Asylum and Immigration Tribunal

HB (EEA right to reside - Metock) Algeria [2008] UKAIT 00069

THE IMMIGRATION ACTS

Heard at Field House
On 26 October 2007 and 19 May 2008

Before

SENIOR IMMIGRATION JUDGE STOREY
SENIOR IMMIGRATION JUDGE WARR

Between

HB

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: Mr J Rene (26 October 2007) and Mr C Lam (19 May 2008) instructed by Messrs David Tang & Co Solicitors
For the respondent: Mr Y Oguntolu (26 October 2007) and Miss F Saunders (19 May 2008), Home Office Presenting Officers

1. The ruling of the European Court of Justice in Metock (Case C-127/08 judgment 25 July 2008) establishes that a third-country national in the United Kingdom who is a family member of an EEA national (Union citizen) exercising Treaty rights here, is entitled to a right of residence on the basis of the family relationship alone. That right is not subject to a requirement of lawful residence.

2. However, this ruling does not mean that there is any change in the approach to deciding EEA appeals involving such family members. Such appeals have to be decided (as before) under the Immigration (European Economic Area) Regulations 2006 ("the 2006 Regulations"). Where the respondent's decision is to refuse to issue a residence card, the appellant, to succeed, must show not

only that he has a right of residence under reg 14(2) but that the respondent is obliged to issue a residence card under reg 17.

3. Where the family member is the spouse or civil partner of a United Kingdom national, he or she must first fulfil the conditions set out in reg 9. If the conditions set out in reg 9 are fulfilled, the family member must meet the requirements set out in the 2006 Regulations as they apply to family members of EEA nationals exercising Treaty rights.

4. Whether a person can succeed in establishing a right of residence as a family member will depend, inter alia, on (i) that person establishing that the family relationship is genuine and on whether (if invoked by the respondent) there are valid (ii) public policy (reg 21) or (iii) fraud grounds for denying him or her that right.

DETERMINATION AND REASONS

1. This case concerns a third-country national who claims a right to reside in the United Kingdom as a family member of a British national under European Community Law, notwithstanding that he is an illegal entrant and was so even before he married. Since it is one of the first cases to be decided in the light of the recent European Court of Justice (ECJ) case of Metock (Case C-127/08 Metock & ors judgment 25 July 2008), it is important that we set out our reasoning with some care. It will be apparent from what we go on to say that the ECJ ruling in Metock affects a number of Tribunal and Court of Appeal decisions. However, its ruling does not mean that there is to be any change to the method of deciding whether an EEA decision is in accordance with the law. As almost all of the relevant Community law dealing with the rights of citizens of the Union and their family members to move and reside freely within the territory of the Member States is now in the form of a directive - Directive 2004/38/EC (hereafter "the Citizens Directive") - decision-makers have to apply the relevant national law implementing this measure, namely the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003) (hereafter "the 2006 Regulations). That is because, whilst a directive is binding as to the result to be achieved, the Treaty leaves to the national authorities the choice of form and methods: Article 288 TEU. Only the failure on the part of a Member State to implement a directive correctly or within the time-frame required by the directive will result in an individual being able to rely for direct effect on the provisions of the Directive: Case 152/84 Marshall v South-West Hampshire Area Health Authority [1986] ECR 723. Otherwise it will only be where there is ambiguity in the meaning of a particular provision in the national implementing measure, that recourse can be had to EU or Community law: Webb v Emo Air Cargo (UK) Ltd [1993] WLR 49 (the doctrine of indirect effect). That is to say, the 2006 Regulations have to be applied, subject only to the doctrines of direct effect and indirect effect.

2. The appellant is a national of Algeria. This is a reconsideration of the determination by Immigration Judge Petherbridge notified on 4 May 2007 allowing his appeal against a decision by the respondent dated 9 March 2007 to refuse to issue a residence card as confirmation of a right of residence under European Community law as the non-EEA national family member of a British citizen. The immigration judge concluded that the

appellant had an enforceable Community right and at para 25 stated that he was "entitled to a Residence Document").

3. Following a hearing on 26 October 2007, a decision was taken to fix a new hearing on 19 May 2008 (so as to allow the parties to produce further evidence about the appellant's passport situation and to make submissions concerning the implications for this appeal of the latest ECJ case, Case C-291/05 Minister voor Vreemdelingenzaken en Integratie v Eind) at which the case would be heard by a panel. The parties were agreeable to this course. Soon after the hearing on 19 May, when the Tribunal became aware that another judgment by the ECJ, in the case of Metock, was imminent, we afforded both parties an opportunity to make further submissions once that judgment became available. We have taken into account both replies we received. Below we refer only to the submissions made by Mr Lam and Miss Saunders, since theirs both recapitulated and added to those made at the first hearing. So far as the submissions addressing Metock are concerned, those from Mr Lam essentially stated that the judgment in Metock vindicated the approach taken by the immigration judge in allowing the appeal. That from Miss Saunders on behalf of the respondent contended that Metock did not preclude Member States enacting immigration rules which were to be seen as part of what was meant by "public policy" within the meaning of Article 35 of the Citizens Directive. The respondent, she reiterated, had been entitled to deny the appellant a right of residence and to refuse to issue him with a residence card.

4. At the date of the hearing before the immigration judge the appellant did not hold a current Algerian passport: the one he brought with him to the UK expired on 18 March 1990. (More recently, on 2 May 2008, he has obtained a new Algerian passport.) He first came to the United Kingdom illegally in December 1996. Unless he is able to show he has acquired an EEA right, the position is that he is someone who has always been here illegally. On 3 June 2003 he married his wife, SH, who is a British citizen. On 31 March 2005 he and his wife went to the Republic of Ireland (hereafter "Ireland"). She found work there. Between 18 May 2005 and 7 November 2005 she worked for two different employers in Dublin. Shortly after 7 November 2005 they returned to the United Kingdom. On 20 February 2006 the appellant applied under "Surinder Singh" (a reference to the ECJ decision, C-370/90 Surinder Singh ex parte SSHD [1992] ECR 1-4265) for a residence document as the non-EEA family member of a British citizen who had been employed in another Member State for over six months, but that application was refused on 10 April 2006, as no passport was produced to confirm the appellant's wife's nationality. On 1 September 2006 he applied again for a residence permit. He was again refused, this time because he had not been lawfully resident in Ireland, because no evidence had been produced to show that he and his wife lived together in Ireland and because no evidence had been produced to show that the appellant's wife was exercising Treaty rights in Ireland prior to coming to the UK.

