CITIZENS' RIGHTS

Making EU citizens' rights a reality: national courts enforcing freedom of movement and related rights

FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

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Foreword

Citizens of the European Union, as well as their family members, have the freedom to move and reside freely in any EU country of their choice. While most travel for holidays or business, growing numbers are moving to other Member States to set up their lives there, some permanently. Several million people – four per cent of all working age EU citizens – now live in a Member State other than their own. Students and pensioners are moving in greater numbers, too.

The founding treaties, the EU Charter of Fundamental Rights and secondary EU law all provide for this fundamental freedom, and other rights – such as not to be discriminated against based on nationality – support its enforcement.

But, as this report's review of relevant national court decisions shows, making these rights a reality remains a challenge. Interpreting certain undefined terms in the Free Movement Directive (2004/38/EC) can pose problems. Moreover, national administrations are not always fully aware of the interpretative guidance provided by the Court of Justice of the EU or by their own domestic courts. Sometimes national courts across the EU, or even within the same Member State, reach divergent conclusions.

This report fills an important gap by presenting an EU-wide, comparative overview of the application of Directive 2004/38/EC across the 28 Member States based on a review of select case law at national level. Providing insight for the first time into how national courts approach the provisions relating to Union citizenship and freedom of movement, it highlights the importance of their proper interpretation. It also underscores their significant impact on vital areas of life for EU citizens and their families, particularly when the rights to entry or residence are at stake.

In allowing legal professionals across the EU to analyse the application of problematic provisions by judges in other Member States, and compare this against their national legal frameworks and European standards, the report aims to support effective enforcement of these crucial rights.

Michael O'Flaherty
Director

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Introduction

The free movement of people is a cornerstone of Union citizenship, giving all Union citizens the right to travel, live and work wherever they wish within the EU. In autumn of 2017, 57 % of Europeans considered "the free movement of people, goods and services within the EU" the most positive achievement of the European Union, slightly ahead of "peace among the Member States of the EU" (56%).[1] The number of EU citizens living in another EU country has been increasing steadily, reaching 16.9 million on 1 January 2017.[2]

While an increasing number of people avail themselves of the right to free movement,[3] and despite regular monitoring of the transposition of the EU legislation by Member States, there is little knowledge about how EU Member States put into practice citizens' right to move freely in the Union.

The freedom of movement of goods, services, capital and people has been the foundation of European integration since the Rome Treaty of 1957. The establishment of Union citizenship through the Maastricht Treaty in 1992 reinforced the right to free movement of people. In this light, Union citizenship becomes the principal source of rights for 'mobile EU nationals' and this is reflected in the jurisprudence of the Court of Justice of the European Union (CJEU).[4]

Rights of EU citizens

Union citizenship is a source of specific rights, enshrined in the Treaties and in the EU Charter of Fundamental Rights. They include:

- the right to non-discrimination on the ground of nationality,
- the right to move and reside freely,
- the right to vote for and stand as a candidate at municipal and European Parliament elections in the Member State of residence,
- access to the diplomatic and consular protection of another Member State outside the EU if a citizen's Member State is not represented there,
- the right to petition the European Parliament and to complain to the European Ombudsman.

Most of these rights are related to or dependent on the exercise of the right to free movement.

For more information, see the Section on 'Legal and policy background'.

The CJEU expressly interpreted the freedom of movement to cover all EU citizens regardless of their economic activity (originally this right was granted essentially to 'workers'). 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[5] (the Directive) was adopted to consolidate different pieces of secondary legislation linked to the free movement of persons, and take account of the large body of case law on this matter. The Directive was designed to encourage Union citizens to exercise their right to free movement and to cut back administrative formalities.

The transposition of this Directive into national law proved challenging. In its report of 2008, the European Commission[6] found the overall transposition of Directive 2004/38/EC to be rather disappointing: "Not one Member State has transposed the Directive effectively and correctly in its entirety. Not one Article of the Directive has been transposed effectively and correctly by all Member States". Considerable parts of the Directive, along with crucial provisions, had been incorrectly transposed in most Member States.

In 2009, the European Parliament commissioned a comparative study[7] on the application of the Directive in selected Member States, which concluded that the European Commission should have taken a more proactive approach to ensure the Directive's correct application. The European Parliament called[8] on the European Commission to monitor how EU Member States comply with the implementation of the Directive, particularly as regards equal treatment and

1 Standard Eurobarometer (2017).
2 Eurostat (2018a).
3 Eurostat (2018b); Eurostat (2018c).
4 See, for example, Lenaerts, K. (2015), pp. 1–10.

5 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) 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 (Text with EEA relevance), OJ L 158, 30 April 2004.
6 European Commission (2008).
7 European Parliament, Committee on Legal Affairs (2009a).
8 European Parliament (2009b), pp. 6–13; see also: European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2009c).

the prohibition of discrimination on the ground of nationality.

To address these problems, the European Commission provided Member States with guidance[9] for a better transposition and application of the Directive – for example, as regards entry and residence; the definition of family members; and restrictions on the right to move on the grounds of public policy and security.[10] Yet, since 2008, the European Commission has had to initiate infringement proceedings against a number of Member States.

In 2016, research commissioned by the LIBE and PETI Committees of the European Parliament showed that EU citizens still face significant obstacles in exercising their right not to be discriminated against on the ground of nationality, as well as other rights related to EU citizenship.

Why this report?

The direct applicability of EU law makes the EU legal system effective. However, this effectiveness relies on national courts ensuring its correct application. For EU citizens to fully enjoy their freedom of movement under EU law, national courts must ensure that it is enforced correctly, in accordance with CJEU jurisprudence. However, there is very little information on how national courts interpret the provisions of the Directive.

The European Commission in 2017 therefore requested FRA to identify, collect and review case law of higher national courts relating to the application of Union citizens' rights, in particular the right to free movement of EU citizens and the related right not to be discriminated against on the ground of nationality. The agency collected this information, which will be available online in the Commission's e-justice portal. In addition, FRA developed this report to present the first EU comparative overview of the application of the relevant EU law across the Member States based on a review of case law at national level. It shows discrepancies in the interpretation of Directive 2004/38 by national courts as well as insufficient knowledge and understanding by national authorities of the jurisprudence of the CJEU.

This report provides an analysis of selected case law of national courts relating to some of the rights derived from Union citizenship, namely:

- non-discrimination on the ground on nationality 'within the scope of application of EU law',
- freedom of movement of EU citizens and their family members,
- the right to vote for and stand as a candidate at municipal and European Parliament elections in the Member State of residence.

No national case law relating to other citizen rights were reported.

Regarding the right to free movement, this report focuses on the right of free movement of EU citizens and their family members, and therefore on the application of Directive 2004/38. The report does not deal with specific rights concerning free movement of workers and their family members, which are provided in particular in Regulation (EU) No. 492/2011 and Directive 2014/54/EU,[11] nor with the issues related to the coordination of social security systems and covered by Regulation (EC) No. 883/2004.[12] Nevertheless, many aspects of Directive 2004/38 are also relevant for mobile[13] workers and pensioners.

This analysis does not aim to cover all situations and legal aspects that might arise under the Directive. It focuses on issues most frequently covered by collected case law or posing most difficulties in interpretation.

The report provides the EU institutions and the Member States with a better understanding of how the implementation of the Directive is ensured in practice as well as of the difficulties that national authorities and national courts may encounter when interpreting provisions of the Directive. Thanks to this knowledge, possible shortcomings in practice can be addressed, and good models replicated.

The report explores how rights attached to Union citizenship have been implemented and interpreted by the national courts and, indirectly, by national

9 European Commission (2009), *Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/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*, COM(2009) 313 final, Brussels, 2 July 2009.

10 See also academic works in this field, in particular, Neergaard U., (ed.), Jacqueson C., (ed.) and Holst-Christensen N. (ed.). (2014).

11 Regulation (EU) 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L 141, 27 May 2011, pp.1-12; Directive 2014/54/EU of the European Parliament and of the Council of 16 April 2014 on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement of workers, 30 April 2014, pp.8-14.

12 Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30 April 2004, which lays down rules regarding the coordination of old-age pensions in cross-border situations.

