[Home] [Databases] [World Law] [Multidatabase Search] [Help] [Feedback]

# England and Wales Court of Appeal (Civil Division) Decisions

**You are here:** BAILII >> Databases >> England and Wales Court of Appeal (Civil Division) Decisions >> KG (Sri Lanka) & Anor v Secretary of State for the Home Department [2008] EWCA Civ 13 (25 January 2008)
URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2008/13.html*
Cite as: [2008] EWCA Civ 13

[New search] [Printable RTF version] [Help]

**Neutral Citation Number: [2008] EWCA Civ 13**

Case No: C5/2007/1440/2210

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL**
**IA/O9078/2006; IA/07178/2006**

Royal Courts of Justice
Strand, London, WC2A 2LL

25/01/2008

B e f o r e :

**LORD JUSTICE BUXTON**
**LORD JUSTICE SEDLEY**
**and**
**LORD JUSTICE HOOPER**

---

**Between:**

| | |
|---|---|
| **KG(SRI LANKA) and AK(SRI LANKA)** | **Appellants** |
| **- and -** | |
| **THE SECRETARY OF STATE FOR THE HOME DEPARTMENT** | **Respondent** |

---

**Mr Manjit Gill QC and Mr Zainul Jafferji (instructed by The Solicitor to the Tamil Welfare Association) for KG**
**Miss Nicola Rogers (instructed by The Merton Law Centre) for AK**
**Mr Robert Palmer (instructed by The Solicitor to Her Majesty's Treasury) for the Respondent**

**Hearing dates : 20 December 2007**

---

**HTML VERSION OF JUDGMENT**

---

Crown Copyright ©

**Lord Justice Buxton :**

1. At the sitting of the court Mr Gill QC, for KG, requested that anonymity be maintained in the case of his client, because of his fears as to the current situation in Sri Lanka. Whilst noting that it was now seven years since KG left that country, and five years since his claim for asylum was refused, we concluded that it would be an inappropriate use of the court's time to investigate the issue in any detail: particularly when assured by counsel of Mr Gill's standing that the issue was a serious one. AK did not seek to maintain anonymity, but we thought that the easiest course was to continue, at least to the delivery of judgment, with the titles of both cases so far adopted.

**Background and outline facts**

2. These two appeals from determinations of the Asylum and Immigration Tribunal were listed and heard together, because they were thought to raise the same question as to the correct transposition into English domestic law of certain provisions of the "Citizens' Directive", Directive 2004/38/EC. In the event, the wider issues as to the present state of English law proved not to be conclusive, since each of the appellants fails on the facts of his particular case. Nonetheless, it is appropriate, both as the context of those decisions and because of the general importance of the subject, to address the issues of transposition: issues on which we received detailed and valuable submissions from all counsel instructed in the appeals.

3. Both of the appellants entered the United Kingdom as in the event unsuccessful asylum seekers, and now seek to remain here, when otherwise they would have no right to do so, as a family relation of EU citizens who have themselves subsequently come to this country. Union citizens are all nationals of another member state, and as such have certain rights both to enter and to remain in the United Kingdom and to bring with them certain of their relations. I first set out in outline the facts of the two individual cases. Some of the facts, in particular in relation to the social relationship of the appellants with their respective Union citizen relative, will have to be further analysed in relation to particular issues addressed later in this judgment.

4. *KG* is a national of Sri Lanka born on 6 March 1968. He lived with his parents in that country until October 2000. In November 2000 he arrived clandestinely in the United Kingdom and claimed asylum shortly thereafter. That claim was refused. KG's appeal was unsuccessful, but he remained in the United Kingdom without leave to remain, living with his elder sister and her husband. The Union citizen relative on whose status he relies is his brother, who had left Sri Lanka in 1992, eight years before KG, and was granted refugee status in Germany. He became an Union citizen when he acquired citizenship of the Federal Republic of Germany in 2001. In January 2006 the Union citizen relative entered the United Kingdom, and applied for a residence permit under his rights of entry as such Union citizen. On the following day KG applied for residence, as a family member of the Union citizen.

5. *AK* is a national of Sri Lanka, born on 10 December 1981. Until 1991 he lived in the family home in Sri Lanka with his parents, a brother, three sisters, his mother's sister, the latter's husband and their four daughters and two sons. In 1991 the family was dispersed by internal disruption endemic in Sri Lanka. AK arrived in the United Kingdom in November 2000, unsuccessfully claimed asylum and in 2001 failed in an appeal against that decision. He nonetheless remained unlawfully in this country. The Union citizen on whose status he relies is one of the daughters of his mother's sister, thus his cousin, who left Sri Lanka in 1992 (AK then being eleven years old and the cousin seventeen years old) and claimed asylum in

France. She became a citizen of the French republic, thus an Union citizen, in 2000. In 2005 she moved to the United Kingdom, exercising her rights as an Union citizen. AK thereupon applied for residence as a relative of the Union citizen.

**Free movement of Union citizens**

*The basic law*

6. An important principle of Community law is the removal of barriers to movement between member states. Originally, that was seen as a means of promoting one of the foundations of the Community as an economic union, as envisaged in articles 48 and 49 of the Treaty of Rome, and the first piece of detailed Community legislation to that end, Council Regulation 1612/68, was limited to the rights of workers. That approach was significantly added to by the creation of citizenship of the Union by Part Two of the Consolidated Treaty. That Part provides by article 18 that

> Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaty and by the measures adopted to give it effect.

7. The principal such measure, with which we are directly concerned in this case, is Directive 2004/38. Articles 5 and 6 of Directive 2004/38 give Union citizens a right of entry into another member state, and a right to reside there for a period of up to three months. A right of residence for more than three months is granted by article 7 to Union citizens who are either workers or self-employed persons in the host state; or have sufficient resources for themselves and their family members not to be a burden on the resources of the host state and have comprehensive sickness cover; or are in the host state for educational purposes, again with provisions as to sufficient resources and sickness cover.

*Family members*

8. Both Directive 2004/38 and earlier legislation make provision about the presence and residence in the host state of family members of the Union citizen, according to the category of relation into which those members fall. Directive 2004/38 identifies two such categories. By article 2(2) "family members" of the Union citizen are

a) the spouse;

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

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

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

I will call these persons *article 2 family members*. It will be noted that such family members fall into two classes: A. Those whose rights are based simply on their relationship with the Union citizen, i.e. spouses, registered partners and children under 21. B. Those who in addition to their relationship with the Union citizen have to prove their dependence on him or his spouse or partner, i.e. children over 21 and direct relatives in the ascending line.

