European Citizens' Third-Country Family Members & Community Law

Court of Justice of the European Communities

No legal residence requirements for the admission of family members with a third-country nationality of migrated Union citizens. Grand Chamber decision of 9 January 2007, Case C-1/05, *Yunying Jia* v. *Migrationsverket*

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Introduction

What governs the first entrance to Union territory by a third country national who is a family member of a European citizen who has migrated to a guest member state: (secondary) Community law or national law? This question, of the utmost constitutional importance as it regards the power to decide on the entrance of foreigners on national territory, one of the pearls in the crown of traditional national sovereignty, was facing the Court of Justice of the European Communities in the case of *Yunying Jia* v. *Migrationsverket*. Earlier the Court had sent out different signals. Now, in the long-awaited and remarkably short full Court decision of 9 January 2007, the Court carefully manoeuvred between Scylla (the member states are in full control) and Charybdis (Community law decides all): a member state is not required to make the grant of a residence permit to a third country national subject to the condition of lawful residence in a member state – but it apparently may do so. It is quite unlikely that this judgment settles the question once and for all.

General background

Free movement regulations and directives have extended the right of entrance and residence for migrating European citizens in the guest member state to their fam-

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ily members, whatever their nationality.[1] These may be spouses, direct descendants who are under the age of 21 or who are dependents, as well as dependent direct relatives in the ascending line. All of these provisions have been replaced by the Articles 5 (entrance) and 7 (residence) of Directive 2004/38 of 29 April 2004 'on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.' However, at the time of the facts of *Jia*, Directive 2004/38 was not yet applicable.

Traditionally, these provisions have been interpreted by member states as providing a right for family members of third-country nationality residing outside the territory of the member states to join the migrating European citizen in the guest member state. By way of example, Article B 10/5 of the Dutch *Vreemdelingencirculaire 2000* (policy rules on immigration) explained before 2004 that *all* third country nationals had a right to join their migrated European family members, without distinction between those who had never set foot on European Union territory and those already legally residing in the Union.

This interpretation seemed to be confirmed by the judgments of the Court in the cases of *MRAX* v. *Belgian State* of 25 July 2002[2] and *Commission of the European Communities* v. *Kingdom of Spain* of 14 April 2005.[3] In the first case, the Court decided, *inter alia*, that 'a Member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a Member State on the sole ground that he has entered the territory of the Member State concerned unlawfully' (point 80). In the second case, the Court affirmed what it had already stated in *MRAX*, namely 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. Therefore, issue of a residence permit to a third country national who is the spouse of a Member State national is to be regarded not as a measure giving rise to rights but as a measure by a Member State serving to prove the individual position of a national of a third country with regard to provisions of Community law (point 28).

[1] Regulation 1612/68 of 15 Oct. 1968 'on freedom of movement for workers' (Art. 10), Directive 73/148 of 21 May 1973 'on the abolition of restrictions on movement and residence with regard to establishment and the provision of services' (Art. 1), as well as, under certain conditions, the Directives on free movement of non-economically active European citizens, Council Directive 90/364 on the right of residence (Art. 1), Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (Art. 1) and Council Directive 93/96/EEC of 29 Oct. 1993 on the right of residence for students (Art. 2).

[2] Case C-459/99, *ECR* 2002 I-06591.

[3] Case C-157/03, *ECR* 2005 I-2911.

All in all, the right of entrance and residence of third country nationals who have furnished proof of their identity and their family relationship was to be subject only to the absence of a threat to public policy, public security or public health[4] and, if necessary, to the possession of a visa.[5] In absence of the latter, however, member states are obliged to grant the family members concerned 'every facility for obtaining any necessary visas' (cf. Article 3 Directive 68/360 and of Directive 73/148).