5. The immigration judge noted that the respondent had refused to issue a residence permit under regulation 9(2) (a) and (b) of the 2006 Regulations. He accepted that the appellant and his wife went to the Republic of Ireland on 31 March 2005, that she undertook employment (in two different jobs) there between May 2005 - November 2005

and that the couple had lived together there during this time. He also accepted that theirs was a genuine marriage and that they lived together in a loving relationship.

6. In deciding to allow the appeal the immigration judge wrote:

> "20. With regard to the 2006 Regulations, it is not a requirement that the Appellant had to be lawfully resident in an EEA State. That was the position under the 2000 Regulations, but not repeated under the 2006 Regulations.
>
> 21. The requirement under Section 9(2)(b) of the Regulations is that the parties have to be "living together" before the United Kingdom national (the Appellant's wife) returned to the United Kingdom.
>
> 22. The evidence is that the Appellant and his wife were living together in the Republic of Ireland throughout the time that they were in that country and during which time the Appellant's wife was in full-time employment."

7. At para 24 the immigration judge considered that the effect of the decisions of the ECJ in C-6-60/00 Carpenter v Secretary of State for the Home Department [2002] ECR I-6279, C-105 Jia v Migrationsverket, C-459/99 Mouvement contre le racisme, l'antisemitisme and la xenophobie ASBL (MRAX) v Belgian State [2002] ECR 1-6591 and C-15703 Commission of Spain per A-G Stix-Hackl was that:

> "…Community law did not require a Member State to take [sic] the grant of a Residence Permit to nationals of a non-Member State, who are members of the family of the Community national who has exercised his/her rights of free movement, subject to the conditions that those family members have previously been residing lawfully in another Member State – see paragraph 33 of Jia."

8. He concluded as follows:

> "35. I am satisfied that the Appellant has discharged the burden of proof, on a balance of probabilities, on the documentary evidence before me that he and his wife have lived in the Republic of Ireland for the period of over 6 months. The Secretary of State's assertion that the Appellant had to be lawfully in another EEA Member State, is not correct as a matter of law and on this point I follow the determination in Jia."
>
> 36. The Appellant is, therefore, entitled to a Residence Document as the [husband] of SH.

9. The respondent's grounds for reconsideration contended that in finding that the appellant did not have to be lawfully resident in another EEA Member State prior to coming to the UK the immigration judge materially erred in law. Reference was made to Surinder Singh and also to Case C-109/01 Akrich v SSHD [2003] ECR I-9607. The grounds further contended that the immigration judge erred in considering that his decision to allow the appeal was in line with the case of Jia. Contrary to what the immigration judge thought, the grounds stated, "Jia does not address the issue of non-EU family members of EU nationals who do not have leave or who have never had leave to enter/reside in the EU and therefore the principle of prior lawful residence within the EU is still relevant." In Jia, the grounds added, the appellant was lawfully resident at the time of the application and therefore consideration of that application was appropriate. By contrast, the appellant in this case was never lawfully resident in the UK or Ireland.

The 2006 Regulations

10. As already intimated, the decision under appeal was an EEA decision which had been made under United Kingdom law implementing the Citizens Directive: the 2006 Regulations. If the appellant could show that he met the relevant requirements of the 2006 Regulations, he was entitled to succeed in his appeal. If he could not show he met those requirements, it would still be necessary to assess whether he was entitled to succeed on the basis of the Citizens Directive or Community law directly. We turn first, therefore, to examine his position under the 2006 Regulations.

11. It is not in dispute that the appellant is the spouse of a British citizen and that theirs is a genuine marriage. Nor is it now in dispute that the couple spent a period of over six months in another Member State (Ireland) in 2005/2006 during which the appellant's spouse was residing in an EEA State (Ireland) as a "worker" (within the meaning of Community law) before returning to the United Kingdom; and that when the couple returned to the UK the appellant's spouse found employment and so was a "qualified person" within the meaning of regulation 6 of the 2006 Regulations. Reg 6(1) states that:

> " …"qualified person" means a person who is an EEA national and in the United Kingdom as-
> …
> (a) a worker;
> …"

12. The parties accept that against this background the immigration judge was correct to look at the appellant's position under reg 9, since that provision is headed "Family members of United Kingdom nationals". But for the inclusion of reg 9 the appellant's spouse, being a UK national, could not be treated as an EEA national because reg 2 defines EEA national to mean a national of an EEA State "…other than the United Kingdom". However, in order to reflect the principle established by the ECJ in Surinder Singh,(and no doubt to ensure the definition of family member in what is now reg 7 was not at odds with this judgment), the United Kingdom Government in its EEA Regulations has sought to ensure that persons in a similar situation could benefit from EEA rights. The predecessor to the 2006 Regulations, the Immigration (European Economic Area) Regulations 2000 (hereafter "the 2000 Regulations"), contained a similar but not identical provision at para 11). Reg 9 of the 2006 Regulations states:

> " (1) If the conditions in para (2) are satisfied, these Regulations apply to a person who is the family member of a United Kingdom national, as if the United Kingdom national were an EEA national.
>
> (2) The conditions are that:
> (a) The United Kingdom national is residing in an EEA State as a worker or self-employed person or was so residing before returning to the United Kingdom; and
> (b) if the family member of the United Kingdom national is his spouse or civil partner, the parties are living together in the EEA State or had entered into a marriage or civil partnership and were living together in that State before the United Kingdom national returned to the United Kingdom.
>
> (3) Where these Regulations apply to the family member of a United Kingdom national, the United Kingdom national shall be treated as holding a valid passport issued by the EEA State for the purposes of the application of Regulation 13 to that family member."