9. Article 3 of Directive 2004/38 then says that the beneficiaries of its provisions are, first, all Union citizens and their article 2 family members "who accompany or join them". It then by article 3(2) makes further provision, which is of central importance in these appeals:

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

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

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

I will refer to the persons addressed in article 3(2)(a) as *other family members* [OFM].

10. Directive 2004/38, including the foregoing provisions, has purportedly been transposed into domestic law by the Immigration (European Economic Area) Regulations 2006. We may note that the legislation is expressed in terms of EEA nationals and not just of Union citizens, but it will be convenient to continue to discuss the Community jurisprudence using the latter expression. Regulations 8 and 17 address the position of OFM (called in the Regulations extended family members). Regulation 8 defines and limits the persons who in relation to entry into the United Kingdom count as OFM. It reads as follows:

**8.** (1) In these Regulations "extended family member" means a person who is not a family member of an EEA national under regulation 7(1)(a), (b) or (c) and who satisfies the conditions in paragraph (2), (3), (4) or (5).

(2) A person satisfies the condition in this paragraph if the person is a relative of an EEA national, his spouse or his civil partner and-

(a) the person is residing in an EEA State in which the EEA national also resides and is dependent upon the EEA national or is a member of his household;

(b) the person satisfied the condition in paragraph (a) and is accompanying the EEA national to the United Kingdom or wishes to join him there; or

(c) the person satisfied the condition in paragraph (a), has joined the EEA national in the United Kingdom and continues to be dependent upon him or to be a member of his household.

(3) A person satisfies the condition in this paragraph if the person is a relative of an EEA national or his spouse or his civil partner and, on serious health grounds, strictly requires the personal care of the EEA national his spouse or his civil partner.

(4) A person satisfies the condition in this paragraph if the person is a relative of an EEA national and would meet the requirements in the immigration rules (other than those relating to entry clearance) for indefinite leave to enter or remain in the United Kingdom as a dependent

relative of the EEA national were the EEA national a person present and settled in the United Kingdom.

(5) A person satisfies the condition in this paragraph if the person is the partner of an EEA national (other than a civil partner) and can prove to the decision maker that he is in a durable relationship with the EEA national.

(6) In these Regulations "relevant EEA national" means, in relation to an extended family member, the EEA national who is or whose spouse or civil partner is the relative of the extended family member for the purpose of paragraph (2), (3) or (4) or the EEA national who is the partner of the extended family member for the purpose of paragraph (5).

11. Where, but only where, the person concerned meets the regulation 8 definition, the Secretary of State has to take the action mandated by article 3(2) of Directive 2004/38. That is expressed in domestic law by regulation 17(4):

    The Secretary of State may issue a residence card to an extended family member not falling within regulation 7(3) who is not an EEA national on application if-

    (a) the relevant EEA national in relation to the extended family member is a qualified person or an EEA national with a permanent right of residence under regulation 15; and

    (b) in all the circumstances it appears to the Secretary of State appropriate to issue the residence card.

12. In our appeals, the Union citizens are both qualified persons, because they are present in the United Kingdom as workers: see §7 above. Both of the appellants have however been held to fall at the first hurdle erected by the Regulations, in that they arrived in the United Kingdom nor from another member state but from Sri Lanka, and therefore had not been residing in an EEA state in which the Union citizen also resides, as regulation 8(2)(a) requires for recognition as an OFM.

13. The appellants accept that they cannot qualify under any other limb of regulation 8(2). They accordingly argue that regulation 8 does not properly transpose Directive 2004/38, in that it imposes greater restrictions on the recognition of family members than Directive 2004/38 provides for; and that they are therefore entitled to have directly applied to their cases the provisions of the Directive themselves. If that is done, the expression

    > in the country from which they have come are dependants or members of the household of the Union citizen

    has to be read as referring to any country and not just to member states and EEA countries as it is limited by regulation 8(2).

14. KG is therefore argued to qualify under article 3(2), on the strength of his residence with his brother in Sri Lanka between 1968 and 1992; as does AK on the strength of his residence with his cousin in Sri Lanka between 1981 and 1991; as well, in both cases, by reason of dependency on the Union citizens. It makes no difference that they are and will remain nationals of Sri Lanka, because, as is accepted, article 3(2) extends to OFM irrespective of their nationality.

15. At an earlier stage of these cases it seems to have been argued that article 3(2) gives the appellants rights of entry and residence in the United Kingdom in the same way as if they were article 2 family members. That contention formed the main issue at least in the appeal of AK to the AIT, and was rejected by that tribunal in what was, with respect, a full and persuasive judgment. Before us, however, Mr Gill correctly confirmed that that contention was unfounded. The most that the appellants could hope to achieve was an order that, in the terms of article 3(2), the state should "facilitate" (whatever exactly that meant) their entry, and in that

process make an extensive examination of their personal circumstances: something that so far had not been done, because of the assumption that the appellants did not qualify as OFM in any event.

16. I will address that claim by first considering the intention and provisions of Directive 2004/38 in more detail; then addressing such authority as there is that assists in the present problem; and then applying the law as found to the facts of these appeals.

**Directive 2004/38**

*The origins of the Citizens' Directive: movement within the Community*

17. As we have seen, new Community legislation was needed because of the introduction of Community citizenship, the rights of movement attaching to which have to be added to the rights previously granted to limited categories of nationals of member states, most obviously migrant workers. That apart, however, the assumptions and procedures of Directive 2004/38 do not mark a fundamental change from the previous state of the law. In particular, as its recitals make clear, Directive 2004/38 proceeds not by replacing but by amending the workers' Regulation 1612/68. Two aspects of that development may be noted as relevant to our cases.

18. First, the provisions about family members, and the different approach taken in Directive 2004/38 to different categories of family member, are not at all new. Article 10 of Regulation 1612/68 made such provision in relation to the families of migrant workers in terms that differ little if at all in substance from article 3(2) of Directive 2004/38. In particular article 10 (2) provides that

> Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 [which makes the same provision as article 2 of Directive 2004/38, save that in 1968 there was no concept of registered partnership] if dependant on the worker….or living under his roof in the country whence he comes.

