OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 27 April 2006 [1]

I — Introduction

1. This case, once again, raises the sensitive issue of the conditions under which family members of Community citizens from countries outside the European Union may claim the right to reside in a Member State of the European Union. In particular, it concerns the question whether these persons must already be legally resident in the European Union before they can claim the rights which they enjoy under secondary Community law, as the Court ruled in the context of the *Akrich* case. [2] Or, by contrast, is it sufficient for them to demonstrate their family relationship with a citizen of the European Union, as the Court held in *MRAX*? [3]

2. In my Opinion in *Akrich*, I referred to the fundamental dilemma which exists in respect of the legal status and rights of these persons. On the one hand, third-country nationals related to Community citizens derive rights from the legal provisions governing the free movement of persons within the Community. On the other hand, in the absence of, as yet, complete harmonisation in the field of immigration, the Member States retain competence to lay down rules on the first admission of third-country nationals to their territory and, ipso facto, to the territory of the European Union.

3. The same dilemma presents itself in the present case, albeit in a wholly different factual context than that underlying the *Akrich* case. There are differences concerning the manner in which Mr Akrich and Mrs Yunying Jia entered the territory of the Member State concerned, differences in the family relationship involved, differences in the personal conduct of the third-country national claiming a right to residence and differences in the applicable provisions of Community law.

1 — Original language: English.
2 — Case C-109/01 *Akrich* [2003] ECR I-9607.
3 — Case C-459/99 *MRAX* [2002] ECR I-6591.

II — Relevant provisions of Community law

4. This case focuses on the rights which third-country family members of Community citizens who have exercised their right of establishment under Article 43 EC derive from Directive 73/148. [4] The following provisions of this directive are relevant in this context.

Article 1(1)

'The Member States shall, acting as provided in this Directive, abolish restrictions on the movement and residence of:

(a) nationals of a Member State who are established or who wish to establish themselves in another Member State in order to pursue activities as self-employed persons, or who wish to provide services in that State;

...

(d) the relatives in the ascending and descending lines of such nationals and of the spouse of such nationals, which relatives are dependent on them, irrespective of their nationality.'

Article 3

'1. Member States shall grant to the persons referred to in Article 1 right to enter their territory merely on production of a valid identity card or passport.

2. No entry visa or equivalent requirement may be demanded save in respect of members of the family who do [not] have the nationality of a Member State. Member States shall afford to such persons every facility for obtaining any necessary visas.'

4 — Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

Article 4(3)

'A member of the family who is not a national of a Member State shall be issued with a residence document which shall have the same validity as that issued to the national on whom he is dependent.'

Article 6

'An applicant for a residence permit or right of abode shall not be required by a Member State to produce anything other than the following, namely:

(a) the identity card or passport with which he or she entered its territory;

(b) proof that he or she comes within one of the classes of person referred to in Articles 1 and 4.'

Article 8

'Member States shall not derogate from the provisions of this Directive save on grounds of public policy, public security or public health.'

III — Facts, procedure and preliminary questions

5. The applicant in the main proceedings, Mrs Jia, is a Chinese citizen, born in 1940, and is now retired. Her son, Mr Shenzhi Li, who is also a Chinese citizen, is married to Mrs Svanja Schallehn, a German citizen. Mrs Schallehn runs a travel agency as a self-employed person in Sweden. The couple have been legally resident in Sweden since 1995 and both hold residence permits which are valid until 3 July 2006.

6. On 2 May 2003, the Swedish Embassy in Beijing granted Mrs Jia a visitor's visa valid for one entry into the Schengen States for a visit of a maximum of 90 days, ending on 21 August 2003. Mrs Jia entered the Schengen area via Stockholm/Arlanda airport on 13 May 2003 with her own valid national passport, and her visitor's visa. Shortly before

the expiry of her visa, Mrs Jia applied on 7 August 2003 to the Migrationsverket (the Swedish immigration authority) for a residence permit indicating that she is a dependent family member of a citizen of the European Union.

7. In support of her application, Mrs Jia referred to her financial situation in China. She and her husband receive pensions from China of about 1 000 to 1 100 Swedish kronor (SEK) per month (approximately EUR 110 to 120), which is not sufficient for them to live on. In view of the fact that no additional financial help is available from the Chinese authorities, they would not manage without the financial contribution from their son and his wife. Mrs Jia produced a certificate of relationship concerning herself and her son issued by the Beijing Notary Public Office and a certificate from China Forestry Publishing House stating that she is financially dependent on her son and daughter-in-law.

8. On 7 April 2004, the Migrationsverket decided to reject Mrs Jia's application for a residence permit and ordered that she should be returned to her country of origin, or to another country if she showed that another country would accept her. It considered that in order to prove economic dependence, a document issued by the competent authority in the country of origin must be produced which shows that the applicant is dependent for support on his relative living in Sweden. The certificate produced by Mrs Jia was not issued by a competent authority. The mere fact that her son sends money and assists her in other ways could not be considered to constitute a sufficient reason for her to be regarded as financially dependent on her son to the extent required by the law. Nor can the fact that Mrs Jia's standard of living would be higher in Sweden be considered to imply that there is economic dependence.

9. On 14 May 2004, Mrs Jia appealed to the Utlänningsnämnden (immigration appeals body) against the Migrationsverket's decision.

10. On 3 September 2003, the Migrationsverket granted Mrs Jia's husband, Mr Yupu Li, a visa valid for one entry into Sweden for a maximum visit of 180 days. On 10 March 2004 he applied for a residence permit on the same ground as his wife. His application was rejected by the Migrationsverket on 17 September 2004. Mr Li appealed to the Utlänningsnämnden against this decision.

11. After the Migrationsverket had rejected Mrs Jia's application for a residence permit, she took her case to the European Commis-

sion. In a letter dated 7 May 2004 to Sweden's Permanent Representation to the European Union, the Commission indicated that the Migrationsverket's decision did not appear to comply with Articles 1(1)(d) and 4(3) of Directive 73/148, Article 8 of the European Convention of Human Rights (hereinafter: ECHR) and the Court's case-law, in particular *MRAX*.[5] Mrs Jia, in its view, was therefore entitled to apply for a residence permit with the same validity as those already issued to her German daughter-in-law and her Chinese son.

12. In a reaction to the Commission's letter, the Migrationsverket observed that 'dependent for support' implies that there should be a real need of money or other contribution which is regularly made by the relatives in the Member State and that it is the need for support in the country of origin which must be decisive, not the need for support on possible relocation to a Member State. The dependence must also be proven by way of a certificate or other documents, preferably a certificate of dependence issued by the authorities of the country of origin. A mere undertaking from the citizen of the Union or his spouse to support his parents is not sufficient for it to be considered that there is the dependence necessary for a residence permit to be granted. This view was conveyed to the Commission by the Swedish Government in a letter of 21 June 2004.

13. In its order for reference, the Utlänningsnämnden raises the question whether the Court's ruling in *Akrich*,[6] that the national of a non-Member State must be lawfully resident within the Community in order to be able to benefit from the rights provided for in Article 10 of Regulation No 1612/68, applies in circumstances other than those in that case. In other words, does this judgment express a generally valid principle, which implies that the rights of a third-country national relative of a citizen of the Union to enter and remain in a Member State, which follow from the EC Treaty and the secondary Community legislation, come into existence only when that third-country national is lawfully resident in a Member State under national legislation and then travels with or travels to join a citizen of the Union exercising his right to freedom of movement, not only as a worker, but as a self-employed person? In addition, a fundamental question raised by the *Akrich* judgment is what the expression 'lawfully resident' implies. The Utlänningsnämnden further queries what must be understood by a factual situation of dependence and whether under Article 6 of Directive 73/148,

5 — Cited in footnote 3.