In the meantime, however, on 23 September 2003, the Court rendered its famous decision in the case of *Secretary of State for the Home Department* v. *Hacene Akrich*.[6] Mr Akrich, a Moroccan citizen, was deported in 1992 for attempted theft and the use of a stolen identity card from the United Kingdom, where he had unlawfully resided after his tourist visa had expired. In 1996, having illegally re-entered the United Kingdom, he married Mrs Akrich. He was arrested and expelled again in 1997, to Ireland, according to his wish, where his wife had settled shortly before. In 1998, the couple wanted to return to the United Kingdom, where Mrs Akrich was offered employment. Mr Akrich claimed the right to accompany his spouse, relying on Article 10 of Council Regulation 1612/68 and on the *Singh* ruling.[7] *Singh* guarantees a European citizen, who has gone to work in a guest member state with his or her spouse of whatever nationality, the right to return to the member state of origin with that spouse (at least if the European citizen also engages in economic activity in the latter state).

The United Kingdom however refused to grant Mr Akrich leave to enter and remain. According to British immigration law, a person against whom a deportation order is in force must be refused leave to enter, unless the Secretary of State revokes the order, as he had refused to do in Mr Akrich's case. The Secretary of State also refused entrance clearance on the basis of *Singh*, as he was of the opinion that Mrs Akrich had used her free movement rights only in order to circumvent British immigration law.

On preliminary questions of the Immigration Appeal Tribunal, the Court of Justice gave a very limited definition of what constitutes abuse of Community law in this context. In the absence of a marriage of convenience, i.e., a marriage 'entered into in order to circumvent the provisions relating to entry and residence of nationals of non-Member States', the motives that have prompted a European citizen to use his or her free movement rights are irrelevant in assessing his or her situation, both in the guest member state (as long as he or she 'there pursues or

[4] Art. 10 Directive 68/360; Art. 8 Directive 73/148/EC, and Art. 27 Directive 2004/38/EC.

[5] On the basis of Regulation 539/2001/EC or, where appropriate, national law.

[6] Case C-109/01, *ECR* 2003 I-9607.

[7] ECJ 7 July 1992, Case C-370/90, *The Queen* v. *Immigration Appeal Tribunal et Surinder Singh ex parte Secretary of State for Home Departmen*t, *ECR* 1992 I-04265.

wishes to pursue an effective and genuine activity') or in the member state of origin, to which the European citizen wants to return (points 55-57).

Although there was no indication whatsoever that the couple had concluded a marriage of convenience, this fact did not help Mr Akrich. The Court determined that Regulation 1612/68 only covers the freedom of movement *within* the Community and that the regulation 'is silent as to rights of a national of a non-Member-State, who is a spouse of a citizen of the Union, in regard to access to the territory of the Community' (point 49). It added that, in a situation such as Akrich's, a third country national married to a European citizen 'must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated' to rely on the Regulation (point 50). And, in the dictum, the Court concluded that:

> where the marriage between a national of a Member State and a national of a non-Member State is genuine, the fact that the spouses installed themselves in another Member State in order, on their return to the Member State of which the former is a national, to obtain the benefit of rights conferred by Community law is not relevant to an assessment of their legal situation by the competent authorities of the latter State (point 3).

Therefore, Mr Akrich could not benefit from Regulation 1612/68 as he had not lawfully resided in the United Kingdom at the time his wife went to Ireland; the fact that the couple had lawfully resided in Ireland – on the basis of the said Regulation – could not fill this lacuna.

The Court based this analysis on the absence of an element of dissuasion: as Mrs Akrich originally had no right to live in the United Kingdom with her spouse, she could not be dissuaded from using her free movement rights by the present refusal of the British authorities. Finally, and without specifying whether this was demanded by Community law or simply a matter of national law, the Court in its final considerations stressed that in assessing Mr Akrich's application, regard must be had to Article 8 of the ECHR, at least if his marriage was 'genuine'.