Similar provision was made in Directive 73/148 on the free movement of self-employed persons.

19. Second, it was endemic in Regulation 1612/68 that it concerned freedom of movement of the worker *within* the Community, and thus that rights even of article 2 family members were likewise limited to movement within the Community in company of the worker who was moving from one member state to another: rather than extending to a right to enter a first member state from a third country. As the European Court of Justice [ECJ] put it in Case C-109/01 *Akrich* at §49:

> 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.

20. That approach cannot be simply translated into Directive 2004/38, because the Directive creates express rights of residence in the host state, which are lacking from Regulation 1612/68. However, it necessarily followed that the worker had a right to reside in the host state whilst exercising his right to work there. There would, therefore, be nothing surprising if the right of residence of the Union citizen under Directive 2004/38 also did not generate rights of initial entry into the territory of the Community for his spouse, and much less for his OFM. And, further, rights of residence created by Directive 2004/38 are expressed as linked to, and in the structure of chapters II and III of Directive 2004/38 are seen as naturally following upon, rights of entry in exercise of the right of free movement. That free movement is described by recital (2) to Directive 2004/38 as a freedom of the *internal* market, thus assuming movement from one member state to another.

21. The point can be illustrated as follows. Suppose that in that case the relevant Union citizen had sought to bring the appellant to France as soon as she acquired French citizenship in 2000. Or that the relevant Union citizen relied on by this or any other third country citizen was a British national born here who had never left this country. There is nothing in Community law that would have required France or the United Kingdom to grant the third country citizen, as an OFM, any rights over and above those to be found in domestic immigration law. However, when taxed from the bench with the apparent paradox that the Union citizen could improve the position of her OFM relatives simply by moving from one member state to another, Miss Rogers robustly replied that there was no paradox at all. The Community rights that were in issue before us were indeed rights that protected freedom of movement, citing in illustration Case C-291/05 *Eind* (as to which see further § 33 below). Those rights had nothing to do with the position of the Union citizen within his own member state.

22. However, that Community rights rested on movement within the Community was very far from being conceded either by Miss Rogers or by Mr Gill, on behalf of KG. Indeed, central to his case was the contention that movement between member states was not required before the Union citizen acquired rights, and thus logically could not be required of the third country national who relied on the rights of the Union citizen. There were two different grounds on which these submissions were based.

23. First, Mr Gill took us to various cases in the ECJ which were said not to impose that requirement in respect of the free movement rights of Union citizens; and which in addition envisaged family members relying on those free movement rights when arriving directly from third countries. Leaving aside Case C-1/05 (*Jia*), which I address in the next section of this judgment, the authorities relied on were Case C-459/99 (*MRAX*) and Case C-157/03 (*Commission v Spain*). Before looking at them in detail, it should be remarked that both of the cases concerned the spouses of Union citizens, a situation very different from that of OFM, and who under the Directive 2004/38 take the benefit of that Directive by proof of relationship and nothing else: see §8 above. The actual issues in the cases were also principally concerned with the effect of Community jurisprudence on national immigration rules as to the visas and passports required to be produced by third country nationals on first entry to a member state, and thus on first entry to the territory of the Community.

24. In *MRAX* the applicant sought the annulment of a Belgian rule that a third country spouse of a Belgian citizen must on entry to Belgium produce a passport or travel document bearing a Belgian visa. The ECJ pointed out, at §39 of its judgment, that Community legislation on free movement did not apply where (as in *MRAX* itself) the persons concerned had never exercised those freedoms; and it further pointed out, at its §57, that Community legislation did not specifically address the measures that a member state could take when a third country spouse of a citizen of that state presented herself at the border without a visa. The ECJ however noted Community jurisprudence on family life (citing Case C-60/00, *Carpenter*, a case to which we return below); and appears to have assumed that by analogy with the then provisions relating to the family members of migrant workers (which are largely reproduced in article 5(4) of Directive 2004/38), absence of a visa could not be used as a reason for refusing entry if the spouse could otherwise establish his or her status as such spouse.

25. The ECJ's answer to the first and principal question put to it, at §62 of its judgment, bears quotation:

> …a Member State may not send back at the border a third country national who is married to a national of a Member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health…..

It is to be noted that emphasis was placed on support of the relationship of marriage, which was the relationship relied on both in *MRAX* and in *Carpenter*. There is nothing in this to suggest that the rules on OFM are equally indifferent as to the country from which the OFM has arrived. And the case says nothing to undermine the basic requirement that the Union citizen should be moving within the Community. Indeed, the only reference to the nature of the rights exercised under the movement directives assumes that the right is one to move within the Community: see *MRAX* at §56.

26. *Commission v Spain* concerned a requirement of the Kingdom of Spain that where nationals of other member states had exercised their freedom of movement into Spain a third county spouse could only reside with them in Spain if the spouse obtained a residence visa from the Spanish consulate in her last country of domicile. The ECJ at its §26 made explicit what had been at least implicit in *MRAX*, that

> the right of entry into the territory of a Member State granted to a third country national who is the spouse of a national of a Member State derives from the family relationship alone.

That being so, and whilst a member state can require a visa or equivalent document from such a third country national, the Spanish rule as to that requirement was unduly restrictive, and thus by implication unduly restrictive of the right of movement of the Union citizen married to that third country national.

27. This case again does not support the argument that the Union citizen's rights extend beyond movement within the Community: indeed, when describing the underlying legislation the ECJ specifically states in its §32 that the right is a right to move within the Community. It is true that the case envisages, or at least does not specifically exclude, that the *spouse* may arrive at the border from a third country. But as the ECJ points out, the only thing that matters in the case of the spouse is the married state, and that alone has to be proved.

28. The most that these cases establish, therefore, is that Community rules as to admission of *spouses* of Union citizens may override national immigration rules, whether the Union citizen is simply resident in his own member state (*MRAX*); or exercising his rights of movement within the Community (*Commission v Spain*). They do not undermine the assumption, stated for instance in *Akrich*, as set out in §19 above, that free movement rights attach only to movement within the Community. And they say nothing about the correct approach to the much more complex question of the nature of the dependence on, or membership of the household of, the OFM of an Union citizen who is moving within the Community.

