

THE HIGH COURT**JUDICIAL REVIEW**

[2007 No. 1324 J.R.]
 [2007 No. 622 J.R.]
 [2007 No. 106 J.R.]
 [2007 No. 1620 J.R.]

BETWEEN

BLAISE BAHETEN METOCK AND HANETTE EUGENIE NGO IKENG AND CHRISTIAN JOEL BAHETEN (A MINOR SUING BY HIS FATHER AND NEXT FRIEND) AND SAMUEL ZION IKENG BAHETEN (A MINOR SUING BY HIS FATHER AND NEXT FRIEND)
APPLICANTS [2007 No. 1324 J.R.]

AND
HENCHEAL IKOGHO
DONNA IKOGHO

APPLICANTS [2007 No. 106 J.R.]

AND
ROLAND CHINEDU AND MARLENE BABUCKE CHINEDU

APPLICANTS [2007 No. 622 J.R.]

AND
HENRY IGBONANUSI AND ROKSANA BATKOWSKA

APPLICANTS [2007 No. 1620 J.R.]

AND
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

Interim Decision of Ms. Justice Finlay Geoghegan delivered on 14th day of March, 2008

1. This decision is given pursuant to Article 234 of the EC Treaty to seek a preliminary ruling from the Court of Justice on the interpretation of Directive 2004/38/EC of the European Parliament and of the Council of 29 April, 2004 on the rights of citizens of the Union and their family members to move and reside freely within the territory of Member States as set out in the questions in this decision. The preliminary ruling is necessary to enable me give judgment in each of the four judicial review applications listed in the title. All were heard simultaneously and, in each, I have reserved my judgment. These applications are regarded as test cases as there are other pending applications which raise similar issues.

2. In all four cases, the applicants include a married couple. In one case the infant children are included among the applicants but they are not directly relevant to the questions upon which preliminary rulings are sought. In each couple, one spouse is a Union citizen of a Member State other than Ireland who is residing and working in Ireland and the other spouse is a non-EU national. All four couples were married in Ireland. Each non-EU national spouse applied for a residence card from the Minister as the spouse of a Union citizen residing and working in Ireland.

3. The respondent, in each of the proceedings, is the Minister for Justice, Equality and Law Reform ("the Minister") on whose behalf the challenged decisions were taken.

4. Three applications were refused by reason of the failure of the non-EU national to provide evidence that he had been lawfully resident in another EU Member State prior to arrival in Ireland. Such a requirement is included in the regulations made by the Minister for the purpose of giving effect to Directive 2004/38/EC in Ireland.

5. The applicants in each case challenge the validity of the decision of the Minister to refuse the application for a residence card. They contend that Directive 2004/38/EC does not permit Ireland include, as it has done in its implementing regulations, a requirement that a spouse of a Union citizen provide evidence of lawful residence in another EU Member State prior to arrival in Ireland. The applicants contend that such provision in the Irish regulation is invalid.

6. If the applicants are successful in that contention then their applications for a residence card will have to be reconsidered by the Minister. There are also further legal issues in dispute between the Minister and the applicants as to the proper meaning and scope of Directive 2004/38/EC. Questions relevant to those disputes are also set out below.

7. I must determine each Judicial Review application on its own facts but there are certain common issues which require to be determined in a majority or all of the proceedings. It is convenient to give one interim decision to make a reference to the Court of Justice in all four proceedings.

Relevant background facts

8. There is no significant fact in dispute between the parties which is relevant to the questions on which I seek preliminary rulings from the Court of Justice. For clarity, I propose shortly setting out the family and immigration history of the applicants and the decisions taken. Not all such facts are necessarily relevant to the questions I am putting to the Court of Justice for the reasons set out below.

9. In proceedings [2007] No. 1324 J.R., Ms. Ngo Ikeng is now a citizen of the United Kingdom. She was a national of Cameroon and was granted a declaration of refugee status in the United Kingdom in 1999 and, subsequently, citizenship. Mr. Metock is a national of Cameroon. He arrived in Ireland on the 23rd June, 2006 and made an application for asylum. That application was ultimately refused on the 28th February, 2007.

10. Mr. Metock and Ms. Ngo Ikeng married in Ireland on the 12th October, 2006. They met in Cameroon in 1994 and have been in a relationship for thirteen years. They have two children, one born in 1998 and the other in 2006, who are also applicants.

11. On the 6th November, 2006, Mr. Metock applied for residence in Ireland as the spouse of a Union citizen working and residing in Ireland. That application was considered by the Minister pursuant to the European Communities (Free Movement of Persons)(No.2) Regulations 2006 (S.I. No. 656 of 2006) ("the 2006 Regulations") which were made to give effect to Directive 2004/38/EC in Ireland.

12. A decision to refuse Mr. Metock's application was sent by letter of the 28th June, 2007. The single reason given was:-

"The provisions of Regulation 3(2) require that in order to avail of residency rights under the Regulations, applicants must submit evidence showing lawful residence in another EU Member State prior to arrival in Ireland. Following a thorough examination of your file, it was decided that no evidence was submitted to satisfy this requirement and that therefore, residence can not be granted".

13. By Order of the High Court of the 15th October, 2007, the applicants were given leave to apply *inter alia* for:-

(1) An order of *certiorari* quashing the decision of the Minister of the 28th June, 2007;

14. In these proceedings, the Minister does not dispute that Ms. Ngo Ikeng is a Union citizen who is working and is residing in Ireland since October or November 2006 (the precise date is unclear but not relevant)..

15. Mr. Metock continues to reside in Ireland. Since 28th February 2008 (refusal of declaration of refugee status), he has no permission to be in Ireland. This means *inter alia* that he has no permission to take up employment in Ireland.