As this ruling, even after numerous times of rereading, seems a running contradiction *Akrich* has not surprisingly been subject to divergent interpretations.[8]

[8] Philipp Tschäpe, 'EuGH: Rechte von mit Unionsbürger verheiratetem illegalen Drittstaatsangehörigen', *Europäische Zeitschrift für Wirtschaftsrecht* (2003) p. 752-758; H. Oosterom-Staples, 'Wanneer is er sprake van misbruik van het recht op vrij verkeer van personen? Het arrest Akrich: meer vragen dan antwoorden' [When is there question of abuse of the right of free movement of persons? The Akrich ruling: more questions than answers], *NTER* [*Netherlands Journal of European Law*] (2004) p. 77-83; Richard Plender, 'Quo vadis? Nouvelle orientation des règles sur la libre circulation des personnes suivant l'affaire Akrich', *Cahiers de droit européen* (2004) p. 261-288; Eleanor Spaventa, 'Case C-109/01, *Secretary of State for the Home Department* v. *H. Akrich*', 42 *CML Rev.* (2005) p. 225-239.

According to a minimalist interpretation, the ruling should not be construed broadly as it is governed by the particularities of the case: illegal residence, a conviction for criminal offences, a deportation order, etc., *Akrich* in this view simply implies that Community law cannot repair the illegality of an immigrant who follows his spouse from the member state of origin to a guest member state (a fact which distinguishes *Akrich* from *Singh*). According to this interpretation, the ruling is not applicable to third country nationals who have never set foot on Union territory. These persons, subject to the public policy derogation and if necessary a visa, could still rely on secondary Community law for entrance and residence in a guest member state.[9]

However the Dutch government defended an opposite interpretation in a case before the Dutch Council of State,[10] which prompted that administrative court to put preliminary questions to the Court of Justice.[11] According to the Dutch Government, every first entrance and residence of a third country national in the territory of the Union has to be assessed individually on the basis of national law, not on the basis of Community law. Giving family members the right to enter and reside in a guest member state without their first having resided legally in Union territory would undermine national immigration law. Indeed, many European citizens married to third country nationals have, in order to circumvent national immigration rules, moved from the United Kingdom to Ireland,[12] or from the Netherlands to Belgium, with the sole objective of being joined there by their spouses or other family members on the basis of Community law, and then returning with them to their member state of origin. Behind the interpretation of the Dutch government looms not only the tightening of the immigration rules in the Netherlands, but also the division of powers between the Union and the member states in the field of free movement of persons (internal and external) on which the Advocate-General based his opinion in the case of *Jia.*

The opinion of Advocate-General Geelhoed

Advocate-General Geelhoed placed the issue in the perspective of the division of powers between the Union and the member states, partly in order to get a workable solution for national authorities (point 63 et seq.). While the internal free movement of persons is entirely governed by Community law, in the absence of fully harmonised immigration law the powers of deciding on first entry of third-

[9] Spaventa, *supra* n. 8, p. 233.

[10] Raad van State 13 July 2005, case number 200409356/1 (point 28).

[11] Case C-291/05 (*Eind*), still pending.

[12] Gavin Barrett, 'Family Matters: European Community Law and Third-Country Family Members', 40 *CML Rev.* (2003) p. 369-421 at p. 379-380.

country nationals remain with the member states.[13] The latter should also apply in the case of the first entry of a third-country national who is a family member of a migrated Union citizen. As is witnessed by the absence of any reference to Article 8 of the European Convention, in elaborating Directive 73/148 and of Regulation 1612/68 the Community legislature did not have in mind the strengthening of the right of family reunification, but rather the removal of obstacles for the free movement of self-employed persons and workers (point 69 et seq.). If a Union citizen moving to a guest member state would not have the right to be accompanied by family members legally residing in the member state of origin, the Union citizen could be dissuaded from using his or her Treaty rights. If however these family members are not yet legally resident in the member state of origin, the Union citizen loses nothing if he or she has no right to be joined by them in the guest member state.

Geelhoed thus used the reasoning on the absence of a dissuasive effect, employed by the Court to dismiss Mr Akrich's claim, as the foundation of a general rule. Moreover, giving these family members an 'automatic' right of admission to the guest member state would create unjustified unequal treatment with regard to family members of a Union citizen who has not left the member state of origin: these could only be admitted after an individual assessment on the basis of the immigration law of that member state (point 74). Concerning the European Convention, Geelhoed's position entailed that it is not applicable to cases like that of *Jia* as a matter of Community law, but solely as a matter of national law (point 73).