13. By dint of reg 9 a United Kingdom national spouse can be treated for the purposes of establishing his or her spouse's EEA rights "as if he were an EEA national". It can be seen that two of the main conditions set out in reg 9 are that the UK national spouse (or civil partner) must be or must have been residing in an EEA State as a worker or self-employed person prior to returning to the UK and that the parties to the marriage (or civil partnership) must be living together or must have lived together in that EEA State before returning to the UK.

14. What then of the immigration judge's consideration of the appellant's position under reg 9? Although his determination said little about this, it is sufficiently clear that he was satisfied that the appellant met the conditions specified in this regulation in full, since he found that the appellant's wife: (i) was a United Kingdom national; (ii) had been residing before returning to the United Kingdom in an EEA State (Ireland); (iii) had been a worker there within the meaning of reg 4(1)(a); and (iv) that she and the appellant had been living together in that State (Ireland) before they returned to the United Kingdom.

15. In the course of concluding that the appellant met all the conditions specified in reg 9 the immigration judge specifically rejected the contention of the respondent in the reasons for refusal letter that in order to comply with reg 9 the appellant had to show he had been lawfully resident in Ireland, which he could not. He pointed out, correctly in our view, that although prior lawful residence was a requirement of the 2000 Regulations, the 2006 Regulations had omitted such a requirement. Reg 11 of the 2000 Regulations had stated:

> "11. Family members of United Kingdom nationals
>
> (1) If the conditions in paragraph (2) are satisfied, these Regulations apply to a person who is the family member of a United Kingdom national returning to the United Kingdom as if that person were the family member of an EEA national.
>
> (2) The conditions are that –
>
> (a) after leaving the United Kingdom, the United Kingdom national resided in an EEA State and –
>
> (i) was employed there (other than on a transient or casual basis):
>
> or
>
> (ii) established himself there as a self-employed person;
>
> (b) *the family member of the United Kingdom national is lawfully resident in an EEA State* [NB. This was substituted from 7 February 2005, by SI 2005/47];
>
> (c) on his return to the United Kingdom, the United Kingdom national would, if he were an EEA national, be a qualified person; and
>
> (d) if the family member of the United Kingdom national is his spouse, the marriage took place, and the parties lived together in an EEA State, before the United Kingdom national returned to the United Kingdom." (Emphasis added)

16. It is unnecessary to analyse all the differences between the provision for family members of UK nationals under these Regulations and the 2006 Regulations. It suffices for our purposes to observe that reg 11(2)(b) clearly stipulated a requirement of lawful residence in an EEA State. In this respect it bears some similarity with the Irish Regulations which were the subject of contention in Metock: see below para 26ff).

17. Plainly the appellant would not have been able to satisfy the requirements of reg 11 of the 2000 Regulations (which required prior lawful residence in an EEA State). And, of

course, at the time the appellant returned with his wife from Ireland and applied for a residence document and at the time when the respondent refused that application (10 April 2006) , the law that then applied was still that set out in the 2000 Regulations (the 2006 Regulations did not come into force until 30 April 2006). But both the application (1 September 2006) and the decision (9 March 2007) which are the subject of this appeal were made after the 2006 Regulations came into force. And (unlike the Irish Regulations which the ECJ in Metock found incompatible with Community law: see below para 26ff)) the 2006 Regulations do not contain a condition of prior lawful residence.

18. Hence the immigration judge was correct to find that the appellant met the conditions of reg 9 in full.

19. However, contrary to what the immigration judge assumed and what Mr Lam submitted to us, the ability of the appellant to fulfil or not fulfil the conditions specified in reg 9 is not the "only" question or issue. It may be that both were encouraged to think it was the only issue by the respondent's reference in the refusal decision to deciding it under (or by reference to) regulation 9. But in law the appellant could not and cannot succeed in establishing a right of residence purely on the basis of reg 9. All that reg 9 does is establish that someone who meets its requirements is entitled to be treated *on the same basis as* the family member of an EEA national. Put another way, reg 9 of the 2006 Regulations affords a *gateway only* for family members of UK nationals in order to seek to benefit from other provisions of the Directive. If they can meet reg 9's conditions, then they are entitled to have their applications/appeals considered on the same basis as family members of nationals of other Member States; but no more than that. So although the appellant in this case was clearly able to pass through the gateway of reg 9, the question remains, was he entitled (as the immigration judge found), as the family member of an EEA national, to be granted a residence card after he had returned to the UK with his spouse?

20. The immigration judge did not seek to show how he thought the appellant could establish entitlement under provisions of the 2006 Regulations other than reg 9. Nor for that matter did either party seek to address this: both relied for the rest on ECJ case law. We will come to that shortly, but (for reasons explained in para 1 above) it is first necessary to determine the appellant's position under other relevant provisions of the 2006 Regulations.

21. Part 2 of these Regulations, (headed "EEA RIGHTS"), deals with the right of admission (reg 11), issue of EEA family permit (reg 12), initial right of residence (reg 13), extended right of residence (reg 14) and permanent right of residence (reg 15). It is apparent that this grouping of rights falls into two main categories. Regulations 11 and 12 consider the position of a person seeking either pre-entry permission to accompany or join an EEA national (regulation 12) or admission to the UK (regulation 11). Regulations 13-15 deal with the position of persons who have been admitted, i.e. with the in-country position. Also of relevance is reg 17 whose relevant parts state:

"(1) The Secretary of State must issue a residence card to a person who is not an EEA national and is the family member of a qualified person or of an EEA national with a permanent right of residence under regulation 15 on application and production of –

(a) a valid passport; and

(b) proof that the applicant is such a family member

…

(2) On receipt of an application under paragraph (1) and (2) and the documents that are required to accompany the application the Secretary of State shall immediately issue the applicant with certificate of application for the residence card and the residence card shall be issued no later than six months after the date on which the application and documents are received.