16. In proceeding [2007] No. 622 J.R., Mrs. Chinedu is a Union citizen and a national of Germany. Mr. Chinedu is a national of Nigeria. He arrived in Ireland in December, 2005 and applied for asylum in Ireland.

17. Mr. and Mrs. Chinedu married in Ireland on the 3rd July, 2006. Mr. Chinedu made an application for residence in Ireland as the spouse of a Union citizen which was received by the Minister on the 1st August, 2006. On the 8th August, 2006, the Minister refused Mr. Chinedu's application for a declaration of refugee status.

18. On the 17th April, 2007, the Minister refused Mr. Chinedu's application for residence as the spouse of an EU citizen pursuant to the 2006 Regulations. The single reason given in the letter of refusal was:-

"The provisions of Regulation 3(2) require that in order to avail of residency rights under the Regulations, applicants must submit evidence showing lawful residence in another EU Member State prior to arrival in Ireland. Following a thorough examination of your file, it was decided that no evidence was submitted to satisfy this requirement and that therefore residence can not be granted".

19. The Minister does not dispute that Mrs. Chinedu is a Union citizen and German national lawfully residing in Ireland. Mr. Chinedu remains in Ireland. Since 8th August 2006 (refusal of declaration of refugee status), he does not have permission to be in Ireland. Mr. Chinedu states that he is now unable to work in Ireland due to his having no permission to do so from the Minister. He makes complaint that he is at a loss by reason of this fact.

20. On the 30th May, 2007, the High Court granted the applicants leave to apply by way of Judicial Review for *inter alia*:-

(1) An order of *certiorari* quashing the decision of the 17th April, 2007, refusing to grant residency;

and

(2) An order of *mandamus* directing the Minister to reconsider the application of Mr. Chinedu seeking residency pursuant to the 2006 Regulations in accordance with the provisions of Directive 2004/38/EC;

and

(3) Damages.

The claim for damages is not being determined as part of the present hearing.

21. In proceeding [2007] No. 106 J.R., Mrs. Ikogho is a Union citizen and national of the United Kingdom. She has resided and worked in Ireland since October, 1996.

22. Mr. Ikogho arrived in Ireland in November, 2004, and claimed asylum. The Minister refused the declaration of asylum and made a deportation order in respect of Mr. Ikogho on the 15th September, 2005. A challenge to the deportation order was made in the High Court which was dismissed by order of the 19th June, 2007.

23. Mrs. Ikogho came to Ireland in 1996 with her then husband and two children, born in 1991 and 1993. They had a further child, who is a citizen of Ireland, in 1998. Unfortunately, irreconcilable differences arose between Mrs. Ikogho and her first husband and they separated in 2001 and subsequently divorced. In December, 2004 she met Mr. Ikogho with whom she commenced a relationship. In August, 2005 he moved in with her and her three children and they continue to reside together.

24. Mr. and Mrs. Ikogho married in Ireland on the 7th June, 2006. On the 6th July, 2006, Mr. Ikogho made an application for residence as the spouse of a Union citizen living and working in Ireland. By a letter which is dated the 12th January, 2006, but is believed to have issued on the 12th January, 2007, his application was refused. The letter of refusal refers to article 3(2) of the 2006 Regulations and the reason given for the refusal is that, by reason of the deportation order made by the Minister on the 15th September, 2005, Mr. Ikogho was illegally resident in Ireland at the time of his marriage to the EU citizen on the 7th June, 2006. It was stated that Mr. Ikogho is not a person who can avail of the relevant provisions of the 2006 Regulations by reason of that fact.

25. By Order of the High Court of 12th February, 2007, the applicants were given leave to seek *inter alia*:-

(1) An order of *certiorari* quashing the decision refusing residence of the 12th January, 2007;

and

(2) An order of *mandamus* directing the Minister to reconsider the application of Mr. Ikogho for residency pursuant to the 2006 Regulations in accordance with the provisions of Directive 2004/38/EC

26. Mrs. Ikogho had been in regular employment in Ireland until about March, 2007. At that time she suffered a miscarriage, having become pregnant by Mr. Ikogho. In an affidavit sworn on the 23rd January, 2008, she states that she is again pregnant with her husband's child and due to give birth on or about the 11th May, 2008. She alleges that the refusal of her husband's application for

residency is detrimental to the exercise of her fundamental freedoms under Community law.

27. The Minister does not dispute that Mrs. Ikogho is a Union citizen and a national of the United Kingdom exercising her rights of free movement and residence under Community law and entitled to reside in Ireland.

28. In proceeding [2007] No. 1620 J.R., Ms. Batkowska is a Union and Polish citizen. She came to Ireland on holidays in February, 2006 and met Mr. Igbonanusi in Ireland. She states that they formed a loving relationship and remained in contact on her return to Poland. She then came back to Ireland in April, 2006 and set up home with Mr. Igbonanusi in Ireland and is employed in Ireland. They were married in Ireland on the 24th November, 2006.

29. Mr. Igbonanusi is a national of Nigeria who arrived in Ireland and claimed asylum on the 2nd April, 2004. The Minister refused Mr. Igbonanusi a declaration of refugee status on the 31st May, 2005. Following further immigration procedures, the Minister made a deportation order against Mr. Igbonanusi on the 15th September, 2005. There is a dispute between the parties as to Mr. Igbonanusi's knowledge of that order and the reason for his failure to present himself to the Garda National Immigration Bureau in September, 2005 as required. That dispute is not relevant to the questions upon which I am seeking a preliminary ruling.