13 Having moved to a Member State other than the State of their nationality.

authorities. This analysis will allow acquainting legal practitioners, in particular judges and public officers, with selected legal arguments formulated by national courts when inquiring into complaints relating to a wide range of issues. These include:

- decisions on residence permits,
- access to education or pre-school care,
- access to employment,
- eligibility for social assistance,
- renting a car or
- using online bank services.

This report can be useful to the Commission, legal professionals and public officials. Read in conjunction with the national reports, which contain more detailed case law summaries, it can be used by public officials and lawyers – particularly judges – but also by NGOs who advocate citizenship matters, such as ECAS[14] or ETTW.[15]

The report highlights the importance of correct interpretations of Union rights and their impact on important areas of life of the citizens concerned, with especially important consequences when a decision of the authorities affects the right of entry or residence. It allows legal professionals across the EU to analyse the application of problematic provisions by judges in other Member States, and compare it against their own legal framework and European standards. It also raises awareness of EU institutions and national courts of possible divergence in interpretation of essential provisions of the Directive.

To contextualise the national case law discussed in this report, some explanations of certain provisions of the Directive by the CJEU are provided. The CJEU jurisprudence outlined here is not intended to be exhaustive. Judgments of the European Court of Human Rights (ECtHR) are not referred to, with one exception directly relevant for the case discussed.

This report is without prejudice to future developments of jurisprudence in this matter, which may be given by the CJEU and national courts.

It must be noted that this analysis refers to only a selection of national case law collected in national reports. The national reports are available on FRA's website.

The report does not provide a legal opinion by FRA or any other EU institution on the conformity of national jurisprudence with EU law. It can therefore neither provide legal advice on issues of national law nor an authoritative interpretation of EU law, which remains within the sole remit of the CJEU.

Legal and policy background

Article 9 of the Treaty on European Union (TEU) and Article 20 of the Treaty on the Functioning of the European Union (TFEU) confer the status of Union citizenship on every person having the nationality of a Member State. Citizenship of the Union is additional to and does not replace national citizenship – it is a legal status dependent upon national citizenship.

Article 20 of the TFEU

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:
   (a) the right to move and reside freely within the territory of the Member States;
   (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;
   (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;
   (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.

These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

The CJEU has repeatedly stated that Union citizenship is destined to be the fundamental status of nationals of

14 See European Citizen Action Service (ECAS).
15 See Europeans Throughout The World (ETTW).

the Member States'.[16] This aspect is reaffirmed in the new definition of members of the European Parliament as "representatives of the Union's citizens" (Article 14(2) of the TEU).[17] Union citizenship is a source of specific rights. Those rights are both substantive and procedural, and additional to the rights associated with citizenship of one's own country. Union-citizenship-related rights are enshrined in the TFEU (Articles 18-25), the TEU (particularly Articles 9-11 and 35), and in the EU Charter of Fundamental Rights (Articles 21 and 39-46). They include:

- the right to non-discrimination on the ground of nationality,
- the right to move and reside freely,
- the right to vote for and stand as a candidate at municipal and European Parliament elections in the Member State of residence,
- access to the diplomatic and consular protection of another Member State outside the EU if a citizen's Member State is not represented there,
- the right to petition the European Parliament and to complain to the European Ombudsman.

Some of the rights associated with Union citizenship are fully independent from the notion of free movement, such as the European citizens' initiative (set out in an EU Regulation of February 2011). Most of them, however, are related to or dependent on exercising the right to free movement.

This was clarified in the landmark case of *Ruiz Zambrano*[18] (see Section 2.1.2), in which the CJEU established that EU citizenship is not limited to and operating only in relation to free movement law. According to the court, Article 20 of the TFEU precludes national measures that have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights attached to the status of citizen of the Union, irrespective of the previous exercise by these citizens of their right of free movement.[19] Individuals may therefore rely on EU citizenship, even in the absence of a cross-border element. In addition, in *Baumbast,*[20] the CJEU expressly detached the free movement rights (which had originally been granted essentially to migrant workers) from any need to be economically active. The CJEU found that the status of Union citizen was sufficient to confer a right to residence in another Member State through direct application of Article 21(1) of the TFEU. This and related jurisprudence was subsequently codified in Directive 2004/38/EC.

According to Articles 20 (2) (a) and 21 of the TFEU, citizens of the Union have the right to move freely across EU Member States. This right is complemented by the right of residence. The right to reside freely applies to all EU citizens who have exercised their right to free movement and to their accompanying family members, even if they are third-country nationals. Several million EU citizens are residents in a Member State other than that of which they are nationals.[21]

The details of that right are set out in Directive 2004/38/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[22] (hereinafter the 'Directive'), also called Citizens' Rights Directive or Free Movement Directive.

Directive 2004/38/EC makes Union citizenship the fundamental basis for nationals of Member States when they exercise their right of free movement and residence on the territory of the Union (preamble 3). Preamble 10, however, asserts that citizens of other Member States should not become a burden on the host state, and thus long-term and permanent residence is subject to certain restrictions (as discussed in following sections).

Methodology

FRA's research covered all 28 Member States. FRANET, FRA's inter-disciplinary research network,[23] collected the case law between February and June of 2017. The case law reported should reflect the up-to-date situation, taking into account the period since the transposition

16 See for example, CJEU, C-184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 20 September 2001, para. 31; C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 17 September 2002, para.82; C-135/08, *Rottmann v. Freistaat Bayern*, 2 March 2010, para. 43; C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 5 May 2011, para. 47; C-148/02, *Garcia Avello v. État belge*, 2 October 2003, para. 22; C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004, para. 25; C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, 8 March 2011, para. 41.

17 As compared to simply "representatives of the peoples of the States brought together in the Community", as in Article 189 of the Treaty establishing the European Community.

18 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, 8 March 2011.

19 *Ibid.*, paras. 41, 44-45, operative part.

20 CJEU, C-413/99, *Baumbast and R v. Secretary of State for the Home Department,* 17 September 2002.

21 Eurostat (2018b).

22 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 (Text with EEA relevance), OJ L 158, 30 April 2004, pp.77-123.

23 FRANET reports on 27 Member States (excluding Croatia, for which no relevant case law was identified) will be available on FRA's website as of August 2018, as well as on the Commission's e-justice portal. See FRANET's webpage for more information on the network.

of Directive 2004/38/EC in a given Member State.[24] The contractors were asked to identity at least 12 cases per Member State relating to non-discrimination, freedom of movement and other citizenship rights, delivered by courts of higher instances and, if possible, setting leading approaches to the issues discussed. Where it was not possible to identify a sufficient number of higher court decisions, final decisions of lower courts or equality bodies were also reported.

National reports stemming from this data collection are available on the e-justice portal of the European Commission[25] and on FRA's website.[26]

The main challenge identified during the research concerned the availability of data. FRA's research revealed considerable difficulties to identify relevant case law in several Member States. This was due to several factors: first, none of the Member States index case law relating to free movement or other Union citizen rights. Therefore, identifying relevant cases requires using some form of key-word search. Such searches may not be entirely reliable, as national courts do not necessarily refer to EU law in their decisions, but rather to domestic law transposing relevant EU legislation. Domestic laws, on the other hand, may use different terms than the corresponding EU legislation. Where a searchable database of national jurisprudence exists, the parties' data are often anonymised, to the point that it is impossible to deduct the party's nationality, and, consequently, whether it concerns a right related to Union citizenship. Lastly, in several Member States, no database exists that can be searched by key words, but instead only by a case reference, or there is no available database at all.

For these reasons, it is impossible to reliably assess the number of relevant cases, and thus EU citizens concerned, and to effectively monitor the application of EU law relating to Union citizen rights, in particular the free movement of persons.

24 For the majority of Member States, the transposition date of the Freedom of movement and residence Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 was 30 April 2007; 1 January 2007 for Bulgaria and Romania, and 1 July 2013 for Croatia.

25 For more information, see the European e-Justice portal.

26 For more information, visit FRA's website.

1

Non-discrimination on the ground of nationality

This chapter analyses situations where national courts examined whether differential treatment of an EU citizen amounted to discrimination (direct or indirect) on grounds of nationality. The chapter also identifies circumstances in which courts deemed differential treatment objectively justified in a general interest and proportional. The national case law presented relates to access to education, employment, social assistance, as well as to services such as banking and car rentals and to defining permanent residence for administrative purposes.