6 — Cited in footnote 2.

in addition to a certificate of relationship, proof that there is dependence can also be required.

14. It was on this basis that the Utlänningsnämnden decided to refer the following questions to the Court under Article 234 EC for a preliminary ruling:

'(1) a. In the light of the judgment in Case C-109/01, is Article 10 of Regulation (EEC) No 1612/68 to be interpreted as meaning that a national of a non-Member State related to a worker as specified therein must be lawfully resident within the Community in order to have the right permanently to reside with the worker — and, in the same way, is Article 1 of Directive 73/148/EEC to be interpreted as meaning that the right to permanent residence of a relative of a citizen of the Union, who is a national of a non-Member State, presupposes that the national of a non-Member State is lawfully resident in the Community?

b. If Directive 73/148/EEC is to be interpreted as meaning that lawful residence within the Community is a requirement in order for a relative of a citizen of the Union, who is a national of a non-Member State, to be able to claim the right to permanent residence under the directive, does that then imply that the relative is to hold a current residence permit valid for or intended to lead to permanent residence in one of the Member States? If there is no permanent residence permit is a residence permit granted on other grounds for a shorter or longer stay sufficient, or is it, as in the case pending before the Utlänningsnämnden, sufficient if the relative applying for a residence permit holds a valid visa?

c. If a relative of a citizen of the Union, who is a national of a non-Member State, cannot benefit from the right to permanent residence under Directive 73/148/EEC because he is not lawfully resident in the Community, does a refusal to grant a relative a residence permit for permanent residence thus restrict the right of the citizen of the Union to freedom of establishment under Article 43 EC?

d. If a relative of a citizen of the Union, who is a national of a non-Member State, cannot benefit from the right to permanent residence under Directive 73/148/EEC because he is not lawfully resident in the Community, is the right of the citizen of the Union to freedom of establishment under Article 43 EC restricted if the relatives of the

citizen of the Union are deported because an application for a national residence permit cannot be accepted after entry into Sweden?

(2) a. Is Article 1(d) of Directive 73/148/EEC to be interpreted as meaning that "dependence" means that a relative of a citizen of the Union is economically dependent on the citizen of the Union to attain the lowest acceptable standard of living in his country of origin or country where he is normally resident?

b. Is Article 6(b) of Directive 73/148/EEC to be interpreted as meaning that the Member States may require a relative of a citizen of the Union who claims to be dependent on the citizen of the Union or his/her spouse to produce documents, in addition to the undertaking given by the citizen of the Union, which prove that there is a factual situation of dependence?'

15. Written observations were submitted by Mrs Jia, by the Belgian, Slovakian, Swedish, Netherlands and United Kingdom Governments and by the Commission. With the exception of the Belgian and Slovakian Governments, these parties made further oral submissions at the hearing of 21 February 2006.

IV — Submissions of parties and intervening parties

A — *On the status of the Utlänningsnämnden under Article 234 EC*

16. Before discussing the questions referred by the Utlänningsnämnden, the Swedish Government sets out the reasons why it considers that this body must be regarded as a 'court or tribunal' within the meaning of Article 234 EC and is, therefore, competent to refer preliminary questions under this provision. It points out that the Utlänningsnämnden is an administrative body with quasi-judicial powers which hears appeals from decisions taken by the Migrationsverket. It is established by law, has a permanent character and its president and vice-presidents must be lawyers with previous judicial experience. The procedure and the substantive rules applied by it are laid down by law. Its decisions are binding and are not subject to appeal. The proceedings are adversarial in character. The Utlännings-

nämnden must respect the principle of the equality of everyone before the law and provide guarantees of impartiality and objectivity. It takes its decisions in all independence, even though it has the possibility of referring certain cases to the Government in circumstances laid down in law.

B — *On the requirement of legal residence (Questions 1a to 1d)*

17. Mrs Jia seeks to distinguish her case from that of *Akrich* by pointing out that she was in possession of a valid visa when she applied for a residence permit and that she had never previously been expelled from Sweden. Under Swedish law she was entitled to remain on Swedish territory pending the examination of her application. Even so, she observes that the Community provisions involved do not lay down a residence requirement. Article 6 of Directive 73/148 does not require an applicant to be in possession of a visa in order to be able to apply for a residence permit. Such a permit can be applied for even after the entry into the territory of the Member State in question. She submits that the refusal to issue a residence permit in a case such as hers constitutes a violation of Article 43 EC.

18. The Swedish and Slovakian Governments and the Commission broadly share this point of view. In their view, the possibility of invoking the right of residence by dependent family members of Community citizens who have exercised the freedom of movement is not dependent on a requirement of prior lawful residence. No such requirement is laid down in Directive 73/148. The Court's ruling in *Akrich* should be interpreted restrictively and is to be explained by the particular factual circumstances of that case. To impose as a prior condition that third-country-national family members, who enter a Member State directly from a third-country, must obtain a residence permit in the Member State of origin of a Community citizen would amount to an unjustified restriction of the latter's right to free movement and would go against the objectives of Article 43 EC and Directive 73/148. As the Court held in *MRAX*, the right of these family members to reside with the national of a Member State derives from the family relationship alone. Consequently, these parties propose to answer the first question in the negative.

19. The Netherlands and United Kingdom Governments take the opposite view. The Netherlands Government distinguishes between immigration of third-country nationals into the territory of the Community and 'onward migration' ('doormigratie') to another Member State within the Community. Whereas the latter comes almost wholly within the competence of the Community, the former continues to be a national competence. The Member States,

in this view, are responsible for the first admission of third-country nationals to the territory of the Community on the basis of an individual assessment. In this context, they must respect their obligations under Article 8 of the ECHR. Community law must not be interpreted in such a way that third-country nationals who do not have a valid residence permit can escape the application of national immigration law. Both these Governments maintain that the rule laid down in *Akrich*, that lawful residence is a prerequisite to third-country nationals being able to invoke the rights granted to them in Article 10 of Regulation No 1612/68, also applies in the context of Directive 73/148. This directive does not govern access to the territory of the Member States from outside the Community. Where the directive aims to facilitate movement within the Community, it cannot be said in the present case that the refusal to grant Mrs Jia a residence permit had a dissuasive effect on her daughter-in-law's exercising her rights under Article 43 EC.

20. As to what constitutes 'legal residence', the Netherlands Government considers that this concept, at any rate, refers to situations where the third-country national is in possession of a permit for family reunification with a Community citizen, is a long-time resident or possesses comparable status. On the other hand, persons who are only in possession of a visa or who are permitted to stay in the territory of a Member State pending the outcome of the application for a residence permit would not qualify. To permit free movement within the Community to persons in such situations would mean that a Member State would have to admit a third-country national without his having been subject to an individual assessment. This cannot have been the intention of the Community legislator. The United Kingdom Government takes a stricter view and submits that 'legal residence' must be determined by national law. Directive 73/148 cannot give a third-country national a greater right than he has been granted in another Member State.