30. Mr. Igbonanusi made an application on the 27th February, 2007, for residence as the spouse of an EU citizen. That application was considered by the Minister under the 2006 Regulations. It was refused by letter of the 27th August, 2007. The single reason given for the refusal was:-

"The provision of Regulation 3(2) required that in order to avail of residency rights in the State under the above mentioned regulations applicants must submit evidence showing lawful residence in another EU Member State prior to arriving in Ireland. No evidence was submitted by you to satisfy this requirement and therefore residence under Regulation 3(2) can not be granted".

31. On the 16th November, 2007, Mr. Igbonanusi was arrested and placed in Cloverhill Prison. An application was made on his behalf for revocation of the deportation order which was refused by the Minister by letter of the 4th December, 2007.

32. By Order of the High Court of the 13th December, 2007, the applicant was granted leave to seek *inter alia*:-

(1) "An order of certiorari quashing the decision to refuse Mr. Igbonanusi residency pursuant to Directive 2004/38/EC as notified by letter of the 27th August, 2007;

and

(2) A declaration that Mr. Igbonanusi has the right and entitlement to remain, reside and work in Ireland and to benefit from the provisions of Directive 2004/38/EC as the spouse of a citizen of the Union working and residing in Ireland pursuant to Directive 2004/38/EC or exercising free movement of workers rights under European Community law".

33. On the same day, the High Court refused to grant to the applicants an interlocutory injunction restraining the Minister from deporting Mr. Igbonanusi from Ireland to Nigeria pending the determination of these proceedings. Mr. Igbonanusi was deported from Ireland to Nigeria in December, 2007.

34. The Minister does not dispute, in the proceedings, that Ms. Batkowska is a Union and Polish citizen and living and working in Ireland.

Implementation of Directive 2004/38/EC in Ireland

35. The Minister initially gave effect to Directive 2004/38/EC in Ireland by the European Communities (Free Movement of Persons) Regulations 2006 (S.I. No. 226 of 2006). These were made on the 28th April, 2006.

36. On the 18th December, 2006, the Minister made the European Communities (Free Movement of Persons) (No.2) Regulations 2006 (S.I. No.656 of 2006) also to give effect to Directive 2004/38/EC in Ireland. Those Regulations came into operation on the 1st January, 2007 and repealed the earlier Regulations.

37. In this decision I only propose to refer to the European Communities (Free Movement of Persons) (No.2) Regulations 2006 ("the 2006 Regulations"). Whilst certain of the applications were made to the Minister when the earlier Regulations were in force, all of the applications were expressly stated to have been decided under the 2006 Regulations. No objection has been taken to this. Further, the relevant articles of each Regulation challenged in these proceedings are identical. Therefore nothing, in my view, turns on the existence of the two sets of Regulations.

38. The 2006 Regulations, for the most part, give effect to Directive 2004/38/EC using identical provisions to those of the Directive. Article 7 of the 2006 Regulations requires a family member of a Union citizen to apply to the Minister for a residence card as envisaged in articles 9 and 10 of the Directive. This was the application made by each non-EU national applicant in these proceedings.

39. Articles 3(1) and (2) of the 2006 Regulations expressly and exhaustively specify the persons to whom the 2006 Regulations apply. These provide:

3. (1) These Regulations shall apply to—

(a) Union citizens,

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

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

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

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

or

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

40. The definition of “qualifying” family members in the 2006 Regulations includes a spouse.

41. As appears, from the above, the 2006 Regulations exclude *inter alia* from their application a family member of a Union citizen unless, as is expressly stated, “The family member is lawfully resident in another Member State”.

42. In considering applications from a family member of a Union citizen already resident in Ireland, the Minister has applied this provision by imposing a requirement that the family member have been lawfully resident in another Member State prior to arriving in Ireland.

Issues of Irish Law

43. As appears from the facts set out above, in three of the applications the single reason given by the Minister for the refusal of the application of the spouse of the Union citizen for residence was that the applicant had not submitted evidence showing lawful residence in another EU Member State prior to arrival in Ireland, as required by article 3(2) of the 2006 Regulations.

44. As a matter of Irish law, I am satisfied that I must determine the applications for orders of *certiorari* in those proceedings by deciding whether or not the single reason given by the Minister was one which is permissible under Directive 2004/38/EC

45. In each case, the Minister made the decision based upon the failure of the non-EU national to meet the lawful residence requirement in article 3(2) of the 2006 Regulations. Each of the applicants contend that this requirement is invalid as it is inconsistent with Directive 2004/38/EC and hence *ultra vires* the powers of the Minister in making a regulation to give effect to Directive 2004/38/EC in Ireland, and void. As a matter of Irish law, I am satisfied that if article 3(2) of the 2006 Regulations is inconsistent with Directive 2004/38/EC, then it is *ultra vires* the powers of the Minister in making regulations to give effect to Directive 2004/38/EC in Ireland and void.

46. Whilst the Minister has raised other objections to the entitlement of the non-EU national spouse of the EU citizen to benefit from the provisions of Directive 2004/38/EC in certain of the proceedings, those objections are not relevant to the determination of whether or not the applicants are entitled to an order of *certiorari*. That issue must be determined by reference to the single reason given by the Minister for the refusals. Hence, the individual facts of the applicants’ immigration history are irrelevant to the determination of this issue, except for the fact that the non-EU national spouse of the EU citizen was not lawfully resident in another EU Member State before he arrived in Ireland.

47. In the remaining proceeding, [2007] No. 106 J.R., counsel for the Minister indicated, in the course of the hearing, that the Minister was now consenting to an order of *certiorari* being made by the Court quashing the decision given on the 12th January, 2007, refusing the application for residence of Mr. Ikogho. No reason was given for this consent, nor was any concession made as to the legal position contended for by the Minister on the statement of opposition in the proceedings. I am satisfied that the Court should not draw any conclusion from the Minister’s consent to the order of *certiorari*, save that it is unnecessary for the Court now to consider the legality of the decision made, which was by reason of the alleged illegal residence of Mr. Ikogho in Ireland at the time of his marriage to the EU citizen.