Both Article 18 of the TFEU and Article 21(2) of the Charter of Fundamental Rights provide that, "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited". These articles are relevant for non-workers and in connection with the provision on European citizenship, which can be invoked by all EU citizens. A number of EU legal instruments prohibit discrimination on the ground of nationality. Article 45 of the TFEU ensures the free movement of workers and non-discrimination in the area of working conditions. Directive 2014/54/EU on measures facilitating the exercise of rights conferred on workers in the context of freedom of movement for workers reaffirms this principle in the context of workers (Articles 4, 5, 7).

The prohibition against discrimination on the ground of nationality has direct effect[27] (horizontal and vertical). This means it can be invoked by any individual against other private entities or against a state authority before a national court of a Member State. The same goes for freedom of movement of persons.

27 See CJEU, 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 5 February 1963; 43/75, *Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena*, 8 April 1976.

Article 21 of the TFEU

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

The CJEU interprets Article 21 of the TFEU on the right to move and reside freely within the territory of the Member States by associating it with the general principle of non-discrimination on the grounds of nationality. Article 21 finds specific expression in Article 45 of the TFEU in relation to freedom of movement for workers. The CJEU also used the concept of EU citizenship to enlarge the scope of non-discrimination on the grounds of nationality beyond workers – for instance, to job-seeking individuals or students.

As a consequence, a Member State is required to provide social assistance not only to those who had already entered its employment market and thus contributed to its economy, but to all Union citizens lawfully resident on its territory – though not without conditions.

FRA research confirmed that EU citizens and their third-country family members still experience discrimination on the ground of nationality when exercising their right to free movement. Often the discrimination does not result strictly from the implementation of Directive 2004/38/EC and does not relate directly to the right of entry and residence. Nevertheless, it is important to highlight since many of the cases of discrimination in practice constitute barriers to the free movement of Union citizens.

1.1. Scope

Article 24(1) of Directive 2004/38/EC confirms the fundamental commitment to equal treatment expressed in Article 18 of the TFEU and in Article 21(1) of the Charter. Furthermore, it establishes that "[t]he benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence".

The CJEU has expressly excluded the application of the prohibition of discrimination on the ground of nationality to third-country nationals. In *Vatsouras,*[28] the CJEU reiterated its restrictive interpretation of Article 18(1) of the TFEU, holding that "[this] provision concerns situations coming within the scope of [Union] law in which a national of one Member State suffers discriminatory treatment in relation to nationals of another Member State solely based on his nationality and is not intended to apply to cases of a possible difference in treatment between nationals of Member States and nationals of non-member countries".

In *Martínez Sala,*[29] the CJEU held that an EU citizen who was no longer employed in a host Member State could invoke a non-discrimination rule when she was refused a child-raising benefit. The court argued that Article 21 of the TFEU attaches to the status of a Union citizen the rights and duties laid down by the treaty, including the right not to be discriminated against on the ground of nationality within the material scope of the treaty. The CJEU also held in *Grzelczyk*[30] that discrimination solely on the ground of nationality is in principle prohibited by Article 18 of the TFEU. In *Trojani,*[31] the CJEU concluded that "national legislation [which] does not grant the social assistance benefit to citizens of the European Union, non-nationals of the Member State, who reside there lawfully even though they satisfy the conditions required of nationals of that Member State, constitutes discrimination on grounds of nationality". That means, in essence, that, provided that a Union citizen is in possession of a residence permit in a Member State, s/he may rely on Article 18 to be granted a social security benefit under the same conditions as nationals of that Member State. However, as clarified by the CJEU in *Radia Hadj Ahmed,*[32] "that interpretation of Article 18 TFEU, the background to which concerns Union citizenship, cannot be applied as it stands to a situation where a third-country national is in possession of a permit for residence in a Member State".

In a case from the **United Kingdom**, the Court of Appeal[33] held that the appellant (a third-country national married to an EU citizen) could not rely on Article 24 of the Directive or Article 18 of the TFEU because he had not acquired a right of residence under EU or domestic law. In another case, the same court ruled[34] that "[o]nly EU citizens can rely on the nationality non-discrimination principle. Furthermore, EU law has no application when a member state treats some people within its jurisdiction less favourably than others (so-called 'reverse discrimination'). The only restrictions are those imposed by the national law, which, in the case of the UK, incorporates Article 14 of the Convention [European Convention of Human Rights (ECHR)]. Article 14 is not violated because the UK government has policy reasons for making distinctions between Zambrano carers[35] and others, and this court cannot say that those reasons are clearly without foundation. Insofar as there is indirect discrimination,[36] it is objectively justified for the same reasons".[37]

The **Belgian** Constitutional Court[38] ruled that a national measure introduced a differentiation in violation of the equality principle included in Article 24 (1) of the Directive. This was because it made possible for the public social welfare centre to refuse social assistance to non-Belgian EU citizens, who have or retain the status of employee, as well as their family members, during the first three months of their residency. The court found that the provision created a discriminatory difference in treatment, because EU citizens and their family members were not entitled to reimbursement of urgent medical aid expenses incurred by the public centre for social welfare during the first three months of residency, whereas persons who resided illegally in Belgium can claim such aid. On the other hand, the refusal of support for livelihood for EU citizens other than employees and their family members, before they obtain permanent residency, did not violate Article 24 of the Directive.

28 CJEU, Joined cases C-22/08 and C-23/08, *Athanasios Vatsouras* and *Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*, 4 June 2009.
29 CJEU, 85/96, *María Martínez Sala v. Freistaat Bayern*, 12 May 1998.
30 CJEU, 184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 20 September 2001.
31 CJEU, C-456/02, *Michel Trojani v. Centre public d'aide sociale de Bruxelles (CPAS)* [GC], 7 September 2004.
32 CJEU, C-45/12, *Office national d'allocations familiales pour travailleurs salariés (ONAFTS) v. Radia Hadj Ahmed*, 13 June 2013.
33 United Kingdom, England and Wales Court of Appeal (Civil Division), *Ahmad v. Secretary of State for the Home Department,* [2014] EWCA Civ 988, 16 July 2014.
34 United Kingdom, England and Wales Court of Appeal (Civil Division), *Sanneh and others v. Secretary of State for Work and Pensions and others*, [2015] EWCA Civ 49, 10 February 2015.
35 For more information on *Zambrano* carers, see Section 2.1.2.
36 The court considered that the discrimination between *Zambrano* carers and other benefit claimants, resulting from the regulations, was not direct discrimination on the ground of nationality, but indirect discrimination based on immigration status.
37 *Ibid.*, para. 29.
38 Belgium, Constitutional Court (*Grondwettelijk Hof van België/Cour Constitutionnelle de Belgique*), Case No. 95/2014, 30 June 2014.

1.2. Derogations

Article 24 (2) of the Directive contains specific derogations as regards social assistance. Member States are not obliged:

1) to confer any entitlement to social assistance during the first three months of residence; or for a longer period where 'the Union citizens entered the territory of the host Member State in order to seek employment' (cross-referencing to Article 14(4)(b)), or

2) to provide maintenance aid for studies 'to persons other than workers, self-employed persons, persons who retain such status and members of their families' prior to the acquisition of permanent residence.

As regards maintenance costs of students, the CJEU accepted in *Bidar*[39] that Member States are permitted to ensure that the granting of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden upon them and that the granting of such assistance may be limited to students who have demonstrated 'a certain degree of integration'. This was further elaborated in *Förster.*[40] Jacqueline Förster, a German national, challenged the Dutch rule relating to financial aid for studies. According to that rule, aid could be granted to students (EU citizens) only if, prior to the application, they have been lawfully resident in the Netherlands for an uninterrupted period of at least five years. The CJEU examined whether such a requirement can be justified by the objective of the host state's policy and held that it was appropriate for the purpose of guaranteeing that the applicant is integrated into the society of the host state.

The **Luxembourg** Higher Administrative Court[41] rejected an appeal relating to a request of a French citizen for a financial incentive (*prime d'encouragement*) that can be applied for up to one year following the obtainment of the diploma. The claimant, after having obtained her master's degree, decided to stay in Luxembourg to work and take up residence. The court held that the incentive constituted a form of maintenance aid for studies (in the sense of Article 24(2) of the Directive), and there was no obligation under EU law to grant such a benefit. Even if she became resident in the country and qualified as a worker at the time of her application, this had not been the case during the period of her studies, for which she was seeking the said incentive.