C — On the requirement of dependence (Questions 2a and 2b)

21. Mrs Jia considers that the notions of 'dependence' and 'reaching the lowest acceptable standard of living' are connected. According to her, 'dependence' implies that the person who has a right of residence actually assumes responsibility for the support of a family member. She maintains that she has adequately demonstrated that she is indeed dependent on her son and her daughter-in-law.

22. The Swedish Government submits that dependence must be seen in relation to the situation in the country of origin and that there must be a real need for regular financial support. Otherwise this condition, laid down in Article 1(1)(d) of Directive 73/148, would be deprived of its useful effect, given the fact that it is designed to limit the circle of family members eligible for staying with the migrant Community citizen. The

condition was also expressly retained in Directive 2004/38.[7] A situation of dependence must be determined in the light of the circumstances of the case on the basis of concrete and objective facts. Member States are entitled to require proof of situation of dependence, in particular by analogy with Article 4(3)(e) of Directive 68/360,[8] by producing a document issued by the competent authority in the country of origin. A simple declaration by the Community citizen on whom the family member is dependent does not suffice. This position is supported by the Belgian, Slovakian and United Kingdom Governments.

23. The Commission, on the other hand, maintains that the situation of economic dependence must be assessed in the Member State where the Community citizen resides. If the country of origin of the third-country family member were to be taken as the point of reference, this would considerably limit the circle of persons eligible for family reunification of Community citizens and would restrict their right to move within the Community. Whether or not this support is sufficient to guarantee a decent standard of living in the Member State is irrelevant, the only criterion being that of economic dependency. As to the proof to be furnished, the Commission takes the view that the Member States must accept any type of evidence which may be adduced to demonstrate the situation of factual economic dependence. As such proof may be difficult to produce at the moment of the application for the right to reside, the only proof which may be accepted at that moment is a commitment on the part of the Community citizen or his spouse to support the family member concerned. In the given case, the Commission considers that Mrs Jia must be considered as being dependent on her son or her daughter-in-law.

V — Admissibility

24. By discussing the status of the Utlänningsnämnden under Article 234 EC, the Swedish Government has implicitly raised the question of the admissibility of the questions referred by this body.

25. The criteria applied by the Court in considering whether a body making a preliminary reference is a court or tribunal for the purposes of Article 234 EC are well established. These include factors such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is

7 — Directive 2004/38/EC of the European Parliament and of the Council 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

8 — Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968(II), p. 485).

adversarial, whether it applies rules of law and whether it is independent. [9] On the basis of the information supplied by the Swedish Government, I have no doubt that the Utlänningsnämnden complies with these criteria. It also seems comparable in statute and organisation to the body which made the preliminary reference in *Abrahamsson*, [10] which the Court found to be a court or tribunal within the meaning of Article 234 EC. The questions are, therefore, admissible.

VI — The problem in a broader context

A — *Introduction*

26. As in *Akrich*, Mrs Jia's case exposes the fundamental tension which exists in respect of the legal position of third-country nationals who are family members of a citizen of the European Union. This tension results from, on the one hand, the powers of the Member States in the field of immigration and, on the other hand, the Community provisions regarding the free movement of persons within the Community. The competence of the Member States in the field of immigration implies that the first admission of a third-country national to their territory and the territory of the European Union is subject to a prior individual assessment of the person concerned. By contrast, existing Community law on the free movement of persons grants rights of entry and residence to the spouses and certain other family members of citizens of the European Union exercising their right of free movement within the Community, irrespective of the family members' nationality.

27. In its judgment in *Akrich*, the Court appeared to have resolved this problem where it held that Regulation No 1612/68 only covers freedom of movement within the Community, but 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. The Court next ruled that in order to benefit from the rights afforded to such third-country nationals, the person concerned 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. [11] However, after having delimited national and Community competences in this manner, the Court went on to qualify the circumstances under which this national competence must be exercised by referring to the right to the protection of family life as laid down in Article 8 of the ECHR.

9 — See, inter alia, Case 61/65 *Vaassen (née Göbbels)* [1966] ECR 261; Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9; Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, and Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 24.

10 — Case C-407/98 *Abrahamsson* [2000] ECR I-5539, see paragraphs 28 to 38.

11 — Cited in footnote 2, at paragraphs 49 and 50 of the judgment.

28. This judgment contrasts with other judgments, dating from both before and after its pronouncement, in which the Court held unequivocally that the rights of third-country nationals, married to a Member State's national to enter the territory of a Member State and to reside there, derives from the family ties alone. [12]

which are relevant to this problem in more detail. In this context, I will also refer to more recent Community legislation which has been adopted in respect of the admission of third-country nationals to the territory of the Union.

B — *Delimitation of competences*

29. A certain degree of confusion regarding the scope of Member States' competence in relation to admitting third-country nationals who are family members of citizens of the Union who have exercised or who wish to exercise their rights of free movement, therefore, persists. In particular, it is unclear whether the Court's approach in *Akrich* can be explained by the specific circumstances of that case or whether the rule laid down in this judgment is of general application. The situation is further complicated by the question whether the Member States are obliged, *as a matter of Community law*, to respect the right to family life under Article 8 of the ECHR. It is, therefore, necessary in my view to place the problem underlying Mrs Jia's case in a broader perspective and to seek a solution, which is workable for national authorities and courts and which is consistent with the division of powers in the field of immigration. In order to find such a solution, I will consider the various legal parameters

30. The first of these legal parameters concerns the division of competences in relation to the immigration into the Union and the movement and residence within the Union of third-country nationals, including the family members of citizens of the Member States who have exercised their right to move within the Union. Article 3 EC, which lists the activities to be undertaken by the Community to achieve the objectives set out in Article 2 EC, makes a clear distinction between the internal and the external component of the free movement of persons. Whereas Article 3(1)(c) EC provides for the establishment of an internal market characterised by the abolition, as between the Member States, of obstacles to the free movement of goods, persons, services and capital, Article 3(1)(d) EC envisages measures concerning the entry and movement of persons as provided for in Title IV concerning visas, asylum, immigration and other policies related to the free movement of persons.

12 — *MRAX*, cited in footnote 3, paragraph 59, and Case C-157/03 *Commission* v *Spain* [2005] ECR I-2911, paragraph 28.

31. The internal aspect is wholly governed by Community law. Free movement of citizens of the Union, i.e. persons possessing the nationality of a Member State, within the territory of the Member States is guaranteed at Treaty level by the combined effect of Articles 18, 39, 43 and 49 EC, all of which have direct effect, in conjunction with the secondary Community legislation adopted in order to give effect to these provisions, in particular Regulation No 1612/68, Directive 68/360, Directive 73/148 and Directives 90/364, 90/365 and 93/96.[13] As a corollary to the rights granted to Community citizens pursuing economic activities in other Member States, these Community instruments also provide for rights of family members, irrespective of their nationality, to move and reside with the primary holder of the Community law right.

