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Opinion of Advocate General L.A. Geelhoed in Case C-109/01

Secretary of State for the Home Department v *Hacene Akrich*

A COMMUNITY NATIONAL WHO HAS MADE USE OF THE FREEDOM OF MOVEMENT CONFERRED ON WORKERS CAN, AFTER RETURNING TO HIS OWN COUNTRY, DERIVE A RIGHT FROM THIS FOR HIS SPOUSE TO SETTLE WITH HIM IN THAT COUNTRY IRRESPECTIVE OF THE SPOUSE'S NATIONALITY

A Member State may, however, rely on an overriding national interest in order to refuse entry to a spouse in the case where that spouse is a national of a non-member country and has not been admitted to the European Union in accordance with the immigration laws of a Member State. The intentions of the worker and his spouse in exercising rights derived from the freedom of movement for workers are immaterial.

Mr Akrich, a Moroccan national married to a United Kingdom national, was, on account of his past conduct, refused entry to the United Kingdom pursuant to United Kingdom immigration legislation. With a view to ensuring that he and his wife could none the less settle in the United Kingdom, Mr and Mrs Akrich remained for more than six months in Ireland, where Mrs Akrich worked in a bank. Mr Akrich subsequently applied, on the basis of Community law, for revocation of the deportation order prohibiting him from entering the United Kingdom.

More specifically, Mr Akrich invokes the Community rules on the free movement of workers as set out in the judgment in *Singh*. Under that judgment, a national of a Member State who has worked in another Member State as an employed person within the meaning of Community law, is entitled, on returning to his or her country, to be accompanied by his or her spouse, irrespective of the latter's nationality. Under

Community law, the spouse is personally entitled to remain in the Member State of which the worker is a national. [1]

The Immigration Appeal Tribunal, before which the matter has been raised at final instance, has requested the Court of Justice to deliver a preliminary ruling on, *inter alia*, the following question: can this Community national, on returning to her Member State of origin, claim the right which Community law confers on migrant workers, that is to say, the right for her spouse to settle with her in her Member State of origin, and must her Member State of origin accept that national immigration law cannot apply to her spouse?

Opinions of the Advocates General are not binding on the Court. It is the function of the Advocates General, acting in complete independence, to propose a legal solution in cases before the Court.

Advocate General Geelhoed points out that two separate areas of competence are in issue in this case. On the one hand there is immigration law, which is still in large measure determined at the level of the Member States and the principal characteristic of which is that it creates a threshold which nationals of non-member countries must cross in order to gain entry to the territory of the European Union. On the other hand there is the free movement of persons within the European Union itself, which has almost entirely been defined at Community level and the main feature of which, in contrast, is that it removes as much as possible, within the EU, the threshold to be crossed in order to secure entry to another Member State. Where ‚ as with Mr Akrich ‚ the case involves the marriage of a national of a non-member country with an EC national, the threshold established by national immigration law includes a prior individual assessment by the authorities, in which the Member States impose stringent requirements on leave to enter for the purpose, *inter alia*, of preventing marriages of convenience. Pursuant to the free movement of persons under Community law, a national of one Member State who settles in another Member State as a worker may always be accompanied by his or her spouse without any prior decision and irrespective of that spouse's nationality.

This inconsistency between the ‚ stringent ‚ national legislation on immigration and the ‚ flexible ‚ Community rules governing the free movement of persons within the Community becomes evident, according to the Advocate General, when persons who have not yet been granted leave to enter or who ‚ as in the case of Mr Akrich ‚ have no right of residence in the territory of the European Union invoke Community law in order to secure lawful entry to that territory. Community law will then be invoked in an issue which touches essentially on the area of national competence in matters relating to immigration.

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1 • Judgment in Case C-370/90 *Singh* [1992] ECR I-4265.

The central issue in the case of Mr Akrich, however, is not that a Community worker, while exercising the freedom conferred on her by the EC Treaty, wishes to be accompanied by her spouse, but rather that she wishes to use her status as a worker to enable her spouse to enter the European Union.

Advocate General Geelhoed proposes the following solution.

He begins by pointing out that a Community national who has made use of the freedom of movement conferred on workers can, after returning to his own country, derive therefrom a right for his spouse to settle with him in that country, irrespective of the spouse's nationality. The Member State of which the worker is a national may, none the less, apply its national immigration legislation and may, on the basis of legislation, refuse entry to the spouse of the worker where that spouse is a national of a non-member country and has not been granted entry to the EU in accordance with immigration law. The Member State may for that purpose invoke grounds of overriding public interest.

This assessment is, however, subject to conditions. Mrs Akrich and her husband are indeed adversely affected by the measure in their exercise of the right of free movement conferred on them by Community law. Mr Geelhoed justifies the application of the assessment in question on grounds of the enforceability and viability of the immigration legislation. The prior individual assessment of a person who is not yet lawfully within the territory of the Union constitutes a necessary precondition of the completion of the internal market involving free movement of persons and lies at the heart of national competence in matters of immigration. Likewise, it is necessary to prevent national immigration legislation from being circumvented, whilst at the same time the extent of the risks to the viability and enforceability of national immigration law should also not be underestimated.

Is there in this case any question of an abuse of Community law? Mr and Mrs Akrich expressly declared that their sole reason for settling in Ireland was to avoid the United Kingdom legislation on immigration. There is, however, in the view of the Advocate General, no question of an abuse of Community law. Mr Geelhoed points out in this regard that it is difficult to apply the doctrine of abuse of Community law in a specific case. Subjective criteria, in particular the intention of the parties concerned, can easily be manipulated. So far as concerns objective criteria, such as the duration of residence in Ireland, these lend themselves to being circumvented. Ultimately, the dividing line between abuse and use of EC law for a purpose not contemplated by the legislature is one which is difficult to establish.

Note: The Judges of the Court of Justice of the EC will now begin their deliberations in this case. Judgment will be delivered at a later date.