39 CJEU, C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills* [GC], 15 March 2005.
40 CJEU, C-158/07, *Jacqueline Förster v. Hoofddirectie van de Informatie Beheer Groep* [GC], 18 November 2008.
41 Luxembourg, Higher Administrative Court (*Cour administrative*), Case No. 26864C, 12 October 2010.

The **Dutch** Administrative High Court held that the appellant, a Belgian student, was entitled to a part of the full study grant which was meant to cover costs related to access to education on equal footing with Dutch students. However, the court held that it did not apply to an entitlement to free public transport during weekdays.[42]

In **Hungary,** Governmental Decree No. 2/2012[43] on the rules of study contracts concluded with students studying on a full or partial stipend imposed a refund obligation on all students irrespective of their nationality. All of those in receipt of full or partial financial support from the Hungarian Government, thus without an obligation to pay (full) tuition, were required to refund the stipend where, after graduation, they did not remain in Hungary to work for a period of time equal to the duration of their state-supported study. The Ombudsman submitted to the Constitutional Court that the decree violated the Fundamental Law of Hungary and other international obligations of the country (e.g. EU Charter of Fundamental Rights) by restricting the free movement granted to all EU citizens, the freedom to choose an occupation and the right to engage in work. The Constitutional Court found[44] that while the restrictions intended to target Hungarian citizens, they applied similarly to all EU citizens, thereby forcing them to stay in Hungary rather than return to their home countries or seek work in other EU Member States.[45]

1.3. Indirect discrimination and possible justifications

The non-discrimination principle covers both direct and indirect discrimination. Indirect discrimination on the grounds of nationality occurs when national legislation of a Member State, although formulated in neutral

42 The Netherlands, Administrative High Court (*Centrale Raad van Beroep*), ECLI:NL:CRVB:2009:BK3113, 30 October 2009.
43 Hungary, Governmental Decree No. 2/2012 on the rules of the student contracts made with students studying on a full or partial stipend, (*2/2012. (I. 20.) Korm. rendelet a magyar állami ösztöndíjas és magyar állami részösztöndíjas hallgatókkal kötendő hallgatói szerződésről*), 20 January 2012, Articles 18-21.
44 Hungary, Constitutional Court (*Alkotmánybíróság*), Case No. 32/2012. (VII.4.) AB., 4 July 2012.
45 Hungary, Fourth Amendment of the Fundamental Law (*Magyarország Alaptörvényének negyedik módosítása*), 25 March 2013. According to the Hungarian national report, on 25 March 2013, Article 7 of the Fourth Amendment of the Fundamental Law established a constitutional basis for the restriction of students' right to move. It supplemented Article XI of the Fundamental Law (on the right to education) with the following (3) paragraph: "An Act may provide that financial support of higher education studies shall be subject to participation for a definite period in employment and/or to engaging in a definite period of entrepreneurial activity, as regulated by Hungarian law".

terms, disadvantages or is likely to disadvantage non-nationals to a greater extent than it does nationals. For example, national rules that subject certain rights to residence requirements,[46] or that refuse to recognise qualifications or experience obtained in another Member State,[47] have been deemed capable of giving rise to indirect discrimination. Residence conditions usually affect larger numbers of foreigners than nationals of the host state.

The CJEU and national courts are more often faced with situations in which indirect discrimination is alleged, although cases of direct discrimination on nationality also arise.[48]

Under EU law, in case of alleged indirect discrimination, an objective justification is possible.[49] Differential treatment may be justified where it pursues a legitimate aim and where the means to pursue that aim are appropriate and necessary. In principle, however, residence conditions are forbidden under EU law, and objective justifications relating to costs, administrative problems, comparisons between national workers and foreign workers and population policy are not accepted.[50]

There are however, certain restrictions that the CJEU is willing to accept as justified.

In *Bressol,*[51] concerning French students' complaint against a restriction on the number of foreign students who could enrol for the first time in medical and paramedical university courses in **Belgium**, the CJEU underlined the fundamental importance of free movement for students. The CJEU made it clear that, in the circumstances of that case[52] the fear of an excessive burden on the financing of higher education could not justify the unequal treatment of resident and non-resident students. But the court accepted that the need to protect the quality of public health may, under certain very strict conditions, justify limitations to the fundamental right of free movement. The ruling stated that a genuine risk to public health must be verified with solid, coherent data. Such a risk could take the form of a lower quality of training or of a future shortage of medical professionals. But the possibility of recruiting medical staff from other Member States must also be taken into account.

The European Commission monitors these kinds of restrictions. It instituted infringement procedures against Belgium and **Austria**, which also used a quota for foreign students. The quota restrictions in Austria reserved 75 % of places in medicine and dentistry schools to the holders of Austrian school-leaving certificates. In **Belgium**, 70 % of the places in the schools for vets and physiotherapists was reserved for students resident in Belgium (restrictions affecting six other healthcare qualifications were lifted in 2011 following a ruling of the Belgian Constitutional Court).[53]

In both cases, nationals of the two countries are far more likely to fulfil such conditions than other EU citizens. According to the European Commission, this constitutes indirect discrimination, in breach of EU law, unless it can be proven that the conditions are necessary to attain a legitimate aim and are proportionate.[54]

In light of *Bressol,* the **Austrian** Constitutional Court held[55] that the quota in question served the protection of public health, and more precisely the prevention of a shortage of doctors because an increasing number of German students pursued medical careers in Germany after completing their studies in Austria. The measure therefore served to ensure that healthcare in Austria is appropriate, necessary and adequate. The Constitutional Court found no discrimination on grounds of nationality.

In May 2017, the European Commission also endorsed Austria's quota system for medical studies as necessary to protect the Austrian health care system. On the other hand, the Commission concluded that the restrictions in place for dental studies were not justified, as no shortage of dentists is likely in Austria.[56]

A case from **Belgium** provides another example of justifications for restrictions affecting non-nationals. In

46 See CJEU, C-57/96, *H. Meints v. Minister van Landbouw, Natuurbeheer en Viscera*, 27 November 1997; and C-212/05, *Gertraud Hartmann v. Freistaat Bayern* [GC], 18 July 2007.

47 CJEU, C-419/92, *Ingetraut Scholz v. Opera Universitaria di Cagliari and Cinzia Porcedda*, 23 February 1994; C-340/89, *Irène Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, 7 May 1991, para. 15; and C-104/91, *Colegio Oficial de Agentes de la Propriedad Inmobiliaria v. José Luis Aguirre Borrell and others*, 7 May, 1992, para. 10.

48 For example, see CJEU, C-118/92, *Commission of the European Communities v. Grand Duchy of Luxembourg*, 21 October 2004; and C-465/01, *Commission of the European Communities v. Austria*, 16 September 2004, where national rules precluded non-Member State nationals from standing for election to certain employees' representative bodies.

49 For more details on categories of discrimination and possible justifications of differential treatment, see FRA (2018).

50 Pennings, F. (2013).

51 CJEU, C-73/08, *Nicolas Bressol and Others and Céline Chaverot and Others v. Gouvernement de la Communauté française* [GC], 13 April 2010.

52 The CJEU noted that, according to the explanations of the French Community, the financial burden was not an essential reason which justified the adoption of the measure. Those explanations indicated that the financing of education is organised through a 'closed envelope' system in which the overall allocation does not vary depending on the total number of students.

53 European Commission (2012).

54 *Ibid.*

55 Austria, Constitutional Court (*Verfassungsgerichtshof),* Case No. B533/2013, 5 March 2013.

56 The infringement procedure is therefore closed, with the proviso that these restrictions be removed in time for the 2019/2020 academic year.

that case, the Constitutional Court[57] examined allegedly discriminatory provisions of a national measure[58] concerning the organisation of childcare for infants and toddlers. The decree, among others, made obtaining a mandatory license for child care in the Flemish Community dependent on the active knowledge of Dutch by the person in charge and by one child supervisor. It also provided that children of whom at least one parent has sufficient knowledge of Dutch get precedence to child care locations subsidised by the Flemish Community in the bilingual area Brussels-Capital, to a maximum of 55 % of their reception capacity.