29. Mr Gill however had a second string to his bow. He instanced hypothetical cases (of course, quite different from the facts of the appeals before us) of nationals of a member state who have never lived within the Community, such as Portuguese citizens living in Daman, Diu or Goa; or Union citizens who have been living in third countries for long periods. In either case, the Union citizen might wish to enter or re-enter the territory of the Community not by entering his own country, but by entering another member state. The rights granted to Union citizens and their relations by Directive 2004/38 must be assumed to apply in such cases: even though plainly neither the Union citizen nor his relations would be coming from another member state.

30. I would agree that these cases do not fit with the concept of movement within the Community, yet it would be surprising if rights to enter, remain in and work in any member state did not apply to them. That, however, has been a dilemma that has been present at least since the formulation of Regulation 1612/68 which, as we have seen, has been consistently interpreted in terms of its title, as relating to freedom of movement within the Community. Nor is the case made any different by the addition of movement rights of Union citizens, since before the formulation of Directive 2004/38 the persons hypothesised in §29 above could well have wished to work in, as opposed to merely entering, other member states.

31. How the ECJ would address such a case were it to arise before it in the context of the movement provisions cannot be gauged with certainty. It was suggested in the argument for

AK that in Case C-138/02 *Collins* the ECJ "had no hesitation" in applying free movement rules to an Union citizen who had been absent in the USA for some twenty years. But that case failed on the question of whether Mr Collins was in fact a "worker", and the wider issues were not addressed. And in any event it seems extremely unlikely that the potential impact of such cases, not so far expressly dealt with in Community jurisprudence, has to drive the interpretation of Directive 2004/38 away from what is undoubtedly the core situation that it addresses, of movement of an Union citizen between one member state and another. The ancillary rights to which that gives rise have therefore still to be assessed in the context of the movement by the Union citizen on which they are based: in the present appeals, movement from Germany to the United Kingdom in the case of KG, and from France to the United Kingdom in the case of AK. The problem raised by Mr Gill does, however, have an impact on the proper interpretation of article 3(2)(a) in general terms, to which I return in §68 below.

*Family reunion?*

32. Mr Gill strongly urged that the *principe moteur* of Directive 2004/38 was the encouragement of the Community value of family reunion; and that its terms should be interpreted, and transposed into domestic law, on that basis. It is easy to see why this was an attractive claim for the appellants. Even if there are difficulties in explaining why the appellants, or for that matter any or all of fourteen relatives who shared a household with AK in Sri Lanka in 1992, should have a right to join their relation in the United Kingdom in 2008, such an event would clearly qualify under the description of family reunion. However, and accepting the submissions of Mr Palmer, I consider that the basis of the argument is misconceived.

33. Put shortly, Community law recognises rights of movement on the part of relations not in order to support family values as such, but in order to make real the right of movement of the Union citizen: who may be deterred from exercising that right if he cannot take his relevant family with him. That is the constant theme of the cases that we were shown in support of the attempt to assert the doctrine of family reunion.

34. In Case C-291/05 *Eind* Mr Eind was a Dutch national who went to work in the United Kingdom, being joined there by his daughter, a national of a third country. Miss Eind was under 21, and accordingly would have been entitled to the benefit of Directive 2004/38 by reason of her relationship alone: see §8, sub-category A, above, and the first phrase of article 2(2)(c). Mr Eind then returned to Holland, where he was economically inactive. The Dutch government argued that Miss Eind had no right to come to Holland with him, since she had had no right to live in Holland when her father moved the United Kingdom, and so he could not have been deterred from making the move to the United Kingdom by the possibility that she might not be able to move back to Holland with him when he returned there.

35. The ECJ disagreed. Miss Eind was not unlawfully present in the United Kingdom, but had been granted rights of residence there: see §11 of the ECJ's judgment. In that context, the ECJ said, at its §§ 36-37, that a Union citizen might be deterred from exercising his rights of movement, as Mr Eind had done by moving to the United Kingdom, by

> the prospect…of not being able, on returning to his Member State of origin, to continue living together with close relatives, a way of life which may have come into being in the host Member State as a result of marriage or family reunification. [37] Barriers to family reunification are therefore liable to undermine the right of free movement which the nationals of the Member States 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.

36. The importance of this for our purposes is the clear recognition that "family reunification" is relevant, but relevant only, to the extent to which it assists in the exercise of the Community right of the Union citizen. That is further underlined by the ECJ in Case-60/00 *Carpenter*, already referred to. Mr Carpenter was a national of the United Kingdom, who exercised a Community right, not of movement, but of the provision of services (by telephone) to

customers in other member states. Mrs Carpenter was a third country national with no right to remain in the United Kingdom under English domestic law. The ECJ held that it would be disproportionate under Community law, read with article 8 of the European Convention on Human Rights, for the English authorities to deport her. An important factor in that assessment was that her removal would interfere with Mr Carpenter's exercise of his Community right to provide services to persons in other member states. The ECJ said, at its §§ 38-39:

> …it should be remembered that the Community legislature has recognised the importance of ensuring the protection of family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self-employed workers within the Community…[39] It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.

37. Here again, the emphasis is on the recognition of family life as a support to, and encouragement of, the exercise of rights by the Union citizen, and not as an end in itself. As Advocate-General Geelhoed said of *Carpenter* in §72 of his opinion in Case C-1/05 *Jia*:

> …although it is clear that Article 10 of Regulation No 1612/68 and Article 1(1) of Directive 73/148 have as their *effect* the protection of family life, it cannot, in my view, be said that this was an *objective* of these provisions. Where the Court observed first in *Carpenter*, and later in *MRAX*, that in adopting the regulations and directives, 'the Community legislature has recognised the importance of ensuring the protection of family life of nationals of Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty', viewed in the context of the time when these acts were adopted, this was merely an implicit and, at most, a secondary consideration. There is no reference to Article 8 of the ECHR in the preambles to Regulation No 1612/68 or Directive 73/148, or, significantly, in their successor, Directive 2004/38. The latter only refers in a general sense to compliance with the ECHR…..I do not consider, therefore, that the protection of family life can be used as a guideline for the interpretation of the scope and the content of the relevant provisions in Regulation No 1612/68 and Directive 73/148. [emphasis in the original]

38. Mr Gill nonetheless took us to two materials that he claimed to point in a different direction. First, although, as the Advocate-General points out, the recitals to Directive 2004/38 say nothing about the essential provision as to family life, article 8 of the ECHR, recital (6) does say that the provisions as to OFM are introduced "in order to maintain the unity of the family in a broader sense". But that says no more than that, as article 3 makes clear, the provisions of the Directive are extended, in limited terms, to persons who are not members of the immediate family, article 2 family members. It does not displace Advocate-General Geelhoed's perception of the basis of Directive 2004/38, and was not seen by him as doing so.

