouse or civil partner a person present and settled in the United Kingdom."*

The decision of the ECJ in the *Metock case*.

25. The decision is important in this case for several reasons. First, it provides the definitive interpretation of the scope of the ***2004 Directive*** which the ***2006 Regulations*** implemented in the UK. Secondly, as Mr Palmer conceded on behalf of the SSHD, the decision confirms that a "family member" of an EU citizen within ***Article 2(2)*** of the ***2004 Directive*** has a directly enforceable right of entry and residence in the UK, subject to the operation of ***Article 35*** of the ***2004 Directive.*** Mr Palmer accepts that the reasoning in ***Metock*** means that the ***Immigration Rules*** can have no application to ZH in this case and that ***Regulation 12(b)(i) and (ii)*** of the ***2006 Regulations*** as presently framed are not lawful. That is why the decision of the AIT, which relied on ZH not complying with the Immigration Rules referred to in ***Regulation 12(b)(ii),*** could not be sustained. Thirdly, the decision confirms that Member States have not only the right to control the entry of family members of EU

Citizens into their territory but also the right to terminate or withdraw rights of entry and residence in case of abuse of rights or fraud, such as marriages of convenience. Mr Palmer relies heavily on the confirmation of those rights as the basis on which the appeal of ZH should be dismissed.

26. Mr Metock was a national of Cameroon. In 1994 he had met Ms Ngo Ikeng and they had had a relationship since then. She had British nationality. Mr Metock arrived in Ireland in June 2006 and applied for asylum, which was refused in February 2007. Ms Ikeng had lived and worked in Ireland from late 2006. Mr Metock and Ms Ikeng were married in Ireland in October 2006. In November 2006 Mr Metock applied for a residence card as the spouse of a European Union citizen working and residing in a Member State, viz. Ireland. In June 2007, the Minister for Justice refused the application, on the ground that Mr Metock did not satisfy the condition of "prior lawful residence" in another Member State that was required by Regulation 3(2) of the Irish European Communities (Free Movement of Persons) (No 2) Regulations 2006.[7] Mr Metock, Ms Ikeng and their children appealed that decision.

27. The argument of Mr Metock and family was that the condition of "prior lawful residence" was incompatible with the ***2004 Directive*** and that the Irish state was not entitled to impose that further condition before the grant of a family permit for entry. The Minister for Justice argued that Member States had the competence to regulate the admission into the Member State of any non – EU nationals who were coming to the Member State from outside Community territory.

28. The High Court of Ireland referred a number of questions to the ECJ for preliminary rulings on the construction and effect of the ***2004 Directive.*** The first two questions are relevant to the present case. They were posed in the following terms:

> *"(1) Does Directive 2004/38/EC permit a Member State to have a general requirement that a non -EU national spouse or a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order that he or she be entitled to benefit from the provisions of Directive 2004/38/EC?*
>
> *(2) Does Article 3(1) of Directive 2004/38/EC include within its scope of application a non – EU national who is a spouse of a Union citizen who resides in the host Member state and satisfies a condition in Article 7(1)(a),(b) [or](c)[8] and is then residing in the host Member State with the Union citizen as his/her spouse, irrespective of when or where their marriage*

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[7] That stipulated: "*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 family member, who is lawfully present in the State*".

[8] Those requirements are, broadly, that the EU citizen is a worker or a self – employed person in the host Member State (para (a)), or has sufficient resources not to become a burden on the social assistance system of the host Member State (para (b)), or has enrolled in an accredited educational establishment to study or do professional training, and has comprehensive sickness insurance or can certify that it will not be a burden on the social assistance system of the host Member State.

> *took place or when or how the non – EU national entered the host Member State?"*.

29. In dealing with the first question, the ECJ held that ***Article 3(1)*** of the Directive applied to all EU citizens who move to or reside in a Member State other than the one of which they are a national and it also applied to all "*family members*" as defined in ***Article 2(2).*** The definition of a "*family member*" did not distinguish between those who had and those who had not already resided lawfully in another Member State: [50]. The judgment referred to other provisions of the ***2004 Directive*** and concluded, at [54] that, as a matter of interpretation the Directive applied to:

> *".... all nationals of non - member countries who are family members of a Union citizen within [Article 2(2)] and accompany or join the Union citizen in a Member State other than that of which he is a national and as conferring on them rights of entry and residence in that Member State, without distinguishing according to whether or not the national of a non – member country has already resided lawfully in another Member State"*.