(3)…

(8) But this regulation is subject to regulation 20(1)".

22. The decision under appeal was a refusal to issue the appellant a residence card. Deciding whether that decision was correct or not divides into two parts. First, there is the issue of whether the appellant has a right of residence and second the matter of whether he can meet the documentary requirements set out in reg 17.

The first issue: whether the appellant has a right of residence

23. The most obvious regulation having application to the appellant is reg 14(2). Reg 14 states in full:

" 1) A qualified person is entitled to reside in the United Kingdom for so long as he remains a qualified person.

2) A family member of a qualified person residing in the United Kingdom under paragraph (1) or of an EEA national with a permanent right of residence under regulation 15 is entitled to reside in the United Kingdom for so long as he remains the family member of the qualified person or EEA national.

3) A family member who has retained the right of residence is entitled to reside in the United Kingdom for so long as he remains a family member who has retained the right of residence.

4) A right to reside under this regulation is in addition to any right a person may have to reside in the United Kingdom under regulation 13 or 15.

5) But this regulation is subject to regulation 19(3)(b)."

24. This regulation is clearly intended to implement Art 10 of the Citizens Directive and reg 14(2) is closely modelled on Article 10(2) which provides that "[t]he right of residence provided for in paragraph 1 shall extend to family members who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c)."

25. As Mr Lam emphasised, neither reg 14(2) nor Article 10(2) stipulates a need for an applicant/appellant to be someone who has lawful residence in the UK or prior lawful residence in another Member State. In Mr Lam's view, to read into reg 14 such a requirement would be contrary to the schema of the 2006 Regulations since the right conferred by it was made subject (by regulation 14(5)) to reg 19(3)(b). The latter stipulates that a person who has been admitted to, or acquired a right to reside in, the United Kingdom under these Regulations may be removed from the United Kingdom if – "he would otherwise be entitled to reside in the United Kingdom under these Regulations but the Secretary of State has decided that his removal is justified on the grounds of public

policy, public security or public health in accordance with regulation 21". If the decision-maker wished to penalise a person for illegal or unlawful residence, that was possible but only if there were public policy etc grounds.

26. In seeking to construe reg 14, we remind ourselves that although the 2006 Regulations are part of national law they were enacted in order to implement a Directive and as such we must adopt a Community law approach to their construction, i.e. that we must construe them as far as possible, in the light of the wording, context and purpose of the Citizens Directive, paying particular regard to that Directive's purpose, in order to achieve the result pursued (Case C-106/89 Marleasing [1990] ECR I-4135, para 8). Since the Citizens Directive has now been the subject of a close examination and a clear ruling by the ECJ in Metock, a ruling which impacts directly on our task of interpreting reg 14, it is to the Court's approach in this case that we must now turn. It concerned a reference made by the Irish High Court who had to consider four applications for judicial review each seeking inter alia an order of certiorari quashing the decision of the Irish Minister for Justice, Equality and Law Reform refusing to grant a residence card to a national of a non-member country married to a Union citizen residing in Ireland under the European Communities (Free Movement of Persons) (No 2) Regulations 2006. Mr Metock, a national of Cameroon, arrived in Ireland on 23 June 2006 and applied for asylum. His application was definitively refused on 28 February 2007, but he married a United Kingdom national in Ireland on 12 October 2006. Mr Ikogho, a national of a non-Member State, arrived in Ireland in November 2004 and applied for asylum. That application was unsuccessful and a subsequent deportation order was upheld by the High Court on 19 June 2007. Before then he had married a United Kingdom national in Ireland on 7 June 2006. Mr Chinedu, a Nigerian national, arrived in Ireland in December 2005 and applied for asylum. His application was definitively refused on 8 August 2006. He married a German national resident in Ireland on 3 July 2006. Mr Igboanusi, a Nigerian national, arrived in Ireland on 2 April 2004 and applied for asylum. Following refusal of that application a deportation order was made against him on 15 September 2005. He married a Polish national on 24 November 2006. The Irish Regulations imposed on family members a requirement, inter alia, of lawful residence in another Member State. The High Court referred three questions to the Court for a preliminary ruling. In the event only two were found to require a ruling. These questions were:

> "(1) Does Directive 2004/38/EC permit a Member State to have a general requirement that a non-EU national spouse of 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) and
>
> - is then residing in the host Member State with the Union citizen as his/her spouse

> Irrespective of when or where their marriage took place or when or how the non-EU national entered the host Member State?"

27. At para 101 the Court's ruling on the first question was as follows:

> "1. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive."

28. So far as the Court's answer to the first question is concerned, it is clear that its ruling that national legislation cannot impose a requirement of prior lawful residence does not impact on the UK's 2006 Regulations: unlike the corresponding Irish Regulations they do not impose a condition of prior lawful residence; but it is perhaps worth noting that the final words of the ruling make it clear that it is given in the context of the other requirements of the directive itself.

29. It is a separate matter whether the Court's ruling, taken together with its earlier jurisprudence, in particular Case C-267/83 Diatta v Land Berlin [1985] ECR 567, impacts on the requirement at reg 9(2)(b) that the parties are/were "living together in the EEA State" before returning to the UK. However, we do not need to decide this matter since on the facts of this case it is agreed that the couple did live together in another Member State (Ireland) before returning to the UK. All we would observe is that (except arguably in relation to the "living together" requirement: see below para 30) it is not immediately obvious that the Court's ruling in Metock precludes national legislation in the form of reg 9 of the 2006 Regulations. Article 2(3) of the Citizens Directive gives the following definition of "host Member State":

> "'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".

