



## FREEDOM OF MOVEMENT WITHIN THE EU

### THE METOCK CASE

This is a case decided by the European Court of Justice [ECJ] in July 2008 on a reference made to it by the Irish High Court. It is concerned with the interpretation of Directive 2004/38/EC (sometimes referred to as the Citizens Directive) on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. The main Article of the Directive which was in issue is Article 5.1 which requires Member States to grant to EU citizens leave to enter with a valid identity card or passport and to grant family members who are not nationals of a Member State leave to enter with a valid passport. In 2006 the government of Ireland had made regulations which provided that only those family members who were not nationals of a Member State would be eligible for admission to Ireland if they had previously been lawfully resident in another Member State. The ECJ ruled that these regulations were contrary to the Directive, which did not allow of any such precondition, and were invalid. There had been an earlier decision of the court which might have been interpreted as allowing such precondition, but the ECJ reconsidered it and did not follow it. Although the court in its judgment for the most part confined itself to a straightforward construction of the language of the Directive, it made a brief reference to Article 8 of the European Convention on Human Rights, which states that everyone has the right to respect for *inter alia* his private and family life. Even in the absence of the uncompromising language of the Directive, Article 8 would probably be decisive.

The only permitted restrictions on freedom of movement of EU nationals within the EU are contained in Articles 27 and 35 of the Directive.

Article 27 allows Member States to restrict freedom of movement and residence of EU nationals on grounds of public policy, public security or public health. Under this provision persons may be refused entry or deported if they have entered. It was under this article that the Dutch MP Wilders was recently refused entry to the UK, as the Home Secretary considered that the anti-Muslim material which he wished to propagate in the UK was contrary to public security and could have inflamed feelings among the Muslim community to such an extent as to create a risk to public security. Any action taken under Article 27 must comply with the principle of proportionality and be based exclusively on the personal conduct of the individual concerned. Previous criminal convictions do not in themselves constitute grounds for taking such measures.

Article 35 provides that Member States may refuse, terminate or withdraw the rights conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. The reference to marriages of convenience does not exclude other possible instances of abuse, but the practice is obviously regarded as significant and serious enough to warrant a specific reference.

The Directive has been implemented in the UK by the Immigration (European Economic Area) Regulations 2006 (SI 2006/1003). Regulation 9 makes special provision for the case of a British citizen who has exercised his right to move to another Member State and then returns to the UK. If such a citizen has a spouse or civil partner from a third country then the parties [to the marriage or civil partnership] must have been living together in the Member State concerned and be so living in that State before the return of the British citizen to the UK. This is a narrower restriction than that which was struck down by the ECJ in the case of the Irish regulations, but it is a restriction which does not have any specific basis in the Directive and could therefore be open to attack under the Directive.

Concerns have been expressed in the UK and in other Member States that the effect of the judgment will be to make it more difficult to tackle fake marriages, trafficking and people smuggling. It certainly weakens the effectiveness of the Immigration Rules relating to persons already in the UK being joined by spouses, parents or children. In the case of spouse visas, paragraph 281 of the Immigration Rules requires *inter alia* that the applicant can demonstrate that there will be adequate accommodation

for the parties in the UK and that they will be able to accommodate and maintain themselves without recourse to public funds. In the case of parents and other dependent relatives paragraphs 317 –319 of the Immigration Rules they must be either over 65 or be living in the most exceptional, compassionate circumstances. In both these cases it is no longer lawful to apply these requirements to third country nationals falling within the scope of the Directive.

The outcome of the case is hardly surprising, given the clear language of the Directive and the applicability of Article 8 of the ECHR. The UKBA will need to be ever vigilant in making good use of Articles 27 and 35, particularly the latter because of the likely extent of abuse by fake marriages.

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