The Belgian Constitutional Court held that the requirement of knowing the Dutch language to obtain the license goes against freedom of establishment and freedom of movement of workers, as it puts in a more favourable position those who master the Dutch language over those who do not. However, the general interest objective justified the restriction. The court also argued that the measure was not disproportionate because the requirement to know Dutch only applied to the organiser of the child-care location and one child supervisor. Therefore, it did not go beyond what was required to understand the relevant regulations and to ensure the quality of care and the safety of the children. With regard to the priority for Dutch-speaking children, the court found that it was not unreasonable for institutions, such as Flemish child-care locations, to provide for a minimum priority access for Dutch-speaking families. The restriction was not considered to be disproportionate, because the priority enrolment was fixed at maximum 55 % and the proofs required from the parents were not difficult to provide.

General interest objectives may justify putting restrictions on the freedom of movement and residence, such as the requirement of sufficient knowledge of a language. Those restrictions should not be disproportionate to the pursued objectives of general interest.

1.4. Setting aside national legislation that violates EU law

Where a legislative provision is the source of differential treatment, it should be examined whether it results in direct discrimination or unjustified indirect discrimination.[59] If the application of the provision leads to a violation of EU law, it should be set aside by the national court. In a case where a **Portuguese** law imposed the requirement of residence in Portugal on those wishing to obtain a recreational navigator license, and the Port and Maritime Transports Institute refused to carry out exams and issue license to EU citizens who completed their training in Portugal, the North Administrative Central Court[60] found the provision in violation of Articles 18, 45, 52 and 56 of the TFEU. It recalled that a State may be subject to non-contractual civil liability for breach of EU law, if the following conditions are met: (i) the legal norm confers individual rights; (ii) the breach is sufficiently serious; (iii) there is a direct causal link between that breach and the damage suffered by individuals.

In **Belgium**, the law on family reunification provided for a derogation from the condition for family reunification of third-country nationals, but not for family reunification of EU citizens: to be considered a family member of an EU national, the partners in the registered partnership both had to be older than 21, whereas the minimum age for partners of a third-country national could be reduced to 18, if they had lived together for at least one year prior to the arrival. The **Belgian** Constitutional Court[61] found that provisions allowing for a derogation from these conditions for family reunification with a third-country national, while no derogation existed for family reunification with an EU citizen, created a difference in treatment for which there was no reasonable justification. The provision in question was annulled. This case also serves as an example showing that discrimination on the ground of nationality may exist not only between mobile EU citizens and host-country nationals, but also between EU citizens and third-country nationals.

1.5. Administrative and legal requirements

(Indirect) discrimination very often results when a condition of permanent or long-term residence is imposed in order to be eligible for different kinds of social assistance or other services. The **Italian** Constitutional Court[62] found discriminatory and unconstitutional provisions adopted by local authorities which included an eight-year residence period in the regional territory among the requirements for having access to public housing flats, or a 10-year residence period as a

57 Belgium, Constitutional Court (*Grondwettelijk Hof van België/Cour Constitutionnelle de Belgique*), Case No. 97/2014, 30 June 2014.
58 Article 6 (1) (4), Article 7, second indent, and Article 8 (2) and (3) of the Decree of the Flemish Community of 20 April 2012 concerning the organisation of childcare for infants and toddlers.
59 See Chapter 1, 'Indirect discrimination and possible justifications'.
60 Portugal, North Administrative Central Court (*Tribunal Central Administrativo Norte*), Case No. 00462/06.2BEPRT, 2 July 2015.
61 Belgium, Constitutional Court (*Grondwettelijk Hof van België/Cour Constitutionnelle de Belgique*), Case No. 121/2013, 26 September 2013.
62 Italy, Constitutional Court (*Corte Costituzionale*), Judgment No. 168, 11 June 2014.

requirement for accessing financial contributions to cover housing costs.

Discrimination can also result from an administrative requirement that at first glance seems neutral, but in practice is difficult to meet by non-nationals. In **Hungary**, to apply for a state-supported loan to buy a flat, applicants had to provide the bank with a certificate issued by a land registry office of the country of origin to verify that the claimants owned no property in their countries of origin. The applicants submitted certificates issued by their national tax authorities, but the bank did not accept the documents as they were not issued by a land registry, although these were the only available documentation in their home countries. The Supreme Court[63] found the refusal to recognise these documents to be discriminatory. The court also held that state financial support for buying a flat is a social benefit, and those enjoying free movement and residence in Hungary cannot be excluded as potential beneficiaries. The administrative challenges were interpreted as discriminatory practices.

In another case related to property rights, the Hungarian Supreme Court rejected the claim of a Romanian plaintiff who had purchased land in Hungary but could not register his ownership title, as this required having been engaged in agricultural activities in Hungary for at least three years. The court confirmed that EU citizens did not enjoy equal treatment with nationals when buying agricultural land (the land in question was actually a garden outside the city), as Hungarian law established restrictions for acquiring ownership title over farming lands and arable lands for non-Hungarian citizens to protect national interests.[64]

1.6. Access to services

Discrimination may occur also in access to services provided by private entities. In **Bulgaria,** foreign nationals, including EU citizens who even held EU health cards, were charged much higher medical fees than Bulgarians. The Commission for Protection against Discrimination found that this practice constituted direct discrimination on the grounds of nationality, in violation of national and EU law.[65] In **France**[66] and the **Netherlands**,[67] the applicants were not able to rent a car – because the relevant companies only accepted French driving licences (or French identification cards) or accepted only driving licenses from 19 foreign countries, excluding Poland.

In **Finland**,[68] an Estonian citizen who lived in Finland and had a Finnish personal identity code, was refused an online banking access code, because the bank required an identification document issued by the Finnish authorities. The Supreme Administrative Court found that the bank's conduct was discriminatory, as taking into account the harmonised EU standards for issuing passports, the bank had, without a justified purpose, put the applicant at a disadvantage as compared to persons holding a passport issued by the Finnish authorities.

A **French** real estate agency refused to rent an apartment to an EU citizen living in France for several years, because the owner's insurance company made the subscription to insurance against unpaid rents conditional on the possession of a French identity document by the tenant. This practice was also found to be against national law, which stipulated that no one can be refused rented housing, in particular, on the grounds of their belonging to a particular nation.[69]

Situations as those described above can result in violations of the freedom of movement of persons, but also the freedom of movement of services.

1.7. Access to employment

Discrimination on the grounds of nationality may occur in relation to access to employment or profession, although this falls rather within the ambit of Article 45 of the TFEU and the freedom of movement of workers.

63 Hungary, Supreme Court (*Kúria),* Case No. Kfv. V. 35.470/2011.

64 Compare with the recent judgment of 6 March 2018 in Joined cases C-52/16 and C-113/16, *'SEGRO' Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala* and *Günther Horváth v. Vas Megyei Kormányhivatal* [GC], where the CJEU observed that the requirement that a close family tie must exist between the usufructuary and the owner of the land seems to constitute indirect discrimination based on the usufructuary's nationality or on the origin of the capital. Infringement proceedings against Hungary on this matter are also currently in progress before the CJEU (see CJEU, C-235/17, *European Commission v. Hungary*, 5 May 2017).

65 Bulgaria, Commission for Protection against Discrimination (*Комисия за защита от дискриминация,* КЗД), Case No. 91 of 2009, 9 March 2010.

66 France, Public Defender of Rights (*Le Défenseur des droits*), Decision No. MLD-2016-258, 3 November 2016. The Defender of Rights found that the condition of holding a European driving licence and the requirement to justify one's identity with a document issued by the French State amounts to excluding people from rental services on the ground of their nationality. The refusal to rent to a car to the claimant falls under Article 225 (2) (1) of the Criminal Code.

67 The Netherlands, Institute for Human Rights (*College voor de Rechten van de Mens*), Opinion No. 2016-78, 14 July 2016. In the Institute's opinion, requiring a Dutch driving license when renting a car constituted indirect discrimination on the ground of nationality.

68 Finland, Supreme Administrative Court (*Korkein hallinto-oikeus/Högsta förvaltningsdomstolen*), Case No. KHO:2017:19; 2350/3/15; 424, 6 February 2017.

69 France, High Authority for the Fight against Discrimination and for Equality (*La Haute autorité de lutte contre les discriminations et pour l'égalité*, HALDE), Case No. 2007-190, 2 July 2007.

This was the case in **Romania**, where access to the notary profession was restricted to those having only Romanian citizenship. The complainant was not allowed to sit an admission exam because of her **dual citizenship**. The National Council for Combating Discrimination[70] found this precondition to be discriminatory on the ground of nationality, and consequently in violation of Romanian anti-discrimination law, as well the principle of equality enshrined in the Romanian Constitution.