30. On its face such a definition would appear to exclude from being a "host Member" State the Union citizen's own state. Further, as we have just seen, Metock was concerned with four cases in which subsequent to arrival in Ireland (and lodging an asylum application) the non-EU national married a national of another Member State who was living and working in Ireland, i.e. married someone who was not a host Member State national. On its face reg 9 complies with (and was indeed intended to give effect to) the judgment of the ECJ in an earlier case, Surinder Singh. In the latter case the Court confirmed the general principle that nationals of a Member State cannot invoke Community rights of free movement or residence without themselves having sought to exercise them in another Member State (see also Cases C-64/96 and C-65/96, Uecker and Jacquet v Land Nordrhein-Westfalen [1997] ECR 1-3 171). Surinder Singh was able to succeed because his wife (a British citizen) exercised rights of movement and residence in another Member State (Germany) before returning with him to her host Member State (the

United Kingdom). If the basic principles enunciated in Surinder Singh (and relied on by the Tribunal in GC (Citizens Directive: UK national's spouse) China [2007] UKAIT 00056 and the Court of Appeal in GC (China) [2008] EWCA Civ 623 (see below paras 58,64)) remain correct, then there is nothing contrary to Community law or the Directive (which does not address the Surinder Singh situation) in continuing to require family members of UK nationals to show that the UK national has worked or been self-employed in another Member State and that they have at least resided there together.

31. The Court's answer to the second question, however, has a direct impact on the appellant's case. Its ruling was:

> "Article 3(1) of Directive 2004/38 must be interpreted as meaning that a national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State."

32. Earlier the Court had drawn attention to various provisions of the Citizens Directive, recitals 1, 4, 5 and 11 in the preamble and Articles 3(1), 6 and 7 and had then concluded:

> " 87. First, none of those provisions requires that the Union citizen must already have founded a family at the time when he moves to the host Member State in order for his family members who are nationals of non-member countries to be able to enjoy the rights established by that directive.
>
> 88. By providing that the family members of the Union citizen can join him in the host Member State, the Community legislature, on the contrary, accepted the possibility of the Union citizen not founding a family until after exercising his right of freedom of movement.
>
> 89. That interpretation is consistent with the purpose of Directive 2004/38, which aims to facilitate the exercise of the fundamental right of residence of Union citizens in a Member State other than that of which they are a national. Where a Union citizen founds a family after becoming established in the host Member State, the refusal of that Member State to authorise his family members who are nationals of non-member countries to join him there would be such as to discourage him from continuing to reside there and encourage him to leave in order to be able to lead a family life in another Member State or in a non-member country.
>
> 90. It must therefore be held that nationals of non-member countries who are family members of a Union citizen derive from Directive 2004/38 the right to join that Union citizen in the host Member State, whether he has become established there before or after founding a family.
>
> 91. Second, it must be determined whether, where the national of a non-member country has entered a Member State before becoming a family member of a Union citizen who resides in that Member State, he accompanies or joins that Union citizen within the meaning of Article 3(1) of Directive 2004/38.
>
> 92. 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, since the refusal of the host Member State to grant them a right of residence is equally liable to discourage that Union citizen from continuing to reside in that Member State.
>
> 93. Therefore, in the light of the necessity of not interpreting the provisions of Directive 2004/38 restrictively and not depriving them of their effectiveness, the words 'family members [of Union citizens] who accompany … them' in Article 3(1) of that directive must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member

countries entered that Member State before or after the Union citizen or before or after becoming his family members.

94. Application of Directive 2004/38 solely to the family members of a Union citizen who 'accompany' or 'join' him is thus equivalent to limiting the rights of entry and residence of family members of a Union citizen to the Member State in which that citizen resides.

95. From the time when the national of a non-member country who is a family member of a Union citizen derives rights of entry and residence in the host Member State from Directive 2004/38, that State may restrict that right only in compliance with Articles 27 and 35 of that directive.

96. Compliance with Article 27 is required in particular where the Member State wishes to penalise the national of a non-member country for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of a Union citizen.

97. However, even if the personal conduct of the person concerned does not justify the adoption of measures of public policy or public security within the meaning of Article 27 of Directive 2004/38, the Member State remains entitled to impose other penalties on him which do not interfere with freedom of movement and residence, such as a fine, provided that they are proportionate (see, to that effect, *MRAX*, paragraph 77 and the case-law cited).

98. Third, neither Article 3(1) nor any other provision of Directive 2004/38 contains requirements as to the place where the marriage of the Union citizen and the national of a non-member country is solemnised."

33. In the light of the Court's ruling on the second question, it is plain that reg 14 cannot be read as imposing any requirement of lawful residence. It requires neither that a third country national family member be able to show prior lawful residence in another Member State nor lawful residence in the host Member State.

34. It is true that unlike this case, which concerns the family member of a United Kingdom national, Metock was concerned with four cases in which subsequent to arrival in Ireland (and lodging an asylum application) the non-EU national married a *national of another Member State* who was living and working in Ireland, i.e. married someone who was not a host Member State national. But in the light of our analysis of reg 9 of the 2006 Regulations as being a "gateway", it follows that persons who pass through that gateway are entitled to have their applications/appeals considered on the same basis as family members of nationals of other Member States exercising Treaty rights. The appellant in this case was able to pass through the reg 9 gateway.

The documentation issue

35. It might be thought straightforward, therefore, that the appellant is entitled to succeed under the 2006 Regulations, reg 14 in particular. However, in the appellant's case there is a further difficulty. When he came to the UK he came illegally. On the evidence before us his entry into Ireland and his re-entry to the UK were effected without the production of either a valid passport or an EEA family permit or a residence card. He was not someone therefore who could show he had been entitled on return from Ireland to the right *of admission* since he was required by the applicable EEA Regulations (then reg 12(2) of the 2000 Regulations) to produce on arrival either a valid passport or a residence permit. The same obstacle would have confronted him had he sought admission after 30 April 2006, since reg 11(2) of the 2006 Regulations similarly provides:

"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…and produces on arrival-

(a) a valid passport;
(b) an EEA family permit, a residence card or a permanent residence card."