48. The Minister is also consenting to the order of *mandamus* claimed “directing the Minister to reconsider the application of Mr. Ikogho for residency pursuant to the 2006 Regulations in accordance with the provisions of Directive 2004/38/EC” and a declaration to similar effect. There remains a dispute between the applicants and the Minister, on the pleadings and submissions, as to the proper meaning of Directive 2004/38/EC. That dispute includes whether or not the requirement of lawful residence prior to arrival in Ireland in article 3(2) of the 2006 Regulations (which Mr. Ikogho does not satisfy) is or is not a permissible requirement under Directive 2004/38/EC, I determined, for reasons given in a ruling in the course of the hearing, that I should not make the orders for *mandamus* and a declaration and remit this matter to the Minister without resolving that dispute. Accordingly, the determination of that issue is likewise relevant to my judgment in proceeding [2007] No. 106 J.R.

Prior High Court Decision

49. The validity of article 3(2) of the 2006 Regulations and its consistency with Directive 2004/38/EC is already the subject of a decision of the High Court. In *S.K. and Anor. v. The Minister for Justice, Equality and Law Reform and Ors.* [2007] I.E.H.C. 216, Hanna J. decided that the prior lawful residence requirement in article 3(2) of the 2006 Regulations is consistent with Directive 2004/38/EC and lawful. He determined that such provision gives effect to Directive 2004/38/EC and the decision of the Court of Justice in *Secretary of State for the Home Department v. Hacene Akrich (Case C-109/01)* [2003] ECR I – 9607 (“Akrich”). Hanna J. concluded that Directive 2004/38/EC “is intended to apply to families which were established in a Member State prior to the move to the host Member State”.

50. This is a decision of a court of equal jurisdiction by which I am not bound. Nevertheless, I should only depart from this decision if the applicants clearly establish that it was wrongly decided, in accordance with the principles set in *Irish Trust Bank v. Central Bank of Ireland* [1976 – 7] I.L.R.M. 50. *S.K. and Anor. v. The Minister for Justice, Equality and Law Reform and Ors.* is presently the subject of an appeal to the Supreme Court but has not been heard.

51. The applicants herein submit that the judgment in *S.K. and Anor. v. The Minister for Justice, Equality and Law Reform and Ors.* is in error in the conclusion reached on the interpretation of Directive 2004/38/EC and the validity of article 3(2) of the 2006 Regulations. They also contend that Hanna J. was in error in not taking into account the judgment of the Court of Justice in *Yunying Jia v. Migrationsverket (Case C-1/05)* [2007] ECR I-1 (“Jia”) in reaching his conclusions on the meaning of Directive 2004/38/EC and the validity of article 3(2) of the 2006 Regulations. They also submit that, in reaching a conclusion in these cases on the proper meaning of Directive 2004/38/EC, I must also take into consideration the judgment of the Court of Justice in case *Minister voor Vreemdelingenzaken en Integratie v. R.N.G. Eind (C-291/05)* (Unreported, European Court of Justice, 11th December, 2007) (“Eind”) which post-dates the judgment in *S.K. and Anor. v. The Minister for Justice, Equality and Law Reform and Ors.*

52. In *S.K. and Anor. v. The Minister for Justice, Equality and Law Reform and Ors.*, Hanna J. refers extensively to the helpful analysis of the Advocate General in *Jia* and to relevant paragraphs from the judgment of the Court of Justice. However, he then decided that, as the facts in *S.K.* did not fit circumstances in *Jia*, “for the purposes of dealing with this application, the *Jia* decision should be left to one side”. Undoubtedly, the facts relating to the applicants in *S.K.* differed greatly from *Jia*. However, also at issue in *S.K.* was the proper meaning of Directive 2004/38/EC and the validity of the lawful residence requirement in article 3(2) of the 2006 Regulations.

Both of these provisions have general application. In determining their meaning or validity it does not appear to me that what was decided by the Court of Justice in *Jia*, in particular at paragraphs 25-33 in relation to the application of its decision in *Akrich*, can be left to one side.

53. Accordingly, I have determined that I should not now simply follow the decision in *S.K. and Anor. v. The Minister for Justice, Equality and Law Reform and Ors.* on the interpretation of Directive 2004/38/EC and validity of article 3(2) of the 2006 Regulations but rather seek a preliminary ruling from the Court of Justice on the interpretation of Directive 2004/38/EC. As observed by the Advocate General in his opinion in *Jia* (at para. 38), the Court of Justice case law on the Community instruments repealed or amended by Directive 2004/38/EC "is not entirely free from ambiguity". In the course of the hearing I sought the views of counsel for the parties as to whether I should exercise my discretion to make a reference. Counsel for all parties submitted that I should do so.

Submission of Minister on Prior Lawful Residence Requirement

54. The Minister submits that the prior lawful residence requirement in article 3(2) of the 2006 Regulations is permitted by Directive 2004/38/EC. In summary his submissions are as follows.

55. The Minister submits that the division of competences between the Community and Member States is such that Community law, and in particular Directive 2004/38/EC, is only concerned with the movement of Union citizens and their family members within the territory of the Member States and not with the entry of such persons into the territory of Member States from outside.

56. The Minister therefore submits that the Member States, including Ireland, retain competence in relation to the admission of non-EU nationals from outside of the territory of Member States into a Member State including, in this instance, Ireland. He submits that if Directive 2004/38/EC is interpreted as meaning that non-EU nationals who are not already lawfully resident in a Member State enjoy an automatic right to enter and reside within the host Member State on the basis of family relationship alone, it would undermine the Member States' powers to control immigration at their external border.