39. Second, we were shown a publication of the Commission, *Civis Europaeus Sum*, in which Mr Frattini, a Vice-President of the Commission, says

> Community law, in the form of Directive 2004/38/EC, fulfils one of humanity's most long-standing aspirations: the possibility of moving without restrictions or hindrances and settling down in the country of one's choice together with one's family

Mr Gill saw some help in the broad and aspirational terms of that statement. But, even if such material could offset the jurisprudence of the ECJ, Mr Frattini's statement goes no further than to record that Directive 2004/38 creates rights of movement for humanity (provided they are Union citizens), and not just for workers, and makes provision for the Union citizens to be accompanied by their families. None of those general propositions are in issue before us; all of them are neutral in the dispute that is in issue before us, of who in detail are the beneficiaries of Directive 2004/38, and on what terms.

40. The upshot is therefore that it is necessary to approach the interpretation of Directive 2004/38 on the basis of the jurisprudence set out above on the exercise of rights of movement by Union citizens, without presuppositions about larger objectives of family reunification.

**Case C-109/01 *Akrich* and Case C-1/05 *Jia***

41. These cases have to be the subject of separate analysis because they loomed so large in the argument before us. The Secretary of State relied strongly on *Akrich*. The appellants relied equally strongly on *Jia*; and indeed the only stated reason for granting permission to appeal in *KG* was a belief that observations of the ECJ in §33 of its judgment in *Jia* might have undermined the construction of article 3(2)(a) adopted by the Secretary of State.

42. In the analysis that follows it will be necessary always to bear in mind that neither case addressed a factual situation falling within article 3(2)(a), and neither case said anything directly about the issue with which we are concerned, the correct meaning of the expression "in the country from which they have come" in article 3(2)(a).

43. Mr Akrich, a third country national, was deported from United Kingdom in January 1991 as an overstayer and a person convicted of serious criminal offences. In January 1992 he returned, using false papers, and was again deported some six months later. He almost immediately returned clandestinely to the United Kingdom, and lived here unlawfully. In June 1996, some four years into that period of unlawful residence, he married the now Mrs Akrich, a British citizen, and applied for leave to remain on that basis. That leave was refused, and in August 1997 he was again deported, on that occasion at his request to the Irish Republic, where Mrs Akrich had established herself as a worker in June 1997. At interview Mrs Akrich was commendably frank as to the reason for her presence in the Irish Republic, saying that she had been advised by her solicitor to stay there for a short time, and then return to the United Kingdom with her husband, asserting a right of entry for both of them under the Community rules on freedom of movement. Such a right appeared to have been established by the decision of the ECJ in Case 370/90 *Singh*. Consistently with that plan, Mr Akrich applied in February 1998 for entry clearance into the United Kingdom, an application that was refused.

44. Not surprisingly, the proceedings were largely concerned with the implications of movement between member states simply for the purpose of attracting Community protections that would not otherwise be available. But the ECJ did not decide the case on that point, saying at §55 of its judgment that the motives for which an Union citizen installed herself in another member state were irrelevant to the exercise of her right of free movement, provided that, as was the case with Mrs Akrich, she had indeed installed herself as a worker. Rather, the ECJ examined the jurisprudential basis of that right of free movement of an Union citizen, and its implications for the rights of the Union citizen's relatives.

45. The ECJ first, in its §49, said that the provision then in issue, Regulation No 1612/68, only provided for freedom of movement within the Community, and in itself said nothing as to the right asserted by Mr Akrich, of access from outside the Community to a member state on the basis of being the spouse of an Union citizen. That paragraph of the ECJ's judgment has already been set out in §19 above. The ECJ then considered the reason why family members had been permitted to accompany Union citizens who moved between one member state and another, and in §§ 51-52 identified that as being in order not to handicap the Union citizen in the exercise of his right of movement. The court would no doubt have had in mind its explanation of the right in §§ 19-20 of its judgment in the case on which Mrs Akrich relied, *Singh*:

> A national of a Member State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another Member State. [20] He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his Member State of origin under conditions at least equivalent to those granted them by Community law in the territory of another Member State.

The congruence of approach with that of the ECJ in Case C-291/05 *Eind*, cited in §35 above, will be obvious.

46. In *Akrich*, however, the position was complicated by the fact that although Mr Akrich had been present in the United Kingdom with his Union citizen spouse, under United Kingdom immigration law he had been there unlawfully. In §§ 53-54 of the judgment the ECJ explained the effect of that circumstance in the context of the Community objective set out in §45 above. If the Union citizen is established in state A with a spouse who has no 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. Take then the case of an 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, Case C-291/05, who, it will be recalled, had obtained rights of residence in the United Kingdom: see §34 above. 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 state A by the fact that the same legal position will obtain in that state.

47. That reasoning is the explanation of the otherwise bald statement in §50 of the ECJ's judgment that

> …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.

That conclusion was reached in the context of two general principles that *Akrich* asserts without question. First, that rights of free movement of Union citizens are rights to move within the Community. Second, that the reach and conditions of rights to accompany Union citizens when so moving must be judged according to whether the absence of such rights will deter the exercise of the right of movement by the Union citizen: even to the extent of applying that test to accompaniment by spouses, who on the face both of Regulation 1612/68 and of Directive 2004/38 have such rights by virtue of their relationship alone.

48. *Jia* also concerned an article 2 family member, in this case a relation in ascending order whose dependence on the Union citizen was found to be established. Ms Schallen, a German national, had migrated to Sweden as a self-employed worker, with her husband, a Chinese national, who had residence rights in Sweden as the spouse of a Union citizen who had moved there from another member state. Her mother-in-law, Ms Jia, entered Sweden from China on a valid visitor's visa, and then applied for permanent residence as a family member of an Union citizen. That application was refused, but the Swedish courts referred various questions arising from it to the ECJ.