30. At [58], the judgment cites a previous decision of the ECJ, ***SSHD v Akrich,***[9] which had been referred to the ECJ by the IAT of the UK. In ***Akrich***, which had been decided under the previous EEC Regulation, ***No 1612/68***, the ECJ had held (in paras 50 and 51 of ***Akrich***) that a national of a non – member country who was the spouse of an EU citizen could only benefit from Article 10 of that Regulation[10] if he or she was lawfully resident in a Member State at the time that the EU citizen and the spouse migrated from one Member State to another. At [58] of ***Metock,*** the Court stated that the earlier conclusion, made under ***Regulation 1612/68,*** must now be reconsidered because "*the benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State"*.

31. At [65] of ***Metock***, the ECJ held that so far as the ***2004 Regulations*** were concerned, the Community legislature had the competence to regulate the entry and residence of nationals of non – member countries who were family members of an EU citizen in a Member State in which that citizen had exercised its right of freedom of movement "*…including where the family members were not already lawfully resident in another Member State"***.**

32. At [70] of ***Metock,*** the ECJ gave its definitive interpretation of the scope of the ***2004 Directive*** and thus the answer to the first question raised by the Irish High Court. The ECJ said:

> *"Consequently, Directive 2004/38 confers on all nationals of non – member countries who are family members of a Union citizen within the meaning of [**Article 2(2)**] of that Directive and accompany or join the Union citizen in a member State*

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9 ***Case Number C – 109/01, [2004] QB 756.***

10 Art. 10 of Reg 1612/68 gave a spouse (and minor dependents) the right to install her/himself with a worker who was a national of one Member State and who was employed in the territory of another Member State.

> *other than that of which he is a national, rights of entry into and residence in the host Member State, regardless of whether the national of a non – member country has already been lawfully resident in another Member State".*

33. At [73-75], the ECJ dealt with the "floodgates" argument of the governments of several Member States, ie. that this interpretation would have serious consequences for Member States because it would greatly increase the number of people who could benefit from rights of residence in the Community. The judgment pointed out, first, that only "family members" had these rights. Secondly, Member States had the power, under ***Article 27*** of the ***Directive,*** to refuse entry and residence on grounds of public policy, public security and public health "*…where this is justified".* Such a refusal would have to be based on an individual examination of the particular case.

34. At [75] the court stated:

> *"Moreover, in accordance with Article 35 of [the Directive], Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by that Directive in the case of abuse of rights or fraud, such as marriages of convenience, it being understood that any such measure must be proportionate and subject to the procedural safeguards provided for in that directive".*

35. On the second question, the ECJ concluded that a national of a non – member country does not have to be a family member of the EU citizen *before* that EU citizen has become established in a host Member State. The judgment stated at [92] that *"[It] makes no difference whether nationals of non – member countries who are family members of a Union citizen have entered the host Member State before or after becoming family members of that Union citizen".* The effect of this is that a national of a non – member country (A) can join (B), who is an EU citizen of a Member State, who has exercised a right of free movement to become established in another Member State, even before (A) has become a "*family member*" towards (B), so long as (A) becomes a *"family member"* of (B) after joining (B) in the host Member State.

36. However, the judgment confirms at [95] that Member States have the right to restrict the rights of nationals of non – member countries to join an EU citizen in a host Member State on grounds of public policy, public security or public health, under ***Article 27*** of the ***2004 Directive.*** In addition, the Member State can restrict rights of entry to avoid abuse of rights or fraud, such as marriages of convenience: [95].

The arguments of the parties in the present appeal.

37. On behalf of the SSHD, Mr Palmer submitted that the appeals should be dismissed for two reasons. He relied first on what he described as the "abuse of rights" doctrine in Community law. He submitted that, on the facts as found by the ECO and the Immigration Judge, the AIT ought to have concluded that ZH was guilty of an "*abuse of rights*" under ***Article 35*** of the ***2004 Directive.*** He submitted that ECJ case law,

as applied in the recent decision of this court in ***Filiz Sonmez v SSHD***[11] demonstrated that under the "abuse of rights" doctrine in Community law a person may not rely on a Community law provision in order to gain an advantage which conflicts with the purpose and aims of that provision. The advantage that ZH wished to obtain here was entry into a Member State, the UK, but not, in fact, as a genuine "*family member*" of IZ, an EU citizen. He submitted that the burden was on ZH to demonstrate that he was not guilty of an "abuse of rights".