32. The external component of this policy area, which was only introduced into the EC Treaty by the Treaty of Amsterdam (which entered into force on 1 May 1999), by contrast, does not confer directly effective rights but provides for the legal bases for a legislative programme for the harmonisation of national legislation governing, inter alia, immigration and controls at the external borders of the Union. Article 61(a) EC, in particular, emphasises the close relationship between the internal and external components of the free movement of persons where it instructs the Council to adopt 'measures aimed at ensuring the free movement of persons in accordance with the provisions of Article 14 [EC], in conjunction with directly related flanking measures with respect to border controls, asylum and immigration ...'. Although various steps have been taken to implement the Tampere European Council of 15 and 16 October 1999 and the subsequent Hague Programme of November 2004,[14] harmonisation in this field remains far from complete. As Community law stands today, it is clear that the Member States retain competence in respect of most aspects of immigration legislation.

33. More specifically, this entails that it is for the Member States to decide on the first admission to their territory of persons from non-Member States according to the criteria laid down in their national legislation. This implies that they are entitled to admit a third-country national only after an assessment of the individual person concerned and, indeed, this is the general practice in most Member States. Once admitted to the territory of a Member State participating in the Schengen system, all individuals have a right to move across the internal borders between these Member States. The right to

13 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968(II), p. 475); Directive 68/360, cited in footnote 8; Directive 73/148, cited in footnote 4; Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26); 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 (OJ 1990 L 180, p. 28), and Council Directive 93/96/EEC of 29 October 1993 on the right of residence for students (OJ 1993 L 317, p. 59).

14 — Both to be found at http://europa.eu.int/comm/justice_home/index_en.htm.

reside in a Member State, however, is governed either by Community law or by national law, depending on the nationality and the legal status of the person concerned.

34. In certain circumstances, the exercise of the rights which third-country-national family members of a migrant Community citizen derive directly from the Community instruments concerned can interfere with the competence of the Member States in the field of immigration. This is the case, as in the case a quo, where a third-country-national family member enters a Member State and claims a right of residence on the basis of Community law, despite the fact the person concerned may not have been lawfully admitted to the territory of that Member State for the purposes of residing there on a long-term basis. In view of this fact, there is a clear need to delimit the extent of both fields of competence.

35. This is not a problem which can be resolved by simply applying the mechanism of supremacy of Community law over conflicting national law. The problem, rather, should be placed in the context of coexistent, yet interdependent, spheres of competence. As is recognised in Article 61(a) EC, there is an evident functional relationship between enabling free movement within the Community in an area without internal frontiers, as is required by Article 14 EC, and the existence of reliable and secure checks at the external borders of this area. In this respect a parallel may be drawn with the relationship which exists between the free movement of goods within the Community and the existence of the common customs tariff and the common commercial policy in respect of goods being imported into the Community. Even though national immigration law has not yet been (fully) harmonised and differences and disparities may persist, it is apparent that, until a sufficient degree of harmonisation is achieved, the free movement of all persons within the internal market, regardless of their nationality, depends on the confidence which the Member States have in each other's policies and practices in admitting third-country nationals to their territory.

C — Existing Community legislation as interpreted by the Court

36. The second point to be discussed concerns the precise scope of the rights granted to third-country-national family members of Community citizens in the various Community instruments governing the free movement of workers, self-employed persons and service providers. More particularly, it is the question whether the rights of entry into a Member State and the right to reside there are granted not only irrespective of the nationality of the family member, but also

irrespective of whether he is entering the host Member State from another Member State or directly from a non-Member State.

37. The terms in which the provisions granting rights of entry and residence to third-country family members are drafted are not conclusive on this point. Both Article 10 of Regulation No 1612/68 on the free movement of workers and Article 1 of Directive 73/148 on the free movement of self-employed persons permit inter alia spouses of workers and of self-employed persons and the dependent relatives in the ascending line, irrespective of their nationality, either to install themselves with a worker who is a national of a Member State and who is employed in the territory of another Member State or to move and reside with a national of a Member State who is established or who wishes to establish himself in another Member State in order to pursue economic activities there. [15]

38. As indicated above, the Court's case-law in this field is not entirely free from ambiguity. The Court has adopted both a generous and a restrictive approach to the conditions under which the rights granted in secondary Community legislation to third-country-national family members of Community citizens can be invoked.

39. The generous approach was displayed in *MRAX*, where the Court stated that the right of a third-country national, married to a Member State national, to enter the territory of the Member States derives under Community law from the family ties alone. Although pointing out that Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148 permit the Member States to make the exercise of this right conditional on the possession of a visa (which is defined as an authorisation given or a decision taken by a Member State required for entry to its territory [16]), it observed that these same provisions require the Member States to grant the persons concerned every facility for obtaining the necessary visas. A policy of a Member State to send back at its borders a third-country-national spouse of a Community citizen who attempts to enter its territory without being in possession of a valid identity card, passport or a visa, where he is able to prove his identity and the conjugal ties and where there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health violates, inter alia, Article 3 of Directive 68/360 and Article 3 of Directive

15 — The same applies to family members of service providers, which I refrain from mentioning, so as not to overburden the main text.

16 — This definition is provided by Article 5 of Council Regulation (EC) No 2317/95 of 25 September 1995 determining the third countries whose nationals must be in possession of visas when crossing the external borders of the Member States (OJ 1995 L 234, p. 1).

73/148, read in the light of the principle of proportionality. [17] Next, the Court ruled that on a proper construction of Article 4 of Directive 68/360 and Article 6 of Directive 73/148, 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. [18]

40. This ruling contrasts sharply with the Court's judgment in *Akrich*, in which it followed a more restrictive approach. This case involved a Moroccan national who had been unlawfully resident in the United Kingdom, had committed a number of criminal offences during his stay and, consequently, had been deported. Mr Akrich returned illegally to the United Kingdom, and married a British woman. After having worked in Ireland for six months, the couple attempted to return to the United Kingdom, invoking the rights granted to the spouses of Community workers by Article 10 of Regulation No 1612/68, as interpreted by the Court in *Singh*. [19] Here, the Court emphasised that Regulation No 1612/68 covers only freedom of movement *within* the Community and that 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. In order to benefit, in a situation such as that at issue in the main proceedings, from the rights provided for in Article 10 of Regulation No 1612/68, 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. [20]

41. However, in *Commission* v *Spain*, [21] which was decided more than a year after *Akrich*, in considering Spanish formalities to be complied with by third-country-national family members of migrant Community citizens prior to being able to apply for a residence permit, the Court again adopted the approach followed in *MRAX*. It repeated that the right to enter the territory of a Member State by a third-country-national who is the spouse of a national of a Member State derives from the family relationship alone. It concluded that a residence visa requirement imposed by Spanish legislation as a precondition for obtaining a residence permit and a refusal to issue such a permit to a third-country national who is a member of the family of a Community national, on the ground that he or she should first have applied for a residence visa at the Spanish consulate in their last place of domicile, constitutes a measure contrary to the provi-

17 — *MRAX*, cited in footnote 3, at paragraphs 59 to 62 of the judgment.

18 — *MRAX*, idem, at paragraph 80 of the judgment.

19 — Case C-370/90 *Singh* [1992] ECR I-4265.

20 — *Akrich*, cited in footnote 2, at paragraphs 49 and 50 of the judgment.

21 — Cited in footnote 12.

sions of Directives 68/360, 73/148 and 90/365.[22] The Court did not refer to *Akrich* in its judgment.

42. There is, therefore, an apparent contradiction in the case-law which results from the divergent approaches in *MRAX* and *Commission* v *Spain*, on the one hand, and *Akrich*, on the other hand. And, indeed, it is this difference in approach which prompted the Utlänningsnämnden to refer the case to the Court.