57. The Minister submits that this division of competences is confirmed by the judgment of the Court of Justice in *Akrich* and, in particular, paras. 49 and 50 of the judgment which provide:

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

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

58. The Minister contends that his entitlement to rely upon the decision of the Court of Justice in *Akrich* as permitting him to confine the scope of Directive 2004/38/EC to those family members who were lawfully resident in another Member State prior to coming to Ireland, is not diminished by the judgment in *Jia*.

59. The Minister submits that the judgment of the Court of Justice in *Jia* must be understood as not requiring Member States to make the grant of residence pursuant to Directive 2004/38/EC subject to prior lawful residence in another Member State but not preventing a Member State from doing so if it so wishes. The Minister submits that the question asked in *Jia* by the Swedish Court, as interpreted by the Court of Justice, was whether Community law requires a Member State to impose a condition of lawful residence and that the Court did not address the question as to whether Directive 73/148/EEC (which was at issue in those proceedings) permits a Member State to impose a condition of lawful residence. The Minister does not consider that the judgment of the Court of Justice in *Eind* alters this position.

60. The Minister submits that Directive 2004/38/EC must be interpreted in accordance with the principles set out by the Court of Justice in *Akrich* and *Jia*. Further, he submits that Directive 2004/38/EC when so construed, whilst it does not require Member States to impose a condition of prior lawful residence in another Member State for family members of a Union citizen who seeks entry or residence pursuant to Directive 2004/38/EC, does leave to Member States a choice or discretion to impose such a condition if they so wish.

61. The Minister does not rely on articles 27 or 35 of Directive 2004/38/EC as authorising article 3(2) of the 2006 Regulations. He accepts that article 3(2) is a measure of general application which is not so authorised.

Submission of Applicants on Prior Lawful Residence Requirement

62. The applicants make varying submissions, in particular, in relation to the reasons for which the judgment of the Court of Justice in *Akrich* does not enable the Minister to impose by Regulation the disputed prior lawful residence requirement. However, counsel for each applicant adopted the submissions made by the other and, therefore, it is appropriate to summarise the submissions of the applicants without distinguishing between same.

63. The applicants submit that the Minister is incorrect in his submission on the division of competences between Community law and the Member States in relation to the immigration of family members of a Union citizen who exercises his or her right to move to or reside in another Member State. The applicants submit that Directive 2004/38/EC governs the entry into the territory of Member States of family members of a Union citizen who is residing in a host Member State. They submit that this follows from a consideration of the enabling EC Treaty provisions (in particular Article 18) and of Directive 2004/38/EC and, in particular, its articles 1,3,5,6,7(1)&(2), 10,27 and 35 when construed in accordance with the Treaty and the recitals to the Directive, in particular recitals (1),(3),(5),(6),(11) and (22).

64. They submit that the fundamental right is that of the Union citizen which derives from the EC Treaty and not from Directive 2004/38/EC. The rights of the Union citizen include a right to move and a separate and distinct right to reside in another Member State. The right of the family member is consequential to and dependant on the right of the Union citizen and in the case of a spouse derives from the family relationship alone. The applicants rely on the judgments of the Court of Justice in *Movement Contre le Racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v. Belgian State (Case C-459/99)* [2002] ECR. I-6591 ("MRAX") and *Commission of the European Communities v. Spain (Case C-157/03)* [2005] ECR. I-2911 ("Commission v. Spain").

65. The applicants submit that the requirement of lawful residence as stated by the Court of Justice in *Akrich* (at paras. 49 and 50) in relation to Council Regulation (EEC) No. 1612/68 does not now apply to the interpretation of Directive 2004/38/EC for a number of

reasons:

(1) The statement of the Court of Justice in *Akrich* must be considered in the context of the facts and rights at issue in the main proceedings in that case. *Akrich* was concerned with an implied right to return to a home Member State derived from the express right of free movement in Regulation (E EC) No. 1612/68. This did not include the distinct right to reside in another Member State referred to in Directive 2004/38/EC and deriving from Article 18 of the Treaty.

(2) The Court of Justice in *Jia* (at paras. 25-33) confirms that what is stated in *Akrich* does not have general application. This limited application of the lawful residence requirement in *Akrich* has been confirmed by the opinion of the Advocate General (at para. 46) and the judgment of the Court of Justice (at paras. 36, 41 and 45) in *Eind*.

(3) Directive 2004/38/EC was adopted on the 29th April, 2004, after the judgment of the Court in *Akrich*. Recital (3) states that it is to "strengthen the right of free movement and residence of all Union citizens". The applicants submit that articles 5 and 7 of the Directive in particular, are inconsistent with an implied requirement of prior lawful residence for a non-EU family member.

(4) *Akrich* should properly be considered as an "abuse of rights" case. Article 35 of Directive 2004/38/EC now expressly enables Member States to take measures to prevent abuse of rights or fraud in accordance with the conditions set out therein. Article 3(2) of the 2006 Regulations is not such a provision.

66. The applicants submit that Directive 2004/38/EC cannot be interpreted as leaving Member States a discretion or choice to include a general requirement of prior lawful residence in another Member State for family members of Union citizens seeking either entry or residence in Ireland. They contend that the scheme of the Directive, as appears from article 1(a) and(c), is that it lays down the conditions governing the exercise of the right of free movement and residence within the territory of Member States by Union citizens and their family members and the limits which may be placed on those rights by Member States. Further, the applicants submit that articles 5, 7 and 10 set out exhaustively what Member States may require of a family member who seeks either entry or residence. They submit that there is nothing in those articles which permit individual Member States to introduce an additional substantive requirement, as Ireland seeks to do in article 3(2) of the 2006 Regulations.