49. The case received detailed consideration from Advocate-General Geelhoed, who reviewed the decisions, which he did not find wholly uniform, in *MRAX*, *Commission v Spain* and *Akrich*. The Advocate-General pointed out that the case involved first entry into the Community in support of or on the basis of internal movement by an Union citizen. The Advocate-General therefore saw the central issue as the need to confront the differences between on the one hand the Community rules on free movement within the Community of Union citizens and their relations; and on the other the recognition (fully explained by the Advocate-General in §§ 32-35 of his Opinion) that decisions on first admittance to a member state from outside the Community remain a competence of the member state on the basis of national domestic law.

50. The Advocate-General addressed that problem at considerable length in §§ 62-81 of his Opinion. His analysis led him to the conclusion that national competence should prevail, to the extent that a relative's free movement rights could only be exercised if he was already lawfully resident in the Community under the law of the relevant member state. At his §85 the Advocate-General said that his conclusion "implies that I consider the rule laid down in *Akrich* to be of general application". However, and with appropriate deference, *Akrich* did not proceed on the basis of national immigration law viewed as a good in itself; but, rather, took that immigration law as a datum, necessarily applying for the reasons of national competence identified by Advocate-General Geelhoed, but relevant only because of its presumed effect on decisions as to movement between member states contemplated by Union citizens married to persons unlawfully present in the Community.

51. We may also observe in passing that Advocate-General Geelhoed joined every other authority in assuming that free movement rights of Union citizens are rights to move within the Community: see §§ 2, 26, 27, 30, 35, 44, 51, 54 and 57 of his Opinion.

52. The ECJ did not specifically engage with the Advocate-General's analysis, but it showed its sensitivity to the issue that he had raised by interpreting the principal question asked of it in terms of the impact of free movement jurisprudence on national immigration law:

> By this question, the referring court asks essentially whether Community law, in the light of the judgment in *Akrich*, requires Member States to make the grant of a residence permit to a national of a non-Member State, who is a member of the family of a Community national who has exercised his rights of free movement, subject to the condition that the family member has previously been lawfully resident in another Member State [ECJ, §25]

53. There could be only one answer to a question so formulated, since Community law about free movement of Unions citizens within the Community could not possibly *require* a member state in operating its national immigration law to impose conditions *restricting* the entry of third country spouses additional to those required by that national law; and that is what the ECJ confirmed when giving a negative answer to the question in its §33. And, so far as *Akrich* was concerned, the ECJ pointed out that Ms Jia had not been unlawfully resident in Sweden, so that

> the condition of previous lawful residence in another Member State, as formulated in the judgment in *Akrich*, cannot be transposed to the present case.

54. *Jia*, like all of the other cases, said nothing about the position of OFM and the specific conditions laid down for their admission. It formulated no general principle, and much less the principle for which the appellants seem to contend in our cases, that under no circumstances could residence rights of either article 2 family members or OFM be dependent on previous residence in a member state. However, Mr Gill sought to draw two further implications from the decision of the ECJ in *Jia*.

55. First, that the Advocate-General had by his reference to *Akrich* argued for the contrary principle, that previous residence in a member state was always required of a family member. By not adopting his approach the ECJ had shown that it supported the appellants' position,

summarised in §52 above. As has been demonstrated, the interplay between the Advocate-General's Opinion and the judgment of the court is a good deal more subtle than that, and in particular the ECJ in *Jia* very carefully formulated what it needed to decide, and equally carefully limited the implications of that decision.

56. Second, that *Jia* represented a rejection by the ECJ of (as I understood the argument) everything said in *Akrich*. As Mr Gill put it, the ECJ had distanced itself from *Akrich*. Not only does that claim simply not accord with what the ECJ actually said in *Jia*, it also pays scant respect to the way in which a court of final resort may be expected to proceed if it decides to depart from earlier authority, particularly authority decided hardly more than three years previously. In such circumstances the court will make explicit what it is doing, as indeed is the practice of the ECJ: see for instance Cases C-267 and 268/91 *Keck* [1993] ECR 1-6097[16].

**Conclusions on the proper construction of article 3(2)(a) of Directive 2004/38**

57. The following propositions can be drawn from this survey of the authorities.

58. First, it is the uniform jurisprudence of the ECJ that the rights of free movement by Union citizens who are workers or self-employed created by Regulation 1612/68 and Directive 73/148 were limited to rights to move within the Community.

59. Second, there is no reason to think that the right of free movement for Union citizen generally created by Directive 2004/38 is any different in that respect, and positive reasons, for instance in recital (2) to Directive 2004/38, to support the argument of continuity.

60. Third, the reason for providing rights to relations of Union citizens is to ensure that Union citizens are not deterred from exercising their rights of movement within the Community: see §§ 30-38 above, and the analysis of *Akrich* in §§ 44-46 above.

61. Fourth, as *Akrich* provides, an assertion of movement rights by a relation of an Union citizen will be tested against the justification for those rights indicated in §60 above, even in cases where the legislation appears to provide for movement rights by virtue of a relationship alone.

62. Fifth, all of the authority relates to the position of article 2 family members. *MRAX* and *Commission v Spain* may indicate that such family members can obtain access to the Community by reason of their relationship alone, but there is no justification for reading that proposition across into the position of OFM. The latter obtain access not by virtue of a relationship alone, but only if they fulfil the conditions specifically laid down in article 3(2)(a).

63. Sixth, *Jia* is not authority for any general proposition that it is unlawful to demand a relation's presence (lawful or otherwise) in a member state before he exercises his rights of movement, and therefore is not authority for reading that proposition into the construction of article 3(2)(a).

64. If therefore we turn to the construction of article 3(2)(a), the general issue common to both appeals which we identified in §2 above is whether the provision that OFM have to be dependants or members of the household of the Union citizen "in the country from which they have come" means, as Regulation 8(2)(a) provides, that "the country" has to be the EEA state in which the Union citizen also resides.

65. The basic point can be put quite shortly. No family members have rights of residence unless the Union citizen exercises his own right to move to or reside in a member state of which he is not a national. Article 3.1 of Directive 2004/38 provides that article 2 family members obtain the benefit of the Directive if they accompany or join such Union citizens. Although not specifically so stated, it is hardly likely that an OFM will not be also so required to be accompanying or joining his relevant Union citizen. The tight relationship between the exercise of rights by the Union citizen and the requirement that the OFMs accompanying or joining him should have been his dependants or members of his household in the country from which they have come very strongly suggests that that relationship should have existed in the country

from which the *Union citizen* has come, and thus have existed immediately before the Union citizen was accompanied or joined by the OFM. It seems wholly unlikely that when article 10(2) of Regulation 1612/68 and article 3(2)(a) of Directive 2004/38 introduce the requirement of dependence on and membership of the household of the Union citizen in the country from which the OFM has come, they can have had in mind anything other than dependence on the Union citizen in the country movement from which by the Union citizen is the whole basis of his rights and, thus of the rights of the OFM.