43. The basic question raised by *Akrich* is whether the rule laid down in that judgment only applies when it has been established by the national authorities that the third-country national concerned is unlawfully resident on the territory of a Member State. This would suggest that the rule applies not only when a person is legally resident, but even when the person is not unlawfully present on the territory of a Member State. In that case, following the *MRAX* approach, the family relationship with a migrant EU citizen would suffice to establish the right to enter and reside in a Member State.

44. This narrow reading of *Akrich* could be based on paragraph 50 of the judgment, where the Court explicitly refers to 'a situation such as that at issue in the main proceedings' as the context in which this rule applies. A pointer in the opposite direction, however, is its observation in the preceding paragraph in the judgment, where the Court states unequivocally that the relevant Community provisions only relate to freedom of movement within the Community and that they are silent in respect of admission to the territory of the Community.

45. In the light of these observations, it is fair to conclude that the law as it stands today in respect of the conditions under which third-country national family members of migrant EU citizens may invoke the rights granted to them by Regulation No 1612/68 and Directive 73/148 does not appear to be wholly consistent.

D — *Family life and free movement*

46. In considering the rights of third-country-national family members of citizens of the Union to enter and reside within the territory of a Member State the Court has also attached considerable importance in its case-law to the protection of family life as guaranteed by Article 8 of the ECHR.

22 — At paragraph 38 of the judgment.

47. In *Carpenter*,[23] the Court was questioned on the compatibility with Community law of the decision of the United Kingdom authorities to deport a national of the Philippines who had overstayed the period of validity of her tourist visa and subsequently had married a United Kingdom national. As the latter provided certain services in other Member States, but had done so from his country of origin, Mrs Carpenter could not invoke the rights granted by Directive 73/148 to third-country-national spouses of Community citizens. The Court, therefore, went on to investigate whether a right of residence in favour of the spouse could be inferred from the principles or other rules of Community law.

48. After having established that Mr Carpenter's activities fell within the scope of Article 49 EC, the Court observed that 'the Community legislature has recognised the importance of ensuring the protection of the 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'.[24] The Court next established 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.'[25]

49. As regards the question whether this restriction on Mr Carpenter's freedom to provide services could be justified, the Court found that the decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the ECHR and that it did not strike a fair balance between the competing interests. The decision to deport Mrs Carpenter, therefore, constituted an infringement which is not proportionate to the objective pursued.[26]

50. In *Akrich*, the Court first determined that a third-country national who is the spouse of a citizen of the Union who has exercised her right to free movement, but who is not lawfully resident in his spouse's Member State of origin, cannot invoke Article 10 of Regulation No 1612/68 to claim a right of residence in that Member State. Nevertheless, it qualified that judgment by pointing out that where the marriage is genuine, in deciding on whether to admit the third-country national concerned, despite his unlawful status under national immigration law, regard must be had to respect for family

23 — Case C-60/00 *Carpenter* [2002] ECR I-6279.

24 — At paragraph 38 of the judgment.

25 — At paragraph 39 of the judgment.

26 — Cf. paragraphs 41, 43 and 45 of the judgment.

life under Article 8 of the ECHR. 'Even though the [ECHR] does not as such guarantee the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) [ECHR]. Such an interference will infringe the [ECHR] if it does not meet the requirements of paragraph 2 of that article ... .' [27] Here, the Court adopted a more reticent approach than in *Carpenter* by leaving it to the national court to apply this test.

51. Finally, I would refer to the Court's judgments in *MRAX* and *Commission* v *Spain*, where it repeated its observation in *Carpenter* that it is apparent in particular from the Council regulations and directives on freedom of movement for employed and self-employed persons within the Community that the Community legislature has recognised the importance of ensuring protection for the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty. [28]

52. Having concluded at the end of the previous section that there is a certain degree of inconsistency in the case-law regarding the law applicable to third-country-national family members of migrant Community citizens, the preceding observations suggest, in addition, that the outcome of these cases is to a large extent determined by the particular facts of each case. In an area such as immigration where decisions taken by the competent authorities affect the lives of individuals in a most fundamental manner, there is, however, a great need for clarity as to the scope of rights and predictability as to the manner in which the law is applied. In order to create greater transparency and to promote legal certainty, a more systematic and structural approach to the interpretation and application of the relevant Community provisions is required.

E — *New Community legislation*

53. Although not directly relevant for the solution of the present case, as they do not apply to it ratione temporis, it is nevertheless useful to refer to the more recent developments in Community legislation in respect of third-country nationals' rights to reside on the territory of the Member States. The directives concerned relate both to the

27 — *Akrich*, cited in footnote 2, at paragraph 59 of the judgment.

28 — *MRAX*, cited in footnote 3, at paragraph 53 of the judgment, and *Commission* v *Spain*, cited in footnote 12, at paragraph 26 of the judgment.

internal and to the external components of the free movement of persons.

54. On 29 April 2004, the European Parliament and the Council adopted a new directive on the basis of Articles 12, 18, 40, 44 and 52 EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, which replaces all the existing directives in this area. [29] This directive codifies and revises the existing Community instruments, taking into account the interpretation given to these acts in the Court's case-law. In a manner similar to Article 10 of Regulation No 1612/68 and Article 1(1) of Directive 73/148, Article 5(1) and (2) of Directive 2004/38 grants family members of Union citizens who are not nationals of a Member State the right to enter the territory of a Member State, provided they are in possession of a valid passport and an entry visa in accordance with Regulation No 539/2001 or, where appropriate, with national law. Under Article 7(2) of Directive 2004/38 a Union citizen's family members who are not nationals of a Member State shall enjoy the right to residence for more than three months, if the Union citizen satisfies the various conditions set out in Article 7(1) of the directive. [30]

55. A further two directives relating to the rights of third-country nationals were adopted on the basis of Article 63 EC, namely Directive 2003/86 on the right to family reunification [31] and Directive 2003/109 concerning the status of third-country nationals who are long-term residents. [32]

56. Only the first of these directives has a bearing on the present case from a substantive point of view, albeit indirectly as it only applies to the reunification with his family members of a third-country national who is already lawfully resident in a Member State (the 'sponsor') and explicitly does not apply to members of the family of a Union citizen (Article 3(3) of the directive). Article 4(1) of Directive 2003/86 obliges the Member States to authorise the entry and residence of the minor children of the

29 — Cited in footnote 7.

30 — These conditions are that the Union citizens (a) are workers or self-employed persons in the host Member State or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State or (c) are enrolled at a private or public establishment ... for the principal purpose of following a course of study, including vocational training. In addition, the Union citizen must have comprehensive sickness insurance cover in the host Member State and assure the relevant national authority ... that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence.

31 — Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

32 — Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2003 L 16, p. 44).

sponsor, subject to certain conditions concerning public policy, public security and public health and concerning the ability of the sponsor, stated briefly, to provide for the family members concerned. By contrast, Member States are not obliged, but are permitted to admit, other family members, including first-degree relatives in the ascending line of the sponsor or his spouse, where they are dependent on them and do not enjoy proper family support in the country of origin (Article 4(2)(a)). The directive, in Article 5, also provides for the procedure for the submission and detailed examination of applications for admission as family members of sponsors. As a rule applications are to be submitted and examined when the family members are residing outside the territory of the Member State concerned, although the Member State in appropriate circumstances may derogate from this (Article 5(3)). This directive had to be transposed into national law by 3 October 2005.