The judgment

Yunying Jia, a Chinese national and the mother-in-law of Ms Svanja Schallehn, a German national who since 1995 was self-employed in Sweden, entered Sweden in 2003 on the basis of a visitor's visa valid for a maximum of 90 days. Shortly before her visa expired, she applied for a residence permit to the *Migrationsverket* stating that she was financially dependent on her son and daughter-in-law. In 2004, the *Migrationsverket* rejected the application due to insufficient proof of financial dependence and ordered the deportation of Ms Jia to China or any other country willing to accept her. Ms Jia contacted the European Commission, who in a letter to the permanent representative of Sweden in Brussels pointed out that the decision of the *Migrationsverket* seemed to be contrary to Directive 73/148, the Court's case-law in *MRAX* and Article 8 of the ECHR. In appeal, the *Utlänningsnämnd*, the Alien Appeals Board, asked two sets of preliminary ques-

[13] Directive 2003/86/EC on family reunification is not applicable to family members of European citizens (Art. 3(3)).

tions. The first focused on the requirement of legal residence as a precondition for family reunification, the second on the requirement of (economical) dependence.

The Court of Justice in its judgment first meticulously and explicitly distinguished *Jia* from *Akrich*. The latter only provided an answer to the question 'what measures the Member States were entitled to take in order to combat steps taken by members of the family of a Community national who did not meet the conditions laid down by national law for entry and residence in a Member State'. In the present case, however:

> 31 (…) it is not alleged that the family member in question was residing unlawfully in a Member State or that she was seeking to evade national immigration legislation illicitly. On the contrary, Ms Jia was lawfully in Sweden when she submitted her application and Swedish law itself does not preclude, in a situation such as that in the main proceedings, the grant of a long-term residence permit to the person concerned, provided that sufficient proof of financial dependence is adduced.
>
> 32 It follows 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 and thus cannot apply to such a situation.

The answer to the first set of questions therefore had to be:

> 33 That having regard to the judgment in Akrich, Community law does not require Member States to make the grant of a residence permit to nationals of a non-Member State, who are members of the family of a Community national who has exercised his or her right of free movement, subject to the condition that those family members have previously been residing lawfully in another Member State.

Distinguishing the concept of 'dependent' in Article 1(1)(d) of Directive 73/148 from the *Lebon* ruling, the leading judgment in this respect so far, was more implicit.[14] As in *Lebon,* the Court held that 'the status of "dependent" family member is the result of a factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or by his spouse' (point 35), and does not presuppose the existence of a right to maintenance. The Court also restated that there is 'no need to determine the reasons for recourse to that support or to raise the question whether the person concerned is able to support himself by taking up paid employment' (point 36). However, it also added to *Lebon*, by ruling that:

[14] ECJ 18 June 1987, Case 316/85, *Centre public d'aide sociale de Courcelles* v. *Marie-Christine Lebon, ECR* 1987 2811.

> 37 In order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.

The condition that the need for material support must exist in the State of origin was prompted by Article 4(3) of Council Directive 68/360/EEC of 15 October 1968, according to which member states may require that dependent relatives in the ascending line of a worker or his spouse provide proof of their dependence by a document issued by the competent authority of the 'State of origin or the State whence they came'. As nothing justifies a difference of assessment between dependent family members of a worker and those of a self-employed person, the same is to apply to the latter category.

In order to enhance the basic freedoms guaranteed by the EC Treaty and the effectiveness of the free movement directives, proof of the dependence 'may be adduced by any appropriate means' (point 41). On the one hand, a document of the competent authority of the State of origin or the State from which the applicant enters is, although particularly appropriate, not a necessary condition for the issue of a residence permit; on the other hand, 'a mere undertaking from a Community national or his spouse to support the family member concerned need not be regarded as establishing the existence of that family member's situation of real dependence' (point 42).