67. The applicants submit that the limits which may be placed by Member States on entry and residence of family members of a Union citizen are those decisions and measures authorised by article 27 and article 35 of Directive 2004/38/EC. Article 3(2) of the 2006 Regulations is not a measure made pursuant to article 27 or article 35 of the Directive, as it is a Regulation with general application.

68. The applicants contend that Directive 2004/38/EC does not permit of differing substantive requirements in different Member States. The applicants referred to the Immigration (European Economic Area) Regulations 2006 made to implement Directive 2004/38/EC in the United Kingdom which contains no prior lawful residence requirement similar to that in article 3(2) of the 2006 Regulations.

69. The applicants rely on the response given to Petition 0646/2006 by Hanna Sobczak (Polish) to the European Parliament (in which reliance is placed on the Court of Justice's judgment in *Jia*) to the effect that article 3(2) of the 2006 Regulations:

"Would appear to be contrary to Community law as the right of residence in Ireland cannot be made conditional upon having resided legally in another Member State before arriving in Ireland. The Commission services envisage drawing the attention of the Irish authorities to this judgment and require that the Irish legislation fully complies with Community law."

Question on Prior Lawful Residence Requirement

70. The single question upon which I need the preliminary ruling of the Court of Justice to enable me to determine the applications for *certiorari* and underlying challenge to the validity of article 3(2) of the 2006 Regulations is:

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.

71. I must respectfully emphasise that, for the reasons set out at paragraphs 43 to 48 above, the question must be answered independently of the immigration history of the applicants except of the fact that the non-EU spouse was not lawfully resident in another Member State prior to arriving in Ireland if it is to be of assistance to me in determining the claims for *certiorari* in these proceedings. In refusing the three relevant applicants, the Minister only relied on their failure to provide evidence of prior lawful residence in another Member State and not on their personal immigration history in Ireland. Further, the prior lawful residence requirement in article 3(2) of the 2006 Regulations applies, irrespective of the immigration status of the non-EU applicant spouse. Other applications in which leave to seek Judicial Review has been granted by the High Court (some of which have been settled and others not yet heard) demonstrate reliance upon article 3(2) to refuse applications for residence from non-EU national spouses of Union citizens who had been permitted to enter Ireland on a "join EU spouse visa" and other types of visa.

72. In the context of the submissions made on behalf of the applicants during the hearing before this Court, the position of non-EU spouses of Irish citizens is not relevant to this Court's decision. . However, as the Court of Justice took into account in *Jia* the analogous position under Swedish law it may be relevant for the Court of Justice to be aware that the Minister, through his counsel, informed this Court that applications for residence for non-EU spouses of Irish citizens are considered and determined by the Minister as part of his executive functions. There are no statutory provisions applicable. The Minister has indicated that each application is decided on its own facts. There is no automatic entitlement to residence and there is no automatic exclusion even of non-EU nationals who may have entered or be in Ireland illegally.

Ancillary Questions

73. If, following the preliminary ruling of the Court of Justice on the question referred at paragraph 70 above, I determine that I should grant an order of *certiorari* of the decisions made on behalf of the Minister to refuse the applications of the non-EU nationals for a residence card, then those applications will be sent back to the Minister to be determined in accordance with Directive 2004/38/EC and the 2006 Regulations.

74. On the notice of opposition filed by the Minister and legal submissions made both in writing and orally, there is one further objection made by the Minister to the eligibility of at least certain of the non-EU applicants in these proceedings which raises the proper interpretation of article 3(1) of Directive 2004/38/EC. As this legal issue is crystallised in the submissions made and on the

undisputed facts affects certain of the applicants, it appears appropriate that the Court determine this issue before remitting the matter to the Minister. If not, there would be uncertainty as to the meaning of any Order made by the Court that the application "be determined in accordance with Directive 2004/38/EC" which is undesirable. Also, on the undisputed facts it would appear to follow, inevitably, that if the Minister applies Directive 2004/38/EC in accordance with the legal meaning for which he contends, he will again refuse certain of the applications and, having regard to the legal submissions made on behalf of the applicants, there would be a further set of Judicial Review proceedings with consequent delay and cost to both parties.

75. I wish to emphasize that, in determining this legal issue in dispute between the parties as to the proper meaning of article 3(1) of Directive 2004/38/EC, I am not seeking to determine the applicants' entitlement to a residence card. In those cases in which leave was granted to claim an order of *mandamus* requiring the Minister to grant the residence card or a declaration to that effect, counsel for the applicants did not pursue those reliefs at the hearing.

76. Article 3(1) of Directive 2004/38/EC provides:

"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".

77. The dispute between the applicants and the Minister relates to the proper meaning of the requirement that the family member "accompany or join" the Union citizen. The dispute arises in the following way.

78. In three of the cases, the non-EU national arrived in Ireland independently of the EU citizen. The applicants in [2007] No. 1324 J.R. are not included in this description as, whilst they arrived separately in Ireland, they had met in the Cameroon and had been in a relationship for thirteen years. In two of the three cases, the non-EU national arrived in Ireland before the EU citizen.

79. In all three cases, the EU citizen and non-EU national married in Ireland, subsequent to the EU citizen moving to Ireland and taking up residence in Ireland.

80. In all three cases, at the date the non-EU national applied for a residence card, pursuant to article 10 of Directive 2004/38/EC as implemented by the 2006 Regulations, he was the spouse of the EU citizen who then had a right to reside in Ireland for a period in excess of three months pursuant to article 7(1) of the Directive and was stated to be residing with the EU citizen in Ireland.