57. In the light of the existing and new Community instruments, three different factual situations may be distinguished which, though from the perspective of the third-country national may not be of significance, do determine the law applicable to his situation and therefore his possibilities of gaining access to the territory of a Member State from a non-Member State and, subsequently, of acquiring the right of residence. First, the third-country national can be the relative of a national of a Member State who has not used his freedom to move to another Member State. Second, the third-country national can be the relative of national of Member State who has exercised his right to move to another Member State. Third, the third-country national can be the relative of another third-country national who is lawfully resident in a Member State of the Union.

58. If the third-country national in the first situation wishes to enter a Member State from outside the Community, clearly national immigration law applies, there being no point of reference for the application of Community law. This implies that the person concerned may be subject to a prior individual assessment.

59. In the third situation, as from 3 October 2005 the rights of the third-country national are determined by Directive 2003/86. Prior to that date national immigration law was applicable. As was indicated above and, in view of the family relationship involved in the case in hand, under this directive the Member States enjoy discretion as to whether or not they will authorise the entry and residence of dependent first-degree relatives in the direct ascending line. The directive also prescribes an examination of the individual circumstances of the applicant third-country national.

60. The second situation is the one which is at issue in the present case and as was observed in points 38 to 40 above two approaches are possible. If the third-country national derives a direct right of residence from Directive 73/148, he will not be subject to an individual assessment by the national immigration authorities. Here, in accordance with *MRAX*, the family relationship would be constitutive of the right of residence. If, on the other hand, it is to be held, in line with *Akrich*, that the third-country national must already be legally resident in a Member State before being able to invoke the rights granted by Directive 73/148, this would imply that national immigration law again applies to his situation.

61. It is apparent from this little survey that the generous interpretation given to Directive 73/148 in the second situation results in the creation of a privileged group of third-country nationals. Where these persons are related to a Community citizen who has exercised his right to move to another Member State, they are immune from the application of the entry and residence requirements set by national immigration law. In the other situations, they are not. Presuming that, from the third-country national's point of view, the family relationships in the three factual situations are as such comparable and that the only difference in the situations is that the relative who is a national of a Member State has moved to another Member State, the difference in treatment which results from what I have termed the generous interpretation of Directive 73/148 requires justification.

F — *Admission and residence of third-country-national family members of Community citizens: towards a more systematic approach*

62. In point 52 above, I indicated that there is a need for a more systematic approach to interpreting the Community provisions on the admission of third-country-national family members from outside the Community to the territory of the Member States and on their rights to reside with Community nationals. Inconsistencies in the case-law lead to legal uncertainty for the third-country nationals concerned and lack of clarity for national authorities responsible for applying these provisions. Indeed, the case-law as it stands even leads to inequality between groups of third-country nationals, for which there does not appear to be any justification. The case-law also impinges on national competences in the field of immigration policy where it permits certain categories of third-country nationals to enter and reside in a Member State without their having been subject to a prior individual assessment.

63. In interpreting the relevant provisions of secondary Community law, in my view, it is essential as a guiding principle to respect the division of competences between the Community and the Member States, as laid down in the EC Treaty. It must be considered to be part of the Court's task, as described in Article 220 EC, not only to ensure the effectiveness of Community law, but also to respect and guard over the powers which the Treaty recognises as belonging to the Member States. This applies not only in a negative sense in delimiting the powers of the Community vis-à-vis those of the Member States, but also in a more positive sense in ensuring that these national powers can be exercised effectively.

64. As things stand today, it is clear that the free movement of persons within the Community, as one of the cornerstones of the internal market, is wholly a Community competence. It is equally clear that the regulation of immigration at the external borders of the Union, to the extent that harmonisation under Title IV of the Treaty has not been accomplished, remains a competence of the Member States. I refer to points 30 et seq. above.

65. The Court's ruling in *Akrich*, that Regulation No 1612/68 'covers only freedom of movement within the Community' and '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', [33] accords fully with this division of competences between the Community and the Member States. As Directive 73/148 pursues the same objectives as Regulation No 1612/68 in respect of a different category of persons, the same must apply to this directive. The fact that the scope of the directive is restricted in a similar fashion was, in fact, recognised, albeit implicitly, by the Court in *Carpenter*, where it held that 'it follows from both its objectives and its content that the Directive governs the conditions under which a national of a Member State, and the other persons covered by Article 1(1)(c) and (d), may leave that national's Member State of origin and enter and reside in another Member State, for one of the purposes set out in Article 1(1)(a) and (b), for a period specified in Article 4(1) or (2)'. [34]

66. The fact that Regulation No 1612/68 and Directive 73/148 are 'silent' as to the first admission of a third-country national to the territory of the Community does not imply that these instruments are neutral in this regard. This finding by the Court does not imply that there is a vacuum which can be filled implicitly by a generous interpretation

33 — *Akrich*, cited in footnote 2, at paragraph 49 of the judgment.

34 — *Carpenter*, cited in footnote 23, at paragraph 35 of the judgment.

of these instruments. It can only mean that, in line with the division of competences laid down in the Treaty, the first admission of these persons is a matter for the Member States to decide upon in accordance with their immigration legislation. This necessarily means that, as the Court held in *Akrich*, and quoted freely, in order to benefit from the rights provided for in these Community instruments, a third-country-national family member 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. [35]

67. To accept that third-country nationals who are not already lawfully resident within a Member State and who wish to join a national of a Member State who has exercised his freedom of movement enjoy an automatic right to enter and reside within the host Member State on the basis of the family relationship alone, without any intervention on the part of that Member State, would make it possible for them to circumvent national immigration laws. Such an approach, therefore, undermines the Member States' powers in respect of controlling immigration at their external border.

68. It can also be inferred from the function of the Community instruments on free movement within the Community that the rights granted to third-country family members in these instruments are not unconditional.

69. Regulation No 1612/68 and Directive 73/148 were enacted explicitly to give effect to Articles 39 and 43 EC respectively. Both instruments are aimed at removing obstacles to nationals of the Member States availing themselves of the rights granted to them under these Treaty provisions by moving as workers, self-employed persons or service providers to other Member States. Such obstacles include the potential effects of the application of national immigration legislation to the main right-holder's family members, particularly where these family members do not have the nationality of a Member State. If these family members were not assured of their entry and admission to another Member State this would dissuade the Community worker or self-employed person to exercise his rights under the Treaty. As a corollary to the right of the Community worker or self-employed person, they therefore also enjoy the right to move to and reside in the Member State where the economic activities are to be pursued.

70. In view of the primary objective of these Community instruments to eliminate any type of obstacle flowing from national entry and residence requirements which might

35 — *Akrich*, cited in footnote 2, at paragraph 50 of the judgment.

dissuade a national of a Member State to move to another Member State for economic reasons, arguably it is the family situation as it exists at the time the Community national decides to go to another Member State which should be taken into account. Once such a person has moved to and is settled in another Member State, a new situation arises in which his legal position should be comparable to that of nationals of the host Member State who have not exercised their right to free movement. If a person from this latter category wishes to be joined by a third-country-national family member from outside the Community, that family member must be admitted under the conditions set by national immigration law. The same must apply to a national who has already exercised his rights to free movement and apparently has not been dissuaded from using that right for reasons related to the non-admission of third-country-national family members. It cannot be said, in other words, that there is a continued right under Community law for nationals of the Member States to be joined at all times by their relatives from outside the Community. In this respect, I do not consider that Article 10 of Regulation No 1612/68 and Article 1(1) of Directive 73/148 are to be regarded as instruments for ex post facto family reunification between nationals of the Member States and relatives from outside the Community.