36. Nor, even after 30 April 2006, was the appellant in a position to have qualified under the new EEA right introduced by reg 13, to an *initial right of residence*, firstly because that right depends on his having had a right of admission and secondly because he did not hold a "valid passport". Not having a right of admission to the UK and not holding a valid passport the appellant was not in a position to qualify, further, for an initial right of residence since reg 13(2) provides that:

"A family member of an EEA national residing in the United Kingdom under paragraph (1) who is not himself an EEA national is entitled to reside in the United Kingdom *provided that he holds a valid passport* ." (Emphasis added)

37. How does that affect the appellant's eligibility for an "*extended right of residence*" under reg 14(2)?

38. We have considered the following argument which might be raised against the appellant, based on the fact that at the date of decision he did not have a valid passport. Although reg 14(2) does not impose a requirement of lawful residence, it is entitled "Extended right of residence", and so might be considered to be a right dependent on there being something to extend, namely an initial right of residence within the meaning of reg 13. In support of such a construction there is the fact that reg 14(2) refers to the need for a person to show he "remains" (not "is") the family member of a qualified person. If at the date by which the immigration judge promulgated his decision the position was that the appellant had never produced to any UK authority a valid passport (and accordingly never qualified for a right of admission or an initial right of residence) how can it be said that he ever had a right of residence to extend?

39. In support of such an argument, it could be added that the requirement for the national of a non Member State who asserts a right of residence as a family member to produce a valid passport is imposed by the Directive itself. Article 10, which concerns the issue of residence cards, states at para 2 that:

"For the residence card to be issued, Member States shall require presentation of the following documents:

(a) a valid passport;
(b) a document attesting to the existence of a family relationship or of a registered partnership;
(c) the registration certificate or …in the absence of a registration system, any other proof of residence in the host Member State of the Union citizen whom they are accompanying or joining;

…"

40. Despite its logicality we have decided that this argument cannot succeed. There are two main reasons. First, Metock clearly envisages that a family member can acquire a right

of residence purely on the basis of the family relationship and irrespective of how the national of a non Member State entered the host Member State and so the requirement on a family member to produce a valid passport cannot operate to nullify that right. Further, Article 10 is concerned with the means by which the right of residence may be "evidenced" (see Article 10(1)) and Article 25(1) makes clear that inability to evidence the right in a specified form cannot be determinative. It states:

> "*Possession* of a registration certificate as referred to in Article 8, of a document certifying permanent residence, of a certificate attesting submission of an application for a family member residence card, *of a residence card* or of a permanent residence card, *may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.*" (Emphasis added).

41. Accordingly we cannot see that the appellant's failure to produce a valid passport either on re-entry from Ireland, in the first three months or subsequently, disqualifies him from entitlement to a right of residence under reg 14(2). It follows that in concluding that the appellant had a right of residence the immigration judge did not err in law.

The second issue: whether the appellant was entitled to a residence card.

42. Given that we have found the appellant has a right of residence and, further, that a failure to comply with administrative formalities, cannot negate such a right or its exercise, it may be thought a foregone conclusion that the respondent was wrong to refuse to issue a residence card and the immigration judge was right to allow the appeal against that refusal. However, there is nothing in the Citizens Directive or the 2006 Regulations or Community law which suggests that possession of a right of residence must automatically entitle a person to possession of documents evidencing those rights. Plainly the appellant in this case was unable to meet the evidentiary requirement of reg 17. That provision makes the obligation on the respondent to issue a residence card dependent on production of (a) a valid passport (and (b) proof that the applicant is such a family member). That in turn is wholly in line with the Directive which (as we have seen) at Article 10(2) states that: "For the residence card to be issued, Member States shall require presentation of the following documents: (a) a valid passport… [(b) and (c) require documentation attesting that the applicant is such a family member and documentation relating to the Union citizen]".

43. We now know that quite recently the appellant had been issued with a valid passport (valid from 2 May 2008). But it remains that he did not produce it until some time after the immigration judge promulgated his determination. Not having produced a valid passport, he was not entitled to a residence card. Accordingly, albeit correct to find that the appellant had a right of residence, the immigration judge materially erred in law in concluding that the appellant was entitled to a residence card (see his para 25).

<u>Our decision</u>

44. Having found a material error of law we turn to consider whether we are in a position to decide the appeal for ourselves. Given that in response to the Tribunal's directions

made after the first hearing the appellant's representatives produced further evidence relating to the appellant's passport documentation, we consider we are in a position to decide the appeal for ourselves without further ado.

45. In reaching our own decision we can be very brief. Only two things need to be said. First, pursuant to s.84(10(d) of the Nationality, Immigration and Asylum Act 2002, it is clear from our earlier analysis that the decision appealed against breaches the appellant's rights under the Community Treaties in respect of his residence in the United Kingdom. Our determination of his appeal must include, therefore, a declaration that he has a right of residence under reg 14(2). Second, the only basis on which we decided that the immigration judge materially erred in law consisted in the fact that the appellant did not have a valid passport. However, as noted earlier, the appellant has now remedied that: he has now obtained a new Algerian passport valid from 2 May 2008 and not due to expire until 1 May 2009. There is no dispute that the appellant has satisfied the respondent that he is the family member of the British national who, by virtue of the provisions of reg 9, can be treated as if he were the family member of an EEA national. Hence he now fulfils the requirements of reg 17(2) and is thus entitled to have a residence card issued to him.