Comment

Governed by Community law

Jia seems to confirm the thesis that the right of family reunification of migrated European Union citizens with third country nationals not legally residing in Union territory is governed by Community law. The Court's consideration that 'Community law does not require Member States etc.' (point 33, cited above) actually leaves no room for another conclusion. For if it were otherwise, Community law would have had no say in the matter at all and the Court could not have referred to it. Besides, if the case were not governed by Community law, the Court's answer that a 'dependent' family member must be in need of material support in the state of origin (point 37) would have been a mere shot in the air.[15]

[15] The Dutch translation of the judgment speaks in point 37 not of 'the state of origin' of the family member, but of the 'member state of origin' (lidstaat), which, of course, completely changes

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However, from the position that Community law governs the case, two different interpretations are, at first sight, possible concerning the condition of prior legal residence. The first is that Community law does not only require, but also does not *allow* making legal residence *a conditio sine qua non*.[16] That would mean that these third country nationals have a community right to family reunification essentially subject only to the absence of a threat for public policy, public security or public health. The *MRAX* and *Commission* v. *Kingdom of Spain* rulings would still stand in full glory.[17]

We do not think this interpretation is tenable. If indeed the member states were not allowed to impose legal residence as a condition, the Court would (and should) certainly have said so. Moreover, in that case the reference of the Court to Swedish immigration law, which does not preclude the grant of a long-term residence permit in a situation such as that of Ms Jia (point 31), would be completely superfluous. Therefore, according to us the phrase 'does not require' (in German: *nicht verpflichtet*; in French: *n'impose pas;* in Dutch: *er niet toe verplicht*) has to be read as implying 'but also does not forbid the imposing of a condition of legal residence'. In this second interpretation, the family reunification for the persons is 'governed' by Community law, but Community law refers back to national law and leaves the member states remarkable room for manoeuvre: they may according to their own wish impose the legal residence condition or not.[18]

In terms of a comparison with the position of the Advocate-General and with earlier case-law, this second interpretation leads to a very complicated picture. In principle, the Court distances itself clearly from Advocate-General Geelhoed's opinion that the member states are in full control. At the same time, on an essential point, the applicability of the free movement directives is entirely dependent on national law – and this of course is totally in line with Geelhoed's opinion. The Court also distances itself from the *Akrich* ruling, which is indeed governed by the particularities of the case, and from the *MRAX* and *Commission* v. *Kingdom of*

the picture and makes the answer inapplicable to the case at hand, as Ms Jia comes from China, and not from another member state. This is a translation mistake (compare the German and French versions).

[16] We think that the Court's emphasis on the fact that Ms Jia was lawfully in Sweden is only meant to distinguish this case from Akrich, and not from the case in which a third country national which applies for family reunification has never set foot on Union territory. In our view, there is in this respect no fundamental difference between those third country family members who are legally residing on Union territory on account of a tourist visa and those who have never set foot on European soil. At least under the regime of Directive 2004/38/EC, such difference would make no sense, because every third country family member of a Union citizen has in principle the right to enter the member states for a period of three months (Arts. 5 and 6).

[17] P. Boeles, case-note in *Jurisprudentie Vreemdelingenrecht* [Case-law on Immigration law] 2007/31.

[18] *See also* Editorial, 3 *EuConst* (2007) p. 1 at p. 3.

Spain rulings. For if a member state may impose a condition of legal residence even on someone like Ms Jia, who was, as the Court carefully noted, 'lawfully in Sweden', it may *a fortiori* do so in case the third country family member who seeks reunification with a migrated European citizen has entered the guest member state illegally – and this was exactly what the guest member state was not allowed to do according to the *MRAX* and *Commission* v. *Kingdom of Spain* rulings.

All in all, the conclusion seems inevitable that *Jia* concerns a fundamental change in the case-law of the Court of Justice. There is not any longer an 'automatic' right to admission in the guest member state for third country family members of a European citizen; the member states have 'regained' their freedom of action to impose a condition of legal residence.