71. The Commission takes the view that where a third-country-national family member wishes to join the Community citizen in the host Member State directly from outside the Community, requiring him to obtain a residence permit in the country of origin of the Community citizen would amount to a restriction of the latter's right to move freely within the Community. Besides the fact that, in a situation such as that in the main proceedings, the requirement of lawful residence implies that the family member should obtain authorisation to stay in the host Member State under its national immigration law, it cannot be accepted that the condition referred to by the Commission necessarily entails a restriction of the Community citizen's right to move to another State. Such a restriction would exist if the condition would result in a loss of rights. However, where no such right, i.e. to be joined by a family member, existed at the time the freedom of movement was exercised, logically speaking there can be no question of a loss of right amounting to a restriction to the freedom of movement.

72. I would add, that 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 obs-

tacles to the exercise of the fundamental freedoms guaranteed by the Treaty',[36] 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.[37] By contrast, the family reunification directive, for obvious reasons in the light of its primary objective, does refer explicitly to Article 8 of the ECHR.[38] 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.

73. That being said, it is important to determine the role of Article 8 of the ECHR in this context. Article 6(2) EU lays down that the Union shall respect fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law. This provision is addressed to the Union itself and applies to the Member States only where they are acting in implementation of Community law and Community acts, as is confirmed by Article II-111(1) of the Treaty establishing a Constitution for Europe.[39] To the extent that the Member States are acting outside the scope of Community law, as they do in taking decisions on granting third-country nationals access to their territory, they must also observe their obligations under Article 8 of the ECHR, not as a matter of Community law, however, but as signatories to the ECHR. On this point, I consider the Court's judgment in *Carpenter* to be questionable, where it effectively applied Article 8 of the ECHR to the facts of the case.

74. Finally, as I already observed in point 61, permitting third-country nationals who have not yet been admitted to the territory of a Member State and who have a family tie to a national of a Member State to enter and reside in the host Member State of the migrant Community national on that basis alone, creates inequality with third-country-national members who are seeking to join a family member who is a national of a Member State, but has not moved within the Community, or a family member who is a third-country national who is already lawfully resident in a Member State. In both the last two cases, the third-country nationals are assessed individually before being

36 — *Carpenter*, cited in footnote 22, at paragraph 38 of the judgment, and *MRAX*, cited in footnote 3, at paragraph 53 of the judgment.

37 — See, consideration 31 of the preamble.

38 — See, consideration 2 of the preamble.

39 — OJ 2004 C 310.

admitted, whereas the family member in the first situation is not. There is no justification for this difference in treatment.

75. Even if there were complete harmonisation of the rules applicable to the admission of third-country nationals at the external borders of the Community, to permit certain categories of persons to gain access to the territory of a Member State and to reside there on the basis of the family relationship with a Community citizen who has happened to have exercised his right to free movement would undermine the effectiveness of these common rules and invite abuse of the type which was at the basis of the case in *Akrich*. To establish a right of residence merely on the chance factor of a national of a Member State having moved to another Member State is both arbitrary and unjust as it creates inequality in respect of Community citizens who have not exercised this right and in respect of third-country nationals who do not have the privilege of being the relative of a migrant Community citizen.

76. In this approach, it is next essential to consider what constitutes 'lawful residence' in a Member State. At the present stage, the criteria by which this can be assessed have not been the subject of harmonisation. It is still up to the Member States to determine when a third-country national is 'lawfully resident' in their territory. Nevertheless, although this as such is not a Community concept, there is a need for identifying certain core features of the concept 'lawful residence'.

77. Being 'lawfully resident' in the territory of a Member State implies that (1) following an application of a third-country national, (2) there should be an explicit decision on the part of the national authorities of a Member State, (3) based on an individual assessment (4) authorising the applicant to enter and stay on its territory (5) for a longer period of time. There can be no question of 'lawful residence' for the purposes of the present assessment when the decision expressly and evidently only authorises a stay for a short period or where this is restricted to a certain purpose. It would contradict the very function of such permits if they were considered to be a sufficient basis for eligibility for long-term or permanent residence.

78. In seeking further guidance as to the meaning of the concept of lawful residence, a minimum degree of content can be found in Article 3 of Directive 2003/86 where the sponsor, who in Article 2(c) is described as a 'third country national residing lawfully in a Member State', is entitled to apply for reunification with certain of his family members when he holds a residence permit with a validity of one year or more and he has reasonable prospects of obtaining the right to permanent residence.

79. From this perspective a visa granted for a stay of a period of three months or leave to

stay pending the outcome of the application for a residence permit does not constitute 'lawful residence' sufficient to be able to invoke the rights granted to third-country-national family members in Regulation No 1612/68 and Directive 73/148.

80. The foregoing observations lead to the conclusion that in taking the division of competences between the Community and the Member States in the field of the free movement of persons as the point of departure, the rights granted in Regulation No 1612/68 and Directive 73/148 to third-country nationals, who are family members of a national who wishes to exercise or has exercised his right to move to another Member State to pursue economic activities there, can only be invoked by those persons if they have been admitted to the territory of a Member State in accordance with its immigration legislation. In taking decisions in this context the Member States must observe their obligations under Article 8 of the ECHR, not as an obligation of Community law, but as signatories to the ECHR.

81. It is only by applying this clear demarcation line between Community and national competences that the scope of the rights granted to third-country family members of migrant Community nationals by Regulation No 1612/68 and Directive 73/148 can be clearly defined, that confusion in the exercise of powers under Community law and national immigration law can be avoided and equality of treatment of third-country-national family members of Community nationals arriving from outside the Community can be guaranteed.

VII — Answers to the preliminary questions

A — *Questions 1a to 1d*

82. Although the first question referred by the Utlänningsnämnden relates both to Article 10 of Regulation No 1612/68 and Directive 73/148, it is evident, from the underlying facts of the case, that only the latter is pertinent to this case.

83. The first question raises three basic issues, all of which have already been discussed in a general sense in the preceding chapter of this Opinion. This means that the answers to be provided to the first question can be brief.

84. It may be recalled that the first of these issues (section (a) of the first question) is whether, in the light of the Court's ruling in

Akrich, a national of a non-Member State related to a citizen of the Union, who is active as a self-employed person in a Member State of which he is not a national, may only claim a right to permanent residence in the host Member State if he is already lawfully resident in the Community.

85. For the reasons given in points 62 et seq., it will be clear that I am of the opinion that Article 1 of Directive 73/148 must be interpreted as meaning that the right to permanent residence of a family member of a citizen of the Union, who is a national of a non-Member State, indeed presupposes that that national of a non-Member State is lawfully resident in the Community. This implies that I consider the rule laid down in *Akrich* to be of general application.

86. The second issue, addressed in section (b) of the first preliminary question, concerns the question whether the requirement of 'lawful residence' implies that the third-country-national family member of a Community citizen must hold a residence permit valid for or intended to lead to permanent residence in one of the Member States. If not, it is queried whether a residence permit granted on other grounds for a shorter or longer stay is sufficient or even whether a valid visa may suffice.