Implications of Metock for cases of family members in the UK illegally or unlawfully

46. The Court noted in Metock that:

> " 95. From the time when the national of a non-member country who is a family member of a Union citizen derives rights of entry and residence in the host Member State from Directive 2004/38, that State may restrict that right only in compliance with Articles 27 and 35 of that directive.
>
> 96. Compliance with Article 27 is required in particular where the Member State wishes to penalise the national of a non-member country for entering into and/or residing in its territory in breach of the national rules on immigration before becoming a family member of a Union citizen.
>
> 97. However, even if the personal conduct of the person concerned does not justify the adoption of measures of public policy or public security within the meaning of Article 27 of Directive 2004/38, the Member State remains entitled to impose other penalties on him which do not interfere with freedom of movement and residence, such as a fine, provided that they are proportionate (see, to that effect, *MRAX*, paragraph 77 and the case-law cited).
>
> 98. Third, neither Article 3(1) nor any other provision of Directive 2004/38 contains requirements as to the place where the marriage of the Union citizen and the national of a non-member country is solemnised."

47. Under the 2006 Regulations the equivalent provision to Articles 27 is reg 21. Article 35 reflects a general principle of Community law and its proscription of marriages of convenience is reflected in the definition given of "spouse" in reg 2(1) ("'spouse' does not include a party to a marriage of convenience").

48. Although we have found that the appellant in this case has a right of residence under reg 14, it is important to emphasise that in his case the respondent has been prepared to accept that the family relationship is genuine and she has not sought at any stage to invoke either public policy or fraud reasons. (Nor has the respondent sought, at least up to now, to impose any penalty or fine.) In the course of the hearing of this case she also accepted that his spouse had worked in Ireland and that the couple had lived together there prior to returning to the United Kingdom. In other cases one or more of these matters may be disputed by the respondent.

Existing case law

49. Since the parties expressed conflicting views about the impact of Metock on existing authorities, both at ECJ and national level, and since potentially a significant number of cases stand to be affected by Metock, it may assist if we seek, tentatively, to outline how we think this judgment impacts on existing case law.

50. So far as ECJ cases are concerned, we can confine ourselves to commenting on the implications of Metock for the case of Akrich. Akrich on its face was authority for taking a restrictive view of the appellant's situation, since its facts were very similar. It too concerned a third country national spouse of a British national who, like the appellant in this case, had resided unlawfully in the UK before and after his marriage to a British citizen. He had no lawful basis for stay in the UK or in any other EEA State. He had been deported to Ireland and the decision appealed against was a refusal to revoke a deportation order made against him. The referring tribunal in Akrich sought to ascertain the scope of the judgement in Surinder Singh. The Court's main conclusions, it will be recalled, were that:

> "49… Regulation (EEC) 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 (EEC) 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. The only proviso the Court saw fit to make was to require that in relation to the situation described in para 54:

> "58…regard must be had to respect for family life under Art 8 of the Human Rights Convention. That right is among the fundamental rights which, according to the court's settled case-law, restated by the preamble to the Single European Act 1986 and by Art 6(2) are protected in the Community legal order"

52. However, the Court in Akrich was concerned to interpret Regulation (EEC) No 1612/68, which the Citizens Directive has now amended. Further, in Metock the Court expressly stated that:

"58. It is true that the Court held in paragraphs 50 and 51 of Akrich that, in order to benefit from the rights provided for in Article 10 of Regulation No 1612/68, the national of a non-member country who is the spouse of a Union citizen 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. However, that conclusion must be reconsidered. The benefit of such rights cannot depend on the prior lawful residence of such a spouse in another Member State (see, to that effect, MRAX, paragraph 59, and Case C-157/03 Commission v Spain, paragraph 28).

59. The same interpretation must be adopted a fortiori with respect to Directive 2004/38, which amended Regulation No 1612/68 and repealed the earlier directives on freedom of movement for persons. As is apparent from recital 3 in the preamble to Directive 2004/38, it aims in particular to 'strengthen the right of free movement and residence of all Union citizens', so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals."

53. What the Court states as para 58 does not necessarily mean that Akrich must be considered as always having been wrong; the approach the Court takes to Community legislation is one of teleological or dynamic interpretation, which sees itself as evolving standards over time. But it does mean that Akrich is no longer to be followed. The Court's reference in Metock to the same interpretation having to be adopted with respect to the Citizens Directive "a fortiori", taken in conjunction with its earlier identification of specific provisions of the Citizens Directive demonstrating that no condition of prior lawful residence can be placed on the right of residence of family members, appears also to suggest that it views the Citizens Directive as having expanded the scope of rights of residence afforded by Community law.

54. Metock also referred to the case of Eind. This case concerned the third country national daughter of a Dutch national. When he went to work in the UK she joined him from Surinam. In the United Kingdom he and his daughter were granted a right to reside. On 17 October 2001 Mr Eind returned to the Netherlands with his daughter. She applied for a residence permit. The decision of the Dutch authorities gave rise to the proceedings which led the Dutch Council of State to refer several questions to the Court for a preliminary ruling. Mr Lam submitted that this judgment was favourable to the appellant's case by analogy. He referred to paras 35-45 and para 37 in particular, which states:

"Barriers to family reunification are therefore liable to undermine the right to free movement which the nationals of the member state have under Community law, as the right of a Community worker to return to the member state of which he is a national cannot be considered to be a purely internal matter".

55. In our view, Eind taken on its own provides only limited support for Mr Lam's argument. The only ruling of possible relevance is 2, which states:

"The fact that a third-country national who is a member of a Community worker's family did not, before residing in the Member State where the worker was employed, have a right under national law to reside in the Member State of which the worker is a national has no bearing on the determination of that national's right to reside in the latter State".

56. This ruling essentially establishes a negative: that in order for a third country family member to have a right to reside in the Member State of which the Union citizen is a national it is not necessary that he or she had a right to reside there previously. Further, the case is not concerned with a third-country national whose presence in both the host

Member State and the Member State to which the Union citizen went in order to work is unlawful. Miss Eind was granted a right to reside in the UK and, prior to entering the Netherlands with her Dutch father, had no history of unlawful presence in the Netherlands or anywhere else in the Community. But in the light of what the Court ruled in Metock , Mr Lam does not need to rely on Eind.