38. Mr Palmer submitted, secondly, that ***Article 35*** of the ***2004 Directive*** is given specific effect in the ***2006 Regulations*** by ***Regulation 2(1)*** of the ***2006 Regulations,*** because that interpretation section stipulates that "*spouse*" does not include "*a party to a marriage of convenience*". He submitted that, on the facts, the marriage of ZH and IZ was, indeed, one of convenience. He argued that the recent decision of the AIT in ***IS (Serbia) v ECO Skopje***[12] demonstrated that, in the context of ***Regulation 12*** of the ***2006 Regulations,*** where the issue of "marriage of convenience" was raised on credible evidence, then there is an evidential burden on ZH to show that his marriage is not one of convenience.

39. Mr Drabble submitted that once it was conceded by the SSHD that the decision of the AIT could not be upheld, ZH was entitled to have both the AIT's decision and that of the Immigration Judge set aside and replaced with a decision that ZH was entitled, under the ***2004 Directive*** and the ***2006 Regulations*** to travel to, enter and reside in the UK as a "*family member*" of an EU citizen who has exercised her rights to enter and live in the UK. Therefore, he submitted, the ECO at Islamabad must issue a "*family permit*" to ZH, pursuant to ***Regulation 12(1)*** of the ***2006 Regulations.***

40. As a fall back position, Mr Palmer submitted that the case should be remitted to the tribunal to find facts and apply the law in the light of the ***Metock case.*** Mr Drabble submitted that the appeal should be allowed and there should be no remission to the tribunal. He accepted that ***Recital 28*** of the ***2004 Directive*** contemplated that Member States would be able to adopt "*necessary measures*" to guard against "*abuse of rights or fraud, notably marriages of convenience or any form of relationships contracted for the sole purpose of enjoying the right of free movement and residence [in Member States]*". He accepted, therefore, that "abuse of rights" or "fraud" was wider than "marriages of convenience". But he emphasised that ***Recital 28*** talked of the abuse of rights, fraud or marriage of convenience being contracted for the "*sole purpose*" of enjoying the right of free movement and residence. He submitted that the right granted to Member States in ***Article 35*** of the ***2004 Directive*** was therefore restricted to dealing with such types of abuse of rights, fraud or marriages of convenience. That was reflected in the requirement that the measures against such abuses had to be "*proportionate*". That restriction would, he submitted, be consistent with the approach that the House of Lords has laid down in ***Baia v SSHD (Nos 1 and 2),***[13] in which it considered the relationship between the right to marry in ***Article 12*** of the ***ECHR*** and UK statutory and regulatory provisions

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11 ***[2009] EWCA Civ 582,*** in the judgment of Dyson LJ at paras 53 – 69. Maurice Kay LJ agreed with Dyson LJ. Sedley LJ dissented on this point.

12 ***[2008] UKAIT 00031,*** at para 14 in particular.

13 ***[2009] 1 AC 287,*** particularly the remarks of Baroness Hale of Richmond at paragraphs 34 -36. Lord Rodger of Earlsferry, Lord Brown of Eaton – under – Heywood and Lord Neuberger of Abbotsbury agreed with Baroness Hale. Lord Bingham delivered a judgment also dismissing the appeals.

which purported to restrict such rights for non – EU immigrants into the UK. Baroness Hale stated, at paragraph [36] of the report that the Government would be free to deny any immigration advantage to a party to a marriage which had been entered into "*solely"* for the purpose of obtaining such an advantage.

41. Mr Drabble submitted that the burden of proof to demonstrate abuse of rights, fraud or that the marriage was one of convenience was upon the SSHD, not ZH. If necessary, he would submit that the conclusion of the AIT on this issue in ***IS (Marriages of Convenience) Serbia v ECO, Skopje*** was wrong. In any event, on the facts of this case, it was, he said, not a marriage of convenience, nor was it an abuse of rights. The parties had a relationship before marriage; there can be no doubt about the commitment of IZ to the relationship and the marriage is continuing for the present.

Analysis and Conclusions on the appeal.