81. The applicants contend that at the date of application for the residence card, the non-EU nationals were persons who came within the scope of article 3(1) by reason of the following:

(i) The Union citizen was residing in Ireland with a right of residence for a period longer than three months pursuant to article 7(1);

(ii) The non-EU national was a family member of the Union citizen, being her spouse;

(iii) The non-EU citizen was at that time accompanying the Union citizen in Ireland within the meaning of article 3(1).

82. The applicants refer to the application of the Directive, in article 3(1), to Union citizens who "move to or reside" in a Member State other than their own. They submit that the Directive applies to a Union citizen whilst residing in a Member State other than his or her own. Hence, if at any time whilst s/he is so residing, the Union citizen acquires a family member, by marriage or otherwise and that person is with them in the host Member State (regardless of how they came to be there), they are a family member who is then accompanying the Union citizen in the host Member State.

83. The applicants also rely upon the distinct right of residence of the Union citizen in the host Member State for a period longer than three months if he or she satisfies the conditions in article 7(1)(a), (b) or (c) of Directive 2004/38/EC.

84. The applicants, finally, rely upon the terms of article 7(2) in relation to the right of residence of the non-EU national spouse. This provides:

"The 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)."

The applicants submit that the right of residence is conferred on the family member who is accompanying the Union citizen in the host Member State and is not in any way dependent upon the circumstances in which the non-EU family member came to enter the host Member State.

85. The applicants submit that, at the date of application for the residence card, the non-EU national spouse of the EU citizen was within the scope of article 3(1) and was then accompanying the Union citizen (who satisfied the conditions in article 7(1)(a), (b) or (c)) and, accordingly, had a right of residence pursuant to article 7(2). They submit that the Minister may only require presentation of the documents referred to in article 10(2) and may only refuse the application pursuant to measures or decisions authorised by articles 27 or 35 of Directive 2004/38/EC.

86. The applicants submit that their contentions are supported in particular by the judgment of the Court of Justice in *MRAX*.

87. The essential submission made on behalf of the Minister is that the non-EU nationals do not come within the scope of the Directive in accordance with article 3(1) because at the time the non-EU national entered Ireland, he was not a family member of a Union citizen. The Minister submits that where a Union citizen is residing in a Member State other than his own, a family member may only be regarded as accompanying him in the host Member State if the family member enters the host Member State at a time when he is already a family member of a Union citizen who is either moving to the host Member State or already residing therein.

88. The Minister, in the oral submissions made in the course of the hearing, had initially submitted that the non-EU national spouses were excluded from the scope of Directive 2004/38/EC because they were not married to the Union citizen at the time the Union citizen moved to Ireland. However, in the course of the submissions, counsel for the Minister appears to have resiled from that submission and accepted that there were certain circumstances in which the spouse of a Union citizen who married subsequent to moving to and commencing to reside in a host Member State could come within the scope of article 3(1) of Directive 2004/38/EC. Counsel appeared to accept that if a Union citizen married outside of the host Member State subsequent to taking up residence

therein and his non-EU national spouse then sought to join the Union citizen in the host Member State, that such person would then come within article 3(1) as the non-EU national spouse would then be joining the Union citizen in the host Member State as a family member. This acceptance was, of course, without prejudice to the Minister's position on prior lawful residence.

89. The submission persisted with on behalf of the Minister appears to be based upon the contention that a non-EU national spouse of a Union citizen cannot be considered to be accompanying the Union citizen in the host Member State within the meaning of article 3(1) (and article 7(2)) unless, at the time of the arrival of the non-EU national to the host Member State, he or she was already a family member of a Union citizen.

90. This submission of the Minister is made independently of the circumstances in which the non-EU national arrived in the host Member State or his or her status in the host Member State prior to asserting a right of residence under article 7(2) and applying for a residence card pursuant to article 10 of Directive 2004/38/EC.

91. The parties did not contend for any difference in the circumstances in which a non-EU national spouse would be considered to be "accompanying or joining the Union citizen" for the purposes of article 3(1) or 7(2). The focus of the submissions was on whether or not the applicants came within the scope of Directive 2004/38/EC and hence article 3(1).

92. Whilst the Minister did not make express submissions relating to the date on which the family member of a Union citizen who asserts a right of residence pursuant to article 7(2) and applies for a residence card, must come within the scope of the Directive. However, it appears implicit from the submissions made by the Minister that he is contending that the family member of the Union citizen must have come within the scope of the Directive on the date he sought to enter Ireland. This is consistent with the provisions of article 3(2) of the 2006 Regulations made by the Minister set out at paragraph 39 above. As appears, article 3(2) confines the scope of the 2006 Regulations to family members who either seek to enter Ireland in the company of a Union citizen, or seek to join a Union citizen in Ireland in respect of which he or she is already a family member.

93. The questions upon which I seek a preliminary ruling from the Court of Justice to enable me give judgment on the dispute between the applicants and the Minister on the scope of Directive 2004/38/EC are:

(2) Does article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national who is:

(i) 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

(ii) 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.

(3) If the answer to the preceding question is in the negative, does article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national spouse of a Union citizen who is:

(i) 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

(ii) Resides in the host Member State with the Union citizen as his/her spouse; and

(iii) Has entered the host Member State independently of the Union citizen; and

(iv) Subsequently married the Union citizen in the host Member State.

Accelerated Procedure

94. The parties (both applicants and the Minister) submitted to this Court that a ruling by the Court of Justice on the questions referred hereby is a matter of exceptional urgency. I am satisfied that it does appear a matter of exceptional urgency and hereby request the President to apply an accelerated procedure pursuant to article 104a of the Rules of Procedure. My reasons for this conclusion and request are as follows.