Legal consequences

Does it actually matter that the issue of family reunification of immigrated European citizens with third country nationals is governed by Community law, which leaves the member states the right to impose the condition of legal residence, and not exclusively by national law? The answer must be affirmative for at least three reasons. First, because the issue is governed by Community law, the fundamental European principle of non-discrimination entails that migrated European citizens may not be worse off than nationals when it comes to reunification with third country nationals. The second concerns the European Convention on Human Rights, which is applicable as a matter of Community law, and not of national law, with all the consequences of precedence and direct effect attached. The third reason relates to the notion of 'dependence', which for ascendants, and descendants above the age of 21, is a condition for family reunification. This notion is, as the ruling testifies, exclusively governed by Community law, more specifically by Directive 73/148, and not by national law. In the case of *Jia*, this for instance precludes the Swedish authorities from dismissing the application on the simple grounds that Ms Jia was able to support herself in China by taking up paid employment, or simply because she could show no document of the competent Chinese authority to proof her dependence (points 36 and 42). Here the powers of the member states are curtailed.

The ruling according to us has further implications for the choice of the appropriate legal basis of the harmonisation of the legal residence requirement. In theory, the free movement Articles in both Title III of the EC Treaty and Article 63(3)(a) EC Treaty, which is part of Title IV inserted by the Treaty of Amsterdam, would seem to be eligible. The latter Article seems at first sight most appropriate, as it authorises the Union to take measures on the 'conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion', with-

out distinguishing between reunion of third country nationals with European citizens and with (other) third country nationals legally residing in the Union. However, the fact that the notion of dependence is governed by Directive 73/148 seems to entail that the free movement Articles in Title III can also be seen as the proper legal basis for further harmonisation in this field. The choice is full of consequences, not only when it comes to decision-making (the co-decision procedure is applicable in Title III, whereas decisions on Article 63(3)(a) require unanimity in the Council and only the consultation of the European Parliament),[19] but also when it comes to the competences of the Court of Justice, which are notably less developed under the Fourth Title (*see* Articles 64 and 68 EC).

Jia, in combination with *Akrich* and *Singh,* also seems to imply that once a third country family member is legally residing on European Union territory, he or she is able to accompany that European citizen anywhere in the Union, even back into the latter's member state of origin, on the basis of Regulation 1612/68 or Directive 73/148. In other words: the member state of origin has to accept that the guest member state has allowed family reunification (mutual recognition).[20] If this were not true, it would lead to the absurd consequence that a European Union citizen could take his or her third country family members, who have joined him or her in a guest member state, to all member states, except to his or her member state of origin. However, where does this leave *Akrich? Akrich* is in our view simply the exception to it (*see infra*). In fact, the Court of Justice will soon clarify the matter on the basis of preliminary questions of the Dutch Council of State in the case of *Eind* (C 291/05).[21] The British government had allowed a daughter with Surinamese nationality to reunite with her Dutch father, who worked in Great Britain, on the basis of Article 10 of the Regulation 1612/68. After a while, when the father moved to the Netherlands, the Dutch authorities refused leave to enter to his daughter on the grounds that Community law was not applicable to the case, and that the father did not fulfill the conditions for family reunification under Dutch immigration law as he was unemployed and lived on welfare. Community law was deemed not to be applicable, first of all because the daughter had never legally resided in the Netherlands (reference to *Akrich*!), and secondly because the father was not economically active. It should be clear that, in our opinion, the first argument is not valid in any case.

If indeed a third-country family member can theoretically claim the full enjoyment of the Community rights at issue once he or she legally resides in the Union,

[19] Council Decision 2004/927/EC of 22 Dec. 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure laid down in Art. 251 of that Treaty, is not applicable to Art. 63(3)(a) EC.

[20] Matthew Welsmore and Peter Starup, 'Case C-1/05, *Yunying Jia* v. *Migrationsverket*, Judgment of the Court (Grand Chamber), 9 Jan. 2007', 44 *CML Rev.* (2007) p. 787-801 at p. 797.