87. As was indicated in points 76 to 79, the requirement of lawful residence implies that the third-country national concerned has been admitted to the territory of a Member State for a longer period, such that he has a prospect of obtaining more permanent residence status. It can be derived from Article 3 of Directive 2003/86 that a period of one year would suffice in this regard. Where permission to enter the territory of a Member State has been restricted to a short term or for a certain purpose, as is the case with a tourist visa, this cannot be regarded as constituting lawful residence.

88. The third issue was raised in sections (c) and (d) of the first question referred by the Utlänningsnämnden: if a family member of a citizen of the Union, who is not a national of a Member State, is refused the right to permanent residence in the Member State where the latter is established or if he is deported from that Member State, does this restrict the citizen of the Union's right to free establishment under Article 43 EC?

89. Article 43 EC requires the elimination of restrictions on the freedom of establishment. It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as

such restrictions.[40] Directive 73/148 regulates the conditions which apply to movement and residence within the Community of nationals of Member States and of their family members, irrespective of their nationality. To the extent that national measures taken in respect of the residence of these persons can be considered to be restrictions within the meaning of Article 43 EC, they should be considered primarily within the context of Directive 73/148.

90. As was recalled in points 69 and 70, this directive has as its main objective to remove obstacles flowing from national entry and residence requirements which could prove to be a disincentive to a national of a Member State wishing to move to another Member State in order to pursue an economic activity there. Once the freedom under Article 43 EC has been exercised, any decision taken in respect of the residence status of family members who are nationals of a third country, which was not already foreseeable at the time of moving to the host Member State, by definition cannot be said to have such a dissuasive effect and cannot therefore be regarded as a restriction within the meaning of Article 43 EC.

91. In taking such decisions, the national authorities evidently must comply with their obligations under Article 8 of the ECHR. This is, however, a matter for the assessment of the national courts.

B — *Questions 2a and 2b*

92. The first leg of the second question is aimed at ascertaining whether the concept of 'dependence' in Article 1(d) of Directive 73/148 relates to the third-country-national relative of the Union citizen being economically dependent with a view to him being able to attain the lowest acceptable standard of living in his country of origin or the country where he is normally resident. The second leg of this question addresses the aspect of the proof which may be required under Article 6(b) of Directive 73/148. May the host Member State require the production of documents to prove that there is a factual situation of dependence in addition to an undertaking given by the citizen of the Union that he will support his family member?

93. As to the first issue, it should be pointed out that the Court, interpreting the same notion of dependence in Article 10 of

40 — See, inter alia, Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and Case C-442/02 *Caixa-Bank France* [2004] ECR I-8961, paragraph 11.

Regulation No 1612/68 in *Lebon*,[41] ruled that the status of dependent member of a worker's family is the result of a factual situation, namely the provision of support by the worker, without there being any need to determine the reasons for recourse to the worker's support, or to raise the question whether the person concerned is able to support himself by taking up paid employment.[42] This definition was repeated in similar terms in *Zhu and Chen*,[43] in the context of Directive 90/364,[44] where the Court again observed that the status of 'dependent' member of the family of a holder of a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence.[45]

94. In neither of these judgments did the Court refer to any level of standard of living for determining the need for financial support by the Community citizen. On the contrary, in *Lebon* it held that it is not necessary to investigate the reasons for financial support being given or the capacity of the dependent relative to care for himself.

95. That being said, in a case such as that in the main proceedings, where dependency is a criterion for establishing the right of a third-country national to reside with a Community citizen in a Member State, it does seem necessary for it to be established that there is indeed an actual need for financial support and that this is attested to by adequate documentary evidence.

96. As such, whether or not the condition of dependency is fulfilled should be determined objectively, taking account of the individual circumstances and personal needs of the person requiring support. It would seem to me that the appropriate test in this regard is primarily whether, in the light of these personal circumstances, the dependant's financial means permit him to live at the minimum level of subsistence in the country of his normal residence, assuming that this is not the Member State in which he is seeking to reside. In addition, it should be established that this is not a temporary situation, but that it is structural in character.

97. According to Article 6(b) of Directive 73/148 the applicant for a residence permit must supply proof that he belongs to one of the classes of persons referred to in Articles 1 and 4 of the directive. This includes the condition of being a dependent family member of the Community citizen concerned. For this purpose, the parallel provision in Directive 68/360, Article 4(3)(e), requires the production of a document

41 — Case 316/85 *Lebon* [1987] ECR 2811.

42 — At paragraph 22 of the judgment.

43 — Case C-200/02 *Zhu and Chen* [2004] ECR I-9925.

44 — Cited in footnote 13.

45 — At paragraph 43 of the judgment.

issued by the competent authority of the State of origin or the State whence he came, testifying that he is dependent on the worker or that they lived under his roof in such country. This same requirement has been retained for third-country-national family members of all Union citizens in Article 10(2)(e) of Directive 2004/38.

98. What is important in this context is that the competent national authorities are convinced of the existence of a factual situation of dependence. In this respect, a document issued by the national authorities of the country of origin is certainly a valuable source of proof, although it may not always be conclusive. It, therefore, should not be excluded that where, according to the national authorities, such an official statement does not suffice, they should be able to require additional evidence. Neither should it be excluded that in the absence of such an official declaration, the applicant third-country national is permitted to prove his dependence by other means. A simple declaration by the Community citizen attesting to him supporting his relative in the past and committing himself to continuing this support in the future is not, in itself, sufficiently objective to be able to establish 'dependence' within the meaning of Article 1(d) of Directive 73/148.

VIII — Conclusion

99. On the basis of the foregoing considerations I suggest that the Court give the following answers to the preliminary questions referred by the Utlänningsnämnden, Sweden:

— Article 1 of Directive 73/148/EEC is to be interpreted as meaning that the right to permanent residence of a relative of a citizen of the Union, who is a national of a non-Member State, presupposes that the national of a non-Member State is lawfully resident in the Community.

— Lawful residence within the Community implies that the third-country national concerned has been admitted to the territory of a Member State for a longer period of at least one year, such that he has a prospect of obtaining more permanent residence status. Where permission to enter the territory of a Member State has been restricted to a short term or for a certain purpose, as is the case with a tourist visa, this cannot be regarded as constituting lawful residence.

— If a relative of a citizen of the Union, who is a national of a non-Member State, cannot benefit from the right to permanent residence under Directive 73/148/EEC because he is not lawfully resident in the Community, a refusal to grant a relative a residence permit for permanent residence or a decision to deport him does not restrict the right of the citizen of the Union to freedom of establishment under Article 43 EC.

— Article 1(d) of Directive 73/148/EEC is to be interpreted as meaning that the concept 'dependence' refers to the situation in which a relative of a citizen of the Union is economically dependent on that citizen of the Union to attain the minimum level of subsistence in the country where he is normally resident, not being the Member State where he is seeking to reside, and that this situation is structural in character.

— Article 6(b) of Directive 73/148/EEC is to be interpreted as meaning that the Member States may require a relative of a citizen of the Union who claims to be dependent on the citizen of the Union or his/her spouse to produce documents, in addition to the undertaking given by the citizen of the Union, which prove that there is a factual situation of dependence.