A Croatian citizen challenged the decision of the **Italian** Customs and Monopolies Agency excluding her from a recruitment procedure because of her lack of Italian citizenship. The Ordinary Court of Udine[71] recalled the CJEU's jurisprudence concerning the public service exception to the right to non-discrimination, which can limit the access of non-citizens to some job opportunities; this exception must be applied strictly. According to the Italian court, the procedure in question was not covered by the "public service exception", as within the same working sector might exist job opportunities which do not imply the exercise of public functions, and are therefore accessible to EU citizens.

Similarly, in the **Polish** District Court's[72] opinion, access to employment in public service for non-Polish nationals should be relatively broad and any exceptions should pertain to limited circumstances. Such exceptional circumstances should relate to the exercise of public authority and should be interpreted narrowly. The execution of public authority in the court's view is connected with the possibility of sovereignly influencing the situation of an individual e.g. by the issuing of an administrative decision.

On the other hand, the condition of carrying out legal practice in **France**, as a requirement for admission to the bar without training, was found to be independent of the applicant's nationality, and not discriminatory with regard to nationals of other Member States, who can meet this condition if they have worked in France. According to the Court of Cassation, this regulation is justified by imperative reasons of general interest for the protection of the public. In requiring knowledge and qualifications likely to protect the rights of parties and the proper administration of justice, the measure does not go beyond what is necessary to achieve this objective.

70 Romania, National Council for Combating Discrimination (*Consiliul Național pentru Combaterea Discriminării*, CNCD), Decision No. 541, 17 September 2008.
71 Italy, Ordinary Court of Udine (*Tribunale di Udine*), Decision No. R.L.N.217 /2016, 30 June 2016.
72 Poland, District Court for Warsaw (*Sąd Rejonowy dla Warszawy-Śródmieścia w Warszawie*), Case No. VIII P 511/10, 16 November 2010.

1.8. Application of tax reliefs to non-nationals

Some of the collected cases concerned different kinds of tax relief, in particular following the sale of immovable property.[73] The national courts' reasoning in these cases is not homogenous.

The Administrative Regional Court[74] in **Latvia** ruled that any national regulation that provides for tax relief in a way that discriminates against citizens of other Member States, breaches the principle of non-discrimination enshrined in Article 18 of the TFEU. In that case, the complainant's request for immovable property tax relief was refused because the municipality had chosen to classify property-tax payers as belonging to one of two groups – citizens and so-called 'non-citizens'[75] (who could be granted relief) and other taxpayers (who could not be granted tax relief). Since the complainant was a Lithuanian national, relief could not be granted. The court decided that, since there was a conflict between national law and international law (Article 18 of the TFEU), the court must apply international law. Consequently, the rule in question was not applicable in respect of the applicant, who should be granted the immovable tax relief.

In **Spain**, the income tax for non-residents who sold immovable property was higher than for EU citizens resident in Spain. The High Court of Justice[76] considered the different tax rates to be contrary to Articles 18 and 21 of the TFEU.[77] The difference in tax treatment of the two categories of taxpayers, which created a higher tax burden for non-residents in situations that are objectively similar to those of residents, constituted indirect discrimination on the grounds of nationality. The higher tax burden borne by non-residents may discourage people from taking up work or buying property in Spain while still being tax residents in another Member State. According to the principle of the primacy of EU law, the provisions in question should be revoked, and the difference paid back to plaintiffs. The

73 European Parliament, Committee on Economic and Monetary Affairs (2011).
74 Latvia, Administrative Regional Court (*Administratīvā apgabaltiesa*), Case No. A420469613 (AA43-0714-15/16), 6 October 2015.
75 In Latvian law, the term 'non-citizen' has a specific meaning. It refers to individuals who are not citizens of Latvia or of any other country, but who, in accordance with the Latvian law "Regarding the status of citizens of the former USSR who possess neither Latvian nor other citizenship", have the right to a non-citizen passport issued by the Latvian government as well as other specific rights. According to the Constitutional Court of Latvia, Latvian 'non-citizens' can be regarded neither as citizens nor as aliens or stateless persons, but as persons with "a specific legal status".
76 Spain, High Court of Justice (*Tribunal Superior de Justicia en Valencia, Sala de lo Contencioso*), Appeal No. 3916/2008, Decision No. 796/2011, 30 June 2011.
77 The judgment still refers to Articles 12 and 18 of the TEC.

Spanish court recalled the CJEU's rulings in *Asscher*[78] and *Gerritse*[79] relating to the financial situation of European citizens in other Member States.

In contrast, in **Poland**, where registration of permanent residence (domicile) is obligatory for everyone, the Supreme Administrative Court[80] decided that it is impossible to unconditionally grant the right to residency tax relief[81] solely on the basis of Article 18 of the TFEU. According to the court, the national legislator may require official proof of registration of one's domicile at the address of the sold property in order to grant the relief, as otherwise it would be advantageous to EU citizens who still have their permanent address in the territory of another Member State. In the court's view, this would be disadvantageous towards Polish citizens who do not obtain their right to residency relief due to the lack of registration of a permanent residence.

1.9. Register of birth certificate of child with same-sex parents

The **Polish** Supreme Administrative Court[82] dismissed the cassation complaint launched by a Polish woman who lived in a same-sex relationship in the United Kingdom, and had a child born in the United Kingdom. On the British document, both women figured as parents of the child. She wished to register the child's birth certificate in the Polish Civil Statuses Records. The Supreme Administrative Court noted that in the process of the transcription of a foreign birth certificate, a Polish birth certificate of the child is created. The court pointed out that the contents of such Polish birth certificates are defined by law – they need to mention the surnames of both parents and their places of residence. The Polish legal system – according to the court – also provides that one of the parents must be male. This case is an example of differential treatment on the ground of sexual orientation, but it also constitutes a hindrance to acquiring documents proving Polish nationality[83] – due to problems in the transcription of birth certificates of children born in homosexual unions, their right to Polish nationality may not be realised in practice.[84]

78 CJEU, C-107/94, *P. H. Asscher v. Staatssecretaris van Financiën*, 27 June 1996.
79 CJEU, C-55/98, *Arnoud Gerritse v. Finanzamt Neukölln-Nord*, 12 June 2003.
80 Poland, Supreme Administrative Court (*Naczelny Sąd Administracyjny*), Case No. II FSK 2500/12, 4 November 2014.
81 Relief from having to pay personal income tax following the sale of an apartment or a building, granted to sellers who were residing in this sold apartment for a period of at least 12 months prior to the transaction date.
82 Poland, Supreme Administrative Court (*Naczelny Sąd Administracyjny*), Case No. II OSK 1298/13, 17 December 2014.
83 Currently, a complaint is pending with the European Court of Human Rights in a similar case, alleging the violation of Article 8 of the Convention in respect of the child.
84 European Network on Statelessness (2015).

2

Right of Union citizens and their family members to move and reside freely

This chapter deals with conditions for entry and residence of EU citizens and their family members set up by Directive 2004/38. It analyses how national courts interpret some of the conditions provided for in Directive 2004/38 for a Union citizen to have the right to reside in the host Member State for more than three months, in particular the notion of 'sufficient resources'. It looks at situations where EU citizens applied for specific social assistance and how national courts dealt with these situations. It also examines the definition of 'family member' under different provisions of the Directive and their application by national courts.

Lastly, this chapter analyses national courts' application of the provisions allowing restrictions of the freedom of movement, in particular the interpretation of public security reasons, the application of the proportionality test related to expulsion decisions, considerations of personal conduct, increased protection against expulsion and procedural safeguards.

Directive 2004/38 applies only to EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who accompany or join them (Article 3 (1)). Under Union law, EU citizens who reside in the Member State of their nationality do not benefit from the rights related to freedom of movement of persons and national immigration rules apply to their third-country family members. However, EU citizens who return to their home Member State after having resided in another Member State[85] or who have exercised their right to free movement without actually residing in another Member State[86] – for example, by providing services in another Member State – can also benefit from the provisions of this Directive.

2.1. Family members (EU and third-country)

2.1.1. Definition of 'family member'

The Directive distinguishes between two categories of family members. Article 2 defines who qualifies as a 'family member' who has the right to accompany and join a Union citizen in another Member State. The nationality of the family member is irrelevant; the right also covers third-country nationals. Family members do not have to move from another country. The scope of their rights depends on whether the Union citizen has exercised their right to free movement (see Section 2.1.3.). If yes, they will be covered by Directive 2004/38. If not, they are covered by national and EU immigration laws.

The following persons belong to the category of family members who enjoy the rights granted by the Directive, without any discretion being left to the national authorities (automatic right of entry and residence):

- spouse;
- registered partner: the partner with whom the Union citizen has concluded a registered partnership on the basis of the legislation of a Member State – but only in Member States that treat registered partnerships as equivalent to marriage; if this is not

85 CJEU, C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, 7 July 1992; and C-291/05, *Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind*, 11 December 2007.

86 CJEU, C-60/00, *Mary Carpenter v. Secretary of State for the Home Department*, 11 July 2002.

the case, the partner could still have the right to entry as a *beneficiary*;

- direct descendants (i.e. children, grand-children) of the citizen or those of the spouse or registered partner, who are under the age of 21 or older but are still dependent (e.g. students);
- dependant direct relatives in the ascending line (i.e. parents, grand-parents) and those of the spouse or registered partner. Therefore, non-dependent parents will belong to the second category below.

Other family members, without any restriction as to the type or degree of relatedness, belong to the second category, defined in Article 3(2) of the Directive: 'beneficiaries'. They do not enjoy an automatic right of entry and residence. However, Member States should facilitate this, in accordance with their national legislation, and under certain conditions:

- The family member, in the country from which they have come (meaning either the country of origin or the country they previously lived in) either
  - is dependent on the EU citizen or
  - has lived in the same household as the EU citizen.
- Serious health grounds strictly require the personal care of the family member by the Union citizen;
- The partner with whom the Union citizen has a durable relationship, duly attested, which does not fall under Article 2(2)(b). This includes both same-sex and opposite-sex relationships. The interpretation of how long the relationship must exist to be durable is in principle up to Member States. The durability of the relationship must be assessed in light of the Directive's objective to maintain the unity of the family in a broad sense. National rules on durability of partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable.[87]

The host Member State is, however, compelled to undertake an extensive examination of the personal circumstances and duly justify any denial of entry or residence of these people (Article 3(2)).

As mentioned above, family members' right to entry and residence is automatic, without a need to meet any other conditions. Consequently, in **Italy**, the Venice Court of Appeal[88] quashed a decision of the Police Headquarters, refusing a residence permit to the husband of a Romanian citizen. The police relied on national legislation, which denied regular residence permits for spouses of Union citizens if they lacked a regular residence permit at the time of marriage. The Italian court stressed the illegitimacy of such national provisions in light of the CJEU's judgment in *Metock*,[89] which the national court deemed directly applicable to the case.

On the other hand, a **German** Higher Social Court of North Rhine-Westphalia[90] confirmed that an unmarried partner of a Bulgarian national, although they lived together and were parents of two children, could not rely by analogy on legislation on the right of residence for spouses of EU citizens. The court, however, found that she had a right to residence pursuant to another provision; this entitles third-country parents of minor, unmarried Germans or minor EU nationals with residence rights, to temporary residence for the purpose of care and custody. The court did not mention the possibility of an interpretation in accordance with Article 3 of Directive 2004/38.

Same-sex spouse/partner

The Directive must be applied in accordance with the non-discrimination principle enshrined in particular in Article 21 of the Charter, which includes non-discrimination on the grounds of sexual orientation. Since the Directive does not contain any exclusions from the personal scope of the term 'spouse', same-sex marriages should be covered, without any discretion for Members States in case of registered partners. This interpretation would also follow from recital 31 of the preamble, which confirms that the Directive: "respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In accordance with the prohibition of discrimination contained in the Charter, Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as [...] sexual orientation".

Still, this issue raises doubts in some Member States that do not recognise same-sex couples. There is a lack of clarity with regard to the mutual recognition of same-sex marriages in EU Member States. This constitutes an obstacle to free movement: being unsure as to whether your same-sex spouse may be able to join you in another Member State and/or be considered as your spouse there is likely to discourage people from exercising their right to free movement.

87 See COM(2009) 313 final, p. 4.
88 Italy, Venice Court of Appeal (*Corte d'Appello di Venezia*), Decision No. 112/2009, 22 April 2009.
89 CJEU, C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* [GC], 25 July 2008.
90 Germany Higher Social Court of North Rhine-Westphalia (*Landessozialgericht für das Land Nordrhein-Westfalen*, LSG NRW), Case No. L 19 AS 1713/15 B ER, 30 November 2015.

In 2017, the ECtHR reaffirmed that Member States must recognise and protect same-sex unions – although the court did not require recognition of actual same-sex marriage. *Orlandi and Others v. Italy*[91] concerned the registration of same-sex marriages concluded abroad in Italy.

The CJEU was also recently faced with a preliminary question concerning same-sex marriages concluded abroad. In 2012, Mr. Coman wanted to return to his home country of **Romania** to work and live after having worked for three years in Brussels, where he married Mr. Hamilton, a US national. He wished to bring his spouse back to Romania, making use of his free movement rights. The Romanian government, however, refused to grant Mr. Hamilton a residence permit. Although the couple were indeed married in the eyes of the Belgian state, Romania recognises no form of same-sex union. The couple challenged the decision before Romanian courts. The Romanian Constitutional Court[92] argued that the term 'spouse' in Article 2(2)(a) of the Directive is vague and referred four preliminary questions to the CJEU.

On 5 June 2018, the CJEU issued a judgment.[93] The CJEU clarified that the term 'spouse' used in the Directive refers to a person joined to another person by the bonds of marriage, is gender-neutral, and may therefore cover the same-sex spouse of an EU citizen.

The CJEU therefore considered that a Member State's refusal to recognise a same-sex marriage lawfully concluded in another Member State, for the sole purpose of granting a right of residence to a third-country family member of a Union citizen, may interfere with the exercise of that citizen's right to free movement. That could have the effect that freedom of movement from one Member State to another would vary depending on whether or not provisions of national law allow marriage between persons of the same sex.[94]

Nevertheless, the court also observed that the EU respects the national identity of Member States, inherent in their fundamental structures, both political and constitutional. Therefore, a person's status, which is relevant to the rules on marriage, is a matter that falls within the competence of the Member States. EU law does not detract from that competence, the Member States being free to decide whether or not to allow homosexual marriage.

Lastly, the CJEU observed that a national measure that is liable to obstruct the exercise of freedom of movement for persons may be justified only where such a measure is consistent with the fundamental rights guaranteed by the EU Charter of Fundamental Rights. The fundamental right to respect for family and private life is guaranteed by Article 7 of the Charter and has the same meaning and the same scope as those guaranteed by Article 8 of the ECHR. It is apparent from the case law of the ECtHR that the relationship of a homosexual couple may fall within the notion of 'private life' and that of 'family life' in the same way as a relationship of a heterosexual couple in the same situation.[95]

As regards the public policy argument put forward by the government, the CJEU noted that the obligation to recognise a homosexual marriage for the sole purpose of a right of residence does not require that Member State to provide for the institution of same-sex marriage in its national law. Moreover, it does not pose a threat to the public policy of the Member State concerned.

Even before this clarification by the CJEU, some national courts had already been faced with this question and issued judgments on it.

Estonia does not recognise same-sex marriage. However, Estonia has adopted the Registered Partnership Act,[96] which allows registered partnerships between same-sex couples. Nonetheless, in 2016, there was no legal basis that would allow official registration of such partnerships in the population register. The applicant had concluded a same-sex marriage in Sweden (both she and her spouse were Swedish) and she wanted the authorities to recognise her marriage and register it in the population register so that her partner could use the relevant marriage-related benefits.

The Tallinn Circuit Court[97] found that when a person's data has been entered into the Estonian population register, they have the right to demand that their family status entered is accurate. Private international law provides that a marriage legally concluded under the laws of one country should also be considered legal in Estonia, when it does not violate Estonian public order. According to the court, even if the conclusion of a marriage between same-sex persons would have to be assessed as contrary to Estonian practices and moral principles, the recognition of such a foreign marriage would not be contrary to public order, since it would not endanger any fundamental legal interest and would not harm

91 ECtHR, *Orlandi and Others v. Italy,* Nos. 26431/12; 26742/12; 44057/12 and 60088/12, 14 December 2017.
92 Romania, Romanian Constitutional Court (*Curtea Constitutională a României)*, Case No. 78D/2016, 29 November 2016.
93 CJEU, C-673/16, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne* [GC], 5 June 2018.
94 *Ibid.*, para. 39.
95 *Ibid.,* para. 50, referring to ECtHR judgments in *Vallianatos and Others v. Greece*, Nos. 29381/09 and 32684/09, 7 November 2013, and *Orlandi and Others v. Italy,* Nos. 26431/12, 26742/12, 44057/12 and 60088/12, 14 December 2017.
96 Estonia, Registered Partnership Act (*Kooseluseadus*), 27 November 2014.
97 Estonia, Tallinn Circuit Court (*Tallinna Ringkonnakohus*), Case No. 3-15-2355/24, 24 November 2016.

any person's subjective rights. Although the Estonian constitution and international treaties protect marriage between a man and a woman, the Estonian legislator has accepted other forms of partnership. Therefore, such partnerships concluded in a foreign country should also be acceptable under Estonian legislation. However, this does not mean that such a partnership would be given equal legal status to a marriage concluded in Estonia and under Estonian legislation.

In **Poland**, a third-country national who had concluded a registered partnership with a Polish citizen in the United Kingdom, was refused entry to **Poland** on grounds of lack of valid documents or visa. Both partners travelled to Poland for holidays. The Regional Administrative Court in Warsaw[98] annulled the decision of the Board Guard. Although the court considered that a registered partner cannot be considered as family member within the meaning of Article 2 (2) of the Directive, since Polish law does not recognise registered partnerships, it took the view that the situation should be examined in light of Article 3 (2) (b). The court noted that this provision was not fully implemented in Polish law, meaning the claimant could invoke the Directive directly (horizontal direct effect). The court also noted that the argument that registered partnership is not recognised in Poland could not in any case justify the refusal. The court argued that if the Polish legal system recognized registered partnership, it would not be necessary to refer to Article 3 (2) (b) of the Directive, as Article 3 (1) would be applicable in that case. The court further reiterated that where the need for facilitation of entry of members of "extended families" might occur (as defined in the Article 3 (2)), the Member States are obliged to perform an in-depth examination of the personal situation of the applicants to confirm that they live in a durable and duly attested relationship. The Polish administrative authorities should interpret the law in a way that makes it easier for members of "extended family members" to enter the territory of Poland. Furthermore, every denial of entry or stay should be duly justified.

In a 2012 decision, the Ordinary Court of Reggio Emilia[99] examined the complaint of a same-sex spouse (and third-country national) of an **Italian** citizen. The couple got married in Spain and decided to move to Italy. The police, however, denied the spouse a long-term residence permit. According to the Italian court, the complainant was to be recognised as the legitimate spouse of the Italian citizen in line with the Directive and relevant Italian law, even though the Italian legislation at the time did not allow for same-sex marriages. The court found that the category of 'spouse' cannot be interpreted according to national legislation, but that each Member State shall respect the legislation on marriage adopted by other EU Member States. The court also stated that the national law in question[100] recognised the right of residence, protecting the preservation of the family union as in the country where it was formed (in this case, Spain) – although neither of the countries of origin of the spouses (in this case, Uruguay and Italy) recognised the possibility of same-sex marriage. For this reason, the challenged decision to deny the long-term residence permit was considered invalid and in breach of EU and national legislation.

Dependent direct relatives

A family member can be considered 'dependent' if they are dependent financially, but not only for this reason.

In a case before the **Swedish** Supreme Administrative Court,[101] an applicant came to Sweden from Bulgaria with her daughter and son-in-law. As her daughter was an economically inactive EU citizen (i.e. she had what in Sweden is called a secondary right to reside), the applicant had to show her connection to the son-in-law in order to get the right to reside and therefore also the right to be registered in the Swedish Population Register. The Supreme Administrative Court found that, even though she could show that she had already lived with her daughter in Bulgaria, she was unable to provide documents issued by Bulgarian authorities showing that the son-in-law had lived with them back in Bulgaria or that, before residing in Sweden, she was financially dependent on her daughter and son-in-law. Thus, the court found that she had not shown that she was a family member of her son-in-law within the meaning of the Alien Act.

Another case from **Sweden** (from 2007) concerned a Polish citizen who arrived in Sweden and applied for a residence permit to join her two daughters already living in Sweden. She argued that the daughters supported her with clothes, money and medicine. Furthermore, she suffered from depression and Parkinson's disease, and had not had anyone to care for her since her daughter in Poland passed away. The Swedish Migration Agency rejected the application and ordered her expulsion from Sweden. The Migration Agency did not consider the applicant's state of health to be a reason for granting a residence permit. The Migration Court supported this decision. Despite her allegedly meeting the conditions laid out in Article 3 (2) of the Directive, the applicant's right of residence under the Directive was not

98 Poland, Regional Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*), Case No. IV SA 154/13, 15 March 2013; and Judgment in Case No. IV SA/Wa 2093/12, 22 May 2013.

99 Italy, Ordinary Court of Reggio Emilia (*Tribunale di Reggio Emilia*), Proceeding No. 1401/2011, 13 February 2012.

100 Italy, Ordinary Court of Reggio Emilia (*Tribunale di Reggio Emilia*), Legislative decree No. 30/2007.

101 Sweden, Supreme Administrative Court (*Högsta Förvaltningsdomstolen*), Case No. 3101-15, 14 June 2016, (Choose: Avancerad; Domstol: Högsta Förvaltningsdomstolen; Målnummer: 3101-15).

considered. The Migration Court of Appeal[102] considered the fact that her right of residence under the Directive had not been investigated to be a serious shortcoming. The case was referred back for re-examination.

According to the **Spanish** Supreme Court,[103] when deciding whether the parents of an EU citizen can be considered as dependents, the Member State has to assess whether, in view of their economic and social circumstances, they are unable to meet their basic needs without their child's assistance. The court established that at least one of the ascendants – the mother, who in her passport indicated that she is a nurse by profession- was of working age, and the remittances paid by the EU citizen to the parents were not enough to cover their needs. Consequently, dependency had not been proven.

Likewise, the **United Kingdom** Court of Appeal[104] stated that the other family member must need the support from his or her relatives to meet his or her basic needs. In the case at issue, Ms. Lim did receive £ 450 a month to cover her living expenses from her daughter and her Finnish son-in-law. However, she owned property in Malaysia and had sufficient savings. The court therefore found that she was financially independent and did not need to rely on additional resources to meet her basic needs.

Similar arguments were invoked by the Slovenian Administrative Court.[105] It did not consider the applicant's father as "a dependent direct relative", as he received a pension in Bosnia of twice the amount set by Bosnian legislation as the amount required for persons to sustain themselves in Bosnia.

The Court of Appeal[106] of the **United Kingdom** ruled in a case involving Nigerian nationals who entered the UK illegally and applied for residence as extended family members of their cousin, S. She had formerly lived in the Netherlands and acquired Dutch citizenship. Between 2004 and the dates when the three respondents respectively left for the United Kingdom, they lived with S. in Nigeria and she supported them financially. S. continued to support them financially after they came to the United Kingdom, both while she remained in Nigeria and when she was in the Netherlands prior to her own move to the United Kingdom. Since April 2008, the respondents lived with her in the United Kingdom in a flat she rented and she continued to support them financially. Lower courts refused them residence cards on the ground that they did not meet the condition of "accompanying or joining" the sponsor, because they had arrived to United Kingdom before her (see Section 2.1.4). The Court of Appeal considered all the elements in the national provision,[107] which stated: "the person satisfied the condition in paragraph (a), [had] joined the EEA national in the United Kingdom and [continued] to be dependent upon him or to be a member of his household". The court held that, when they lived in Nigeria, they were dependent on S. and were members of her household, and they continued to be dependent on her. However, the court also held that this finding did not confer any substantive right to residence in the United Kingdom and this was still a matter for the Secretary of State's discretion.

2.1.2. Primary carer of a minor EU citizen and 'Zambrano carers' [third-country primary carers of minor children with host-country nationality]

The CJEU case *Zambrano*[108] is a key case clarifying the situation of third-country nationals whose children are nationals of the host country, but have never