66. That consideration is reinforced not only by the requirement that the OFM must be accompanying or joining the Union citizen, but also by the justification for ancillary rights of movement in terms of not deterring the Union citizen from exercising the primary right (see §60 above). The analysis of the ECJ in *Akrich* addressed actual but unlawful presence of the family member in the original member state. But the argument that "the country" in article 3(2)(a) means any country at all, whether or not the Union citizen is there at the time of movement, assumes that the OFM rules will extend to cases where the OFM is not present in the original member state at all, even unlawfully. It is hard to see how the Union citizen will be deterred from exercising his right to move from one member state to another by the prospect of not being able to take with him an OFM who was once, in another state, but is not now, a member of his household.

67. So far so good. But the argument goes no further than to establish that in order to exercise an OFM's ancillary rights the dependence or membership of household must be in the same country as that from which the Union citizen is moving. Regulation 8(2)(a) however requires the OFM to have been a dependant or a member of the household of the Union citizen in *the EEA state* in which the Union citizen resides.

68. In most cases, including those addressed in these appeals, the country relevant to the rights of the Union citizen will indeed be a member state, because his rights will be based on movement, which the jurisprudence indicates will normally be movement within the Community. That however leaves the so far unresolved position of the Union citizen who wishes to enter a member state other than his own, being a person who has never lived in his own member state, or has lived in a third country for a substantial period of time: see §§ 29-31 above. The most that can be said about the impact of such cases is that, provided Community law sees the need to accommodate them under the freedoms of movement of Union citizen, they would undermine the position of Regulation 8(2)(a) in interpreting article 3(2)(a) of Directive 2004/38 as requiring "the country from which they have come" as necessarily being an EEA state.

69. That difficulty does not assist the present appellants. Their claims are based squarely on their Union citizen relative's movement from a member state: in the case of KG from Germany and in the case of AK from France. For the reasons set out in §§ 65-66 above, they can only rely on Directive 2004/38 rather than the Regulations if they can establish dependency or membership of the household of the Union citizen in the country relevant to the Union citizen's own right of establishment in the United Kingdom, which countries are Germany and France respectively. That of course they cannot do.

**Conclusion on the construction issue**

70. I would therefore and for that reason by itself dismiss both of these appeals. But it is also relevant in these cases to go further and demonstrate that even if the construction of the Directive adopted in §§ 65-66 above is wrong, and "the country from which they have come" can be any country at all, and not necessarily the country relevant to the Union citizen's exercise of his rights, nevertheless on the facts both appellants must fail in any event. That is because, even assuming in their favour that their construction of "the country" is correct, neither appellant comes anywhere near to meeting the other detailed requirements of article 3(2)(a).

71. I therefore take separately those various requirements imposed by Directive 2004/38. The difficulties for the appellants that the requirements of the article present may also be thought to support the construction of the central term of the article that is adopted above.

**The facts of these cases**

*Who accompany or join them*

72. As explained in §65 above, the requirement that the relatives should be accompanying or joining the Union citizen is only specifically stated in Directive 2004/38 in relation to article 2 relatives, but it is inconceivable that that assumption is not also made in the case of OFMs. Further, the only sensible assumption is that the case of an OFM arriving from a third country is assessed from this point of view on his first seeking entry into the member state; because it is then that the issue discussed above must arise, of whether his Community rights should override national immigration law.

73. Both of the appellants plainly fail on that score. When they sought admission to the United Kingdom (or, in the case of KG, arrived here clandestinely) the movement to the United Kingdom of the Union citizen on which their claims are based was still five years in the future. Indeed, in KG's case the relation on whom he relies had not yet even achieved the status of Union citizen. And even if that difficulty is disregarded, and the question is asked whether when they applied for residence permits they were accompanying or joining the Union citizen relative, the answer is still in the negative. As a simple matter of fact neither appellant accompanied the Union citizen relative. And as a simple matter of language they could not base their application for a residence permit on any claim that they were joining the Union citizen relative in the United Kingdom. Rather, the Union citizen relative had joined them in the United Kingdom, where they had been present for many years before the Union citizen relative arrived.

74. These objections are not merely pedantic points of construction. Rather, they illustrate that the purpose and justification of the ancillary rights granted to the relatives of Union citizens is to support the exercise by those Union citizens of their own rights, if needs be by overriding domestic immigration law. That is why, to qualify, the relatives must either come with the Union citizen when he is exercising his rights or join him once he has exercised those rights. That purpose and justification is not borne out when an OFM who has already for many years been in breach of the immigration laws of a member state seeks to use the arrival there of his Union citizen relative as a means of legitimising his own previous breach.

*Dependants in the country from which they have come*

75. We assume for present purposes that the appellants will qualify if they can show relevant dependency in Sri Lanka (on no view is dependency in the United Kingdom relevant). The nature of dependency of a relative was in issue in *Jia*. In §43 of that judgment the ECJ interpreted the term as meaning that the family members

> need the material support of [the Union citizen] or his or her spouse in order to meet their essential needs in the State of origin of those family members or the State from which they have come at the time when they apply to join [the Union citizen].

76. Neither appellant can meet that test. We have not been shown any of the evidence, but in KG's case the highest at which the case has been put is that the Union citizen sent money to KG's family in Sri Lanka. There is no indication that KG's essential needs would not have been met without that money. I should add that the first Immigration Judge in KG's case did make a finding of dependence (and of residence in the Union citizen's household), but that was on the mistaken basis that article 3(2)(a) would be satisfied by dependence or residence in the United Kingdom, rather than in the country from which KG had come. In AK's case the first

Immigration Judge made a finding at §23 of his Determination that is fatal to the appellant's claim:

> I find that [the Union citizen] provided some support but that this was relatively small in the early years and that this would have had to have been shared among the large family. I find that the appellant exaggerated the relative importance of the [Union citizen]'s remittances. It is more probable than not that the appellant's support was provided mainly by his own parents.

*Members of the household of the Union citizen*

77. There was some tendency in the argument before us to read this requirement as one of being members of the same household; or, as was said on behalf of AK, members of a communal household. That is not what Directive 2004/38 says, nor was that the condition in Regulation 1612/68, which requires the OFM to have been, in relation to the Union citizen, under his roof, not under the same roof. It seems very likely that the assumption is that the household will indeed have been that of the Union citizen, that is, that he was in colloquial terms head of it, the relations were under his roof, and on that basis he can reasonably wish to be accompanied by the members of it when he leaves for another country. If, on the other hand, the liberty extends to what might be called collateral members of the same household, then it is very difficult to see why for instance cousins with a close relationship but not actually living together are excluded; or why, to give a concrete example, it should be crucial to the case of AK that he was living in the same house, rather than the same street, as his cousin.

78. KG asserts membership of the Union citizen's household, but the household in their case was clearly that of their parents. AK asserts that the household headed by his parents was the household of his seventeen year old cousin who was living there with her own parents. That seems to be an abuse of language. The claim also demonstrates the reach of the appellants' case. The household in question was lived in by fourteen people, all of whom if living unlawfully in the United Kingdom would on the appellants' argument qualify for a residence permit as soon as the Union citizen relative arrived here. To them would have to be added any other relatives of the Union citizen with whom she happened to have lodged or shared a flat either in Sri Lanka or in any other country that she passed through on her way to France.

*The time of dependency and of living in the household*

79. Article 3(2)(a) is expressed in the present tense: in the country from which they have come *are* dependants or members of the household of the Union citizen. That cannot be disregarded either as a matter of construction or as a matter of common sense. The article speaks in the present tense because it assumes that the case of the OFM will be adjudicated upon at or near to the same time as that of the Union citizen whom he is accompanying or joining. While it will not literally be the case that he is at that time still dependent on the Union citizen or a member of his household in the country from which he has come, it makes sense that he should have been so dependent or a household member very recently. It makes no sense to suppose that this requirement of current dependency or household membership can be fulfilled by demonstrating in 2008, or in 2000, that KG or AK lived in the Union citizen's household until 1992.

*Deterrence from exercising the Union citizen's rights*

80. We have seen that in *Singh* and in *Akrich* the ECJ recognised that an assertion of dependency rights must be tested against the extent to which failure to recognise those rights would deter the Union citizen from exercising his own rights: see §§ 45-47 above. And even if that is not an absolute rule, it provides a very good cross-check as to whether any particular derivative claim falls within the terms of the article. When we asked Miss Rogers how the present claims met that requirement (there having been no evidence on the point) she said that it could be assumed that the Union citizen relatives might have been encouraged to come to the United Kingdom by the prospect of joining their OFMs in a lawful, rather than as it was up to then unlawful, residence. That will not do. The test is expressed in terms of dissuasion or

deterrence, not of encouragement. Just as Mrs Akrich was not to be taken as deterred from moving to the United Kingdom by the fact that her husband would not obtain residence rights, he not having had those rights in the Irish Republic; so AK's Union citizen relation is not to be taken as being deterred from moving to the United Kingdom by a refusal to grant residence rights there to an OFM who had no rights, and not even any physical presence with her, in France.

**Disposal**

81. All of these considerations strongly reinforce the conclusion that the appeals must fail. If contrary to that conclusion the appellants did fall within the terms of article 3(2)(a), then I would accept, despite a somewhat faint argument to the contrary by Mr Palmer, that there has not been the extensive examination of their personal circumstances that the article calls for. However, on my findings set out above that issue does not arise.

**Reference to the ECJ**

82. If it were necessary for the resolution of these cases to decide the issue as to the application of article 3(2)(a) to Union citizens who move other than between member states, referred to in §68 above, then subject to further argument I would be inclined to think that a reference to the ECJ might be necessary on that point. In the event, the issue does not affect the outcome of the appeals, and therefore a reference could not be justified. And, further, as demonstrated in §§ 72-80 above the appeals must fail on the facts whatever view is taken of the central issue of construction. That is another reason for a reference to be out of the question.

**Lord Justice Sedley**

83. The imprecision of the phrase "the country from which they have come" in art. 3(2)(a) of Directive 2004/38 mirrors the imprecision of the governing obligation to "facilitate entry and residence for", rather than to admit, people who are (not were) dependants of the EU citizen or members of his or her household in that country. The entire provision is more aspirational than legislative.

84. This is why a search for the underlying policy is necessary, and I respectfully agree with Lord Justice Buxton as to what the policy is.

85. There is, however, one literal aspect of the Directive which is worth noting. "The country from which they have come" may mean the country of origin or the country last lived in or visited. Some help as to which it is, however, is given by art. 8(5)(e), which draws a distinction between "the country of origin" and the "country from which they are arriving". If the latter is meant to be synonymous with "the country from which they have come" in art. 3(2)(a), the latter provision cannot relate only to status in the country of origin.

86. The French and German texts make it clear, in my view, that this is the case. In each of these texts the same expression is used in the two articles: in French, "pays de provenance", in German "Herkunftsland", contrasted with, respectively, "pays d'origine" and "Ursprungsland", in each case meaning country of origin. This seems to me to put it beyond doubt that the Directive itself in art. 3(2)(a) is concerned with the status of the applicant in the country from which he or she has most recently come.

87. This meaning goes some but not all of the way towards Lord Justice Buxton's interpretation of art. 3(2)(a). It demonstrates that the applicant may have been a dependant or household member of the EU citizen in the EU country from which the latter has just come, but also in the country of origin. This ambivalence, which I think is reflected in §68 of Lord Justice Buxton's judgment, suggests that the policy of the Directive is to be found as much in the requirement to "facilitate" entry and residence as in the place from which the applicant has come. If that place is the EU state from which the EU citizen himself or herself has moved, the obligation to facilitate entry and residence is a strong one; if not, there seems to me nothing in the policy

and objects of the Directive which requires a right of entry to be accorded by way either of implementation or of transposition.

**Lord Justice Hooper:**

88. I too agree that the appeals should be dismissed for the reasons given by Buxton LJ.

**BAILII:** Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII
URL: *http://www.bailii.org/ew/cases/EWCA/Civ/2008/13.html*