42. I must deal first with the appeal itself. As I have already noted, the AIT held that ***Metock*** did not affect ***Regulation 12(b)(ii)*** of the ***2006 Regulations,*** in particular, the requirement of a "family member" who is joining an EEA national in the UK (ie. IZ in this case) to meet the "*requirements of the Immigration Rules (other than those relating to entry clearance) for leave to enter the United Kingdom…"*. That conclusion was wrong. ***Metock*** decides that it is the Community legislature that has the competence to regulate the conditions of entry and residence of the "family members" of the EU national, including the entry and residence of those "family members" who are nationals of non – member countries.[14] The ***2004 Directive*** does not permit the imposition of prior requirements that must be met by a "family member" who is a national of a non – member country, eg. prior lawful residence in another Member State, because the Directive confers directly on all nationals of non – member countries who are "family members" certain rights of entry into and residence in a host Member State.[15] It follows that the imposition of prior requirements on "family members" of EU nationals, such as those set out in ***paragraph 281*** of ***HC 395*** are not lawful because they are not permitted by the ***2004 Directive.***

43. Next I must explain why I reject, at this stage, the submissions of Mr Palmer on the points raised in the Respondent's Notice. As indicated, this raised two grounds on which it was said that the AIT decision could be upheld. I will deal first with the argument that this was a "marriage of convenience", therefore ZH was outside the definition of "spouse" for the purposes of the ***2006 Regulations.*** I will deal secondly with the argument that, on the facts, ZH's attempt to exercise the right of entry and residence granted by the ***2004 Directive*** as implemented by the ***2006 Regulations,*** would be an "abuse of rights", so he could not be permitted to exercise the right.

44. As to the first, the AIT stated, at [41] that the Immigration Judge "*fell short of making a finding that this was a marriage of convenience"*. The AIT itself made no such finding. Therefore, on the facts as found by the Immigration Judge and the AIT, it is not open to the SSHD before us to argue that this was a "*marriage of convenience*" for the purposes of the ***2006 Regulations,*** in order to argue that ZH is

14 See [64 and 65] of ***Metock.***

15 See [70] of ***Metock.***

not a "*spouse"* within the definition in ***Regulation 2(1),*** so that he cannot benefit from ***Regulation 12.*** In my view, however, an argument that this was a "*marriage of convenience*", within the terms of the ***2006 Regulation*** would be open to the SSHD at the re-hearing before the tribunal**.** Mr Drabble did not contend that an "issue estoppel" would prevent the SSHD from arguing that point (or the "*abuse of rights"* issue) at a re-hearing before the tribunal. The tribunal will have to consider the facts against the proper interpretation of "*spouse"* and "*marriage of convenience"* for the purposes of the ***2006 Regulations.*** But this ground for sustaining the appeal is not open to the SSHD before us.

45. As to the second ground, at no stage so far has the SSHD raised the "*abuse of rights*" argument as a reason for refusing ZH entry to the UK or the grant of an EEA family permit. The Immigration Judge did not find facts in relation to such an argument and he did not consider the legal issues that might be raised. Neither did the AIT. ***Metock*** has confirmed that the "*abuse of rights*" doctrine can be relevant to issues of rights of entry and residence in a Member State of nationals of non – member countries who are "*family members*" of an EU national. In my view it is open to the SSHD to argue at the re-hearing before the tribunal that the doctrine can be invoked to refuse ZH entry to the UK and to refuse to grant him an "EEA family permit". But it will be up to the tribunal to make any necessary findings of fact and to apply the law.

46. For those reasons, I would allow the appeal. I am conscious, however, that serious and difficult issues arise which concern: (i) the interpretation of the word "*spouse"* and the phrase "*marriage of convenience*" for the purposes of the ***2006 Regulations,*** (ii) whether it is the person seeking an EEA family permit or the SSHD that has the burden of proving that a marriage is a *"marriage of convenience"* for the purposes of the ***2006 Regulations;*** and (iii) the nature and application of the "*abuse of rights*" doctrine for the purposes of the ***2004 Directive*** and, therefore, the ***2006 Regulations.*** The points were fully argued before us. These issues will be raised at the re-hearing before the tribunal. When I prepared a first draft of this judgment I thought it would be possible and right to express some views on all three topics, in the hope of assisting the tribunal, although my views would not, strictly speaking, have been necessary for my decision on this appeal. However, having considered the issues and after discussion with Rix and Wall LJJ, I have decided that it is not sensible to give any views on these topics. On further reflection I think it will be much better that the tribunal should first find the further facts that might be relevant and, if further issues of law arise, they will be considered on appeal if necessary.

Disposal

47. Accordingly, the appeal is allowed. The case is remitted to a fresh tribunal to reconsider all matters. The appellant is entitled to the costs of the appeal and there should be a detailed assessment of them if they cannot be agreed.

Lord Justice Wall

48. I agree .

Lord Justice Rix

49. I also agree.