95. The ruling on the first question in particular will apply to many others as well as the applicants in these proceedings. Article 3(2) of the 2006 Regulations applies to all applications pursuant to Directive 2004/38/EC. The Minister has indicated that currently he receives approximately 180 such applications per month. He received 2,283 such applications in 2007. It appears probable from the analysis given to the Court on his behalf that a significant number of the non-EU national applicants cannot provide evidence of prior lawful residence in another Member State.

96. The four cases which are the subject of this reference form part of in excess of fifty cases commenced before the High Court in 2007 seeking orders of certiorari of decisions of the Minister refusing applications under Directive 2004/38/EC as implemented by the 2006 Regulations. These were case managed by the High Court and given priority by reason of the importance and general application of the issues raised. Initially, approximately ten such cases were listed for hearing in January 2008 as test cases. Prior to the hearing date, all except the four herein were settled by the Minister to the satisfaction of the applicants. With one exception, the terms of settlement were not disclosed to the Court, other than a consent order that the applicants recover their reasonable costs from the Minister. The settled cases appear primarily to have related to non-EU national spouses who had lawfully entered Ireland on a visa. In excess of 40 such cases were settled. There remain a number of applications commenced in 2007 and earlier where the non-EU nationals are in analogous situation to those in these applications or the applicants in *SK*.

97. The Minister is obliged by Directive 2004/38/EC to issue a Residence card to family members within six months of the date of application (article 10(1)). Hence, he continues to take decisions many of which are to refuse applications from non-EU national spouses who cannot provide evidence of prior lawful residence including from some who have been permitted to enter Ireland on a visa. These refusals give rise to continuing applications to the High Court. Since the hearing of these proceedings, the High Court has granted leave to challenge the Minister's refusal of residency in at least twenty applications. Three such applications which relate to

applicants who were permitted to enter Ireland on a visa are listed for hearing in April 2008. The hearing date has been fixed as a matter of priority as the applicants contend they are in a different factual position to the non-EU applicants herein having been given express permission to enter Ireland. Further, they contend that the earlier settlements by the Minister of similar intended test cases have precluded the inclusion in this reference of cases with similar facts to theirs.

98. At present, it appears probable that the Minister's decisions to refuse in reliance on article 3(2) of the 2006 Regulations, followed by applications to the High Court, will continue until the preliminary ruling requested herein is determined. These involve significant costs and expenses for the Minister and applicants and court resources. The Minister seeks clarity as soon as feasible on the questions on which the ruling is sought.

99. Whilst I have formed the view that it is necessary to seek a preliminary ruling on the interpretation of Directive 2004/38/EC in relation to the prior lawful residence requirement in article 3(2) to enable me give judgment on the applications for *certiorari* I am also of the view that the applicants have adduced strong arguments in favour of the contention that Directive 2004/38/EC does not permit Member States 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. The Minister accepts that Directive 2004/38/EC does not so require. Subject to what may be determined by the Court of Justice in response to the requested preliminary ruling, the applicants' submission that the Directive sets out exhaustively the substantive conditions governing the exercise of the right of free movement and residence within the territory of the Member States of Union citizens and their family members and the limits which may be placed on those rights, appears persuasive as does the further submission that the limits which may be placed by Member States on the rights are those authorised by articles 27 or 35. The overall purpose and intention of the Directive appears to be that the general conditions set out therein apply throughout all the territory of the Member States. It is difficult to envisage that it permits of differing general conditions in the territory of different Member States as contended for by the Minister.

100. To take a simple example: a French national is employed initially in France by a French subsidiary of an American corporation. He is promoted to work at head office in New York. He spends ten years in New York and whilst there marries a US citizen who has never lived outside of the US. He is then offered a choice between becoming chief executive of the United Kingdom or Irish subsidiary and must live in the relevant country. If the Minister's contention is correct, he has no real choice. If the French national chooses the United Kingdom, his wife appears entitled to residence pursuant to the national provisions implementing Directive 2004/38/EC, whereas if he chooses Ireland, she is excluded by the prior lawful residence requirement in article 3(2) of the 2006 Regulations. This appears a real deterrent to exercising his Community right to move to and reside in Ireland. Subject to the ruling of the Court of Justice on the questions herein, it is difficult to envisage how this additional condition in Ireland is consistent with the overall purpose and effect of Directive 2004/38/EC.

101. The present personal circumstances of the four applicant couples are also relevant factors in the urgent need for the ruling. It is not in dispute that all are Union citizens exercising their right to reside and work in Ireland. There is no challenge to the *bona fides* of the marriages. The three non-EU national spouses who remain in Ireland are not permitted to work. In two families there are minor dependant children. The four Union citizens are women (one of whom is currently pregnant) who should be able to benefit from family life with a working spouse. If the non-EU national spouses are within the scope of Directive 2004/38/EC as they contend, then they have an express right to take up employment pursuant to article 23. The other Union citizen is also deprived of the company of her spouse in Ireland other than as a result of a procedure authorised by article 27 of Directive 2004/38/EC. Similar factual circumstances exist for others whose applications are dependant on the requested ruling.

102. Finally, the Minister is facing claims for damages in certain of the proceedings, principally relating to alleged loss of earnings. If there is a liability (which has not been determined), the amount will inevitably increase with the length of the period prior to final judgment.

Order

103. There will be an order requesting a preliminary ruling from the Court of Justice on the following questions.

(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:

(i) 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

(ii) 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.

(3) If the answer to the preceding question is in the negative, does article 3(1) of Directive 2004/38/EC include within its scope of application a non-EU national spouse of a Union citizen who is:

(i) 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

(ii) Resides in the host Member State with the Union citizen as his/her spouse; and

(iii) Has entered the host Member State independently of the Union citizen; and

(iv) Subsequently married the Union citizen in the host Member State

And a request that such ruling be the subject of accelerated procedures pursuant to article 104a of the Rules of Procedure of the Court of Justice.