[21] *See supra* n. 11.

it becomes important to define *when* he or she does so. Here, groundwork done by Advocate-General Geelhoed in his opinion on *Jia* is valuable. According to him, on the one hand, a (tourist) visa granted for a period of three months does not constitute 'legal residence' in the sense required (point 79); the Court in *Jia* seems to be of the same opinion, as it implicitly distinguished between being 'lawfully in Sweden', which Ms Jia was, and 'legal residence' (cf. points 31, 32 and 33). On the other hand, in Geelhoed's view, a third country national with a residence permit with a validity of one year, who has the reasonable prospect of obtaining a permanent residence permit, can claim the enjoyment of the family reunification rights.

Finally, we are of the opinion that the situation as sketched is not different under the reign of Directive 2004/38, which essentially incorporates the 'old' directives and regulations, including the case-law of the Court of Justice, into one legislative act.

Distinguishing Akrich

As said before, we believe that *Jia* makes clear that *Akrich* forms the exception to the rule that once a third country family member is legally residing on Union territory, he or she in principle can claim the right to follow his or her European citizen family member anywhere in the Union, even back into the state of origin of the citizen in question. That implies that *Akrich* is essentially a correction of *Singh:* under certain circumstances, a legally residing third country national cannot follow his or her spouse back into the latter's member state of origin. At the same time, by distinguishing Jia's case so clearly from that of Akrich, the Court in *Jia* seems to rectify its position in *Akrich* that only a marriage of convenience leads to abuse of Community law, and that the motives which have prompted a European citizen to use its free movement rights in all other cases are irrelevant. For, although Mr Akrich was legally residing in Ireland at the time he claimed application of Regulation 1612/68, his claim was dismissed, as he and his wife were 'taking advantage of Community law', Mr Akrich did not meet the conditions set in national immigration law and the couple was 'seeking to evade national immigration law illicitly' (point 29, 30 and 31, *Jia*). So, an Akrich-constellation-of facts (illegal residence, criminal behavior and deportation on the basis of national law on account of that) leads to the loss of secondary Community rights. At least materially, that calls for the qualification of the Akrich couple's behavior as 'abuse' of Community law.

However, that does not imply that a marriage of convenience and an Akrich-like-constellation-of-facts have exactly the same legal effects. A marriage of convenience will not in principle lead to applicability of Community rights or of Article 8 of the European Convention of Human Rights for the third country national

concerned: if a marriage is not genuine, there is also no relevant 'family life'.[22] However, at least Article 8 of the European Convention is, according to the Court in *Akrich*, applicable to Mr Akrich's situation, although it did not make clear in that decision whether this was on the basis of Community law or simply on the basis of national law. The former is in line with *Jia*. Hence, although he could not rely on the Regulation, Akrich's situation fell under the scope of Community law. That also explains – and justifies – the reference to the European Convention in that judgment.[23]

That, however, begs the question whether the constellation of facts that killed Mr Akrich's Community law title to follow his spouse back the United Kingdom will forever, that means until the British Secretary of State revokes the expulsion order, obstruct his use of Community rights? If the Akrich couple for instance would have lived lawfully (and without disrupting public order, etc.) for, let's say, ten years in Ireland before Mrs Akrich accepted her job in London, would the Court then still be able to dismiss the holding that the couple simply was 'seeking to evade national immigration law illicitly' (point 31 *Jia*)? Or, would the duration of the legal residence in another member state be able to wash away the original sins of illegal residence and disruption of public order? The principle of proportionality surely would require that.

To be continued.

[22] *See also* Art. 4 of Council resolution of 4 Dec. 1997 on measures to be adopted on the combating of marriages of convenience, *OJ* [1997] C 382/1: 'Should the authorities competent under national law find the marriage to be one of convenience, the residence permit or authority to reside granted on the basis of the third-country national's marriage shall as a general rule be withdrawn, revoked or not renewed.'

[23] Cf. Spaventa, *supra* n. 8, p. 236-237.