57. From the above it can be seen that whatever may have been the position under ECJ jurisprudence prior to Metock, it is now the case that a third-country national spouse may be able to acquire a right of residence in a host Member State where his spouse or civil partner resides, on the basis of the family relationship alone.

General principles of Community law and Article 8

58. Given our conclusions relating to Metock it is unnecessary for us to address Mr Lam's subsidiary argument that, even if ECJ case law does not demonstrate that a family member whose presence in the host Member State has always been illegal is entitled to a right of residence as such, he or she should be granted one if failure to do so would breach general principles of Community law, that of proportionality and human rights protection in particular (he cited in support cases such as MRAX and Carpenter).

UK case law

59. The Tribunal has not hitherto decided in any reported case the issue of a person seeking to rely on "Surinder Singh rights" under the 2006 Regulations as the third country national spouse of a British citizen where that person is not lawfully resident in the United Kingdom. The closest it has come is in GC. In GC, however, the United Kingdom national, although she had moved to another EEA State (Ireland) for a few months, the appellant himself had not moved with her. Accordingly reg 9 did not apply to him: see GC, para 50. As noted earlier, we have not had to decide whether Metock assists the family member of a United Kingdom national (in relation to the requirements that the UK national must have exercised Treaty rights in another Member State and resided there with the family member), although (as indicated earlier), on general Community law principles we cannot see that it does except in relation to the requirement (now negated by Metock) that the family member's presence there must be lawful.

60. We recognise, however, that Metock does mean that the general approach the Tribunal has taken to cases involving persons who seek to invoke rights as EEA family members of EEA nationals notwithstanding that their presence in the UK is illegal or unlawful can no longer be followed.

61. Turning to decisions of the higher courts, KG and AK (Sri Lanka) [2008] EWCA Civ 13 (which was raised in submissions) is primarily a case about "other family members"/extended family members, whereas Metock is concerned with Article 3 family members. That aside, some of what is said (secondarily) in this decision by Buxton LJ about "free movement rules" more generally can be described as prescient since there are several passages which suggest that free movement rights can be accorded to third country nationals of EEA nationals or Union citizens exercising Treaty rights on the basis of the family relationship alone: see paras 8, 27, 62. However, in the light of Metock certain

other parts of his judgment's analysis of free movement rules can, with respect no longer be followed. At para 46 Buxton LJ noted, by reference to Akrich:

> "If the Union citizen is established in state A with a spouse who has not right to be there, the Union citizen cannot be seen as deterred from moving to state B by the fact that the spouse will not be able to accompany her, because she had had no right to have him in her company in state A…"

62. In the same passage Buxton LJ continued:

> "Take the case of a Union citizen contemplating return from state B, in which she has been established as a worker, to her native state A. If her spouse had a right to be with her in state B he will be permitted under the free movement rules to enter state A with her. That was the position with Miss Eind…But if the spouse did not have a right to be in state B, the free movement rules will not apply, and he will only be permitted to enter state A if he complies with its domestic immigration law. The free movement rules do not apply because, as the Union citizen had no right to have her spouse with her in state B, she cannot have been deterred from moving to stage A by the fact that the same legal position will obtain in that state".

63. In the light of the Court's rejection in Metock of the prior lawful residence requirement, this analysis cannot stand. Buxton LJ's comments at paras 20, 25, 28 30, 58, 60 and 61 that the Citizens Directive does not generate initial rights of entry into the territory of the Community for a family member spouse and that the free movement guaranteed by the Citizens Directive is a freedom of the internal market, "thus assuming movement from one member state to another", are no longer wholly apposite. His analysis at paras 65 of the "accompanying" and "joining" requirements, at least insofar as they relate to family members, must also be rejected. (The further Court of Appeal judgement in KG (Sri Lanka) [2008] EWCA Civ 664, has no relevance to the issues of concern here, nor does TC (Kenya) [2008] EWCA Civ 543, which concerns Article 35 of the Citizens Directive).

64. Since our hearings of this case, we have become aware of the judgment of the Court of Appeal on 11 June 2008, Shirley McCarthy and Secretary of State for the Home Department [2008] EWCA Civ 641. This case concerned a dual UK and Irish national who had sought to argue that she had resided in the UK in accordance with the 2006 Regulations by virtue of her Irish citizenship. Upholding the decision of the Tribunal, Pill LJ concluded that a UK national resident in the UK cannot, by virtue of having Irish nationality, claim a permit which may be granted by virtue of the Directive. We do not see that Metock impinges on this decision at all. Further, Pill LJ's *obiter* comment at para 33, in which he said that he disagreed with the Tribunal in considering that the Directive invariably imposes a requirement that there is movement from one country to another, could be said to very much anticipate Metock.

65. Bringing matters up to the present, we come then to the recent Court of Appeal judgement dealing with the Tribunal case of GC: GC (China) [2008 EWCA Civ 623. As already noted, this judgment (which echoes, although it does not cite, an earlier Court of Appeal judgment, R(on the application of H)(by his mother and next friend OH) [2008] EWCA Civ 245) upholds the approach of the Tribunal in GC which was to find that the appellant, the spouse of a national of the United Kingdom, could not succeed either under reg 9 of the 2006 Regulations or Community law because she had not moved. Whilst it

may be that statements made by Sedley LJ at para 8 concerning the need for "inter-state movement" and at para 13 concerning the inconsistency between the "accompanying or joining" requirements of Article 7 of the Citizens Directive and "staying put" cannot survive Metock, the ratio of the judgment is that a person who is re-entering the country of her *own* nationality is not exercising any EU right of free movement: that is not impugned by Metock.

66. For the above reasons we conclude that:

the immigration judge materially erred in law;
the appellant has an EEA right of residence;
the decision we substitute for his is to allow the appellant's appeal.

Signed:

Dr H H Storey