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3 National Resistances and the Role of the ECJ in the Enforcement of the Rights conferred by the Directive: The *Metock* Ruling

3.1 The Significance of the *Metock* Ruling

As we have seen in Section 2.2 above, citizens of the Union who exercise their free movement rights when accompanied by family members who are also citizens of the Union encounter far less difficulties than when they seek to be joined or accompanied by so-called 'third country national family members' (TCN). In 2003, before Directive 2004/38 came into force, the ECJ ruled in *Akrich* that the right to be joined by a TCN family member was guaranteed under European law as long as the European citizen was seeking to enforce this right in another Member State than the one of his/her nationality. In fact, the Court affirmed that when the marriage between a Member State national and a TCN was genuine, the fact that the spouses had settled in another Member State for the sole purpose of obtaining rights under EU law was not relevant in the assessment of their legal situation by the competent national authorities. The ECJ thereby conveyed the impression that Article 10 of Regulation 1612/68 could only be invoked if the TCN spouse of an EU national moving to a Member State had previously been lawfully residing in another Member State. Following this decision, Ireland, the UK and Denmark introduced a fundamental distinction in their respective immigration legislations between the movement of 'lawfully residing TCNs' (who benefited from EU free movement and citizenship laws) and 'new entries' from outside the EU (who were subject to national immigration law).

That notwithstanding, in July 2008, the ECJ reconsidered whether Directive 2004/38 provided a right to family reunification with TCN family members who had not already resided 'lawfully' in another Member State. Four TCNs had unsuccessfully applied for asylum in Ireland before meeting and marrying EU citizens exercising their free movement rights in this country. They were then refused a residence card by the Irish authorities on the grounds that the national legislation only applied if the family member was lawfully resident in another Member State and was seeking to enter Ireland with an EU citizen or was seeking to join the EU citizen there. Reconsidering and clarifying its previous jurisprudence, the ECJ held that there is a right for citizens of the Union who are exercising their free movement rights in a host state to be joined or accompanied by TCN family members irrespective of where they are coming from (i.e. inside or outside the EU) and of the legality of their residence in another Member State. In particular the Court held that:

therefore, in the light of the necessity of not interpreting the provisions of Directive 2004/38 restrictively and not depriving them of their effectiveness, the words 'family members [of Union citizens] who accompany ... them' in Article 3(1) of that directive must be interpreted as referring both to the family

members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming his family members.

Furthermore, the ECJ also stated that the Directive builds on the existing rights of citizens of the Union and that European legislation cannot be used to restrict or remove ones which were held previously. In the light of this, the ECJ clarified its previous decision in *Akrich*. While it seems that all Member States are now complying with the decision in *Metock*, as we have highlighted in the previous Section of this paper, some Member States are applying the ruling only to spouses and children of EU citizens exercising their free movement rights and not to wider family members, such as parents and grandparents who are also covered by Directive 2004/38. Further, some national administrations apply a sufficient resources requirement for TCN family members even where the principal is a worker or is self employed. This is not permitted by the Directive.

The political turmoil which followed this judgment provides us with an illustrative example regarding the resistance shown by certain Member States to European legislation and ECJ rulings on the freedom to move. As we will see in the next Section, a small group of Member States unsuccessfully sought to reopen the negotiations in order to ‘revise’ Directive 2004/38 to specifically address practices which they considered to be facilitated by this judgment: i.e. “*marriages of convenience*” and “*illegal immigration*”. This group aimed at bringing pressure through the Council on the European Commission to present an amendment to the Directive in order to allow Member States having more control over the admission and exceptions applicable to TCN family members. Under Article 35 of Directive 2004/38 however, Member States may already adopt measures to prevent the so-called abuses of rights conferred by the Directive such as ‘marriages of convenience’ *in so far as* they respect the principle of proportionality and provide for procedural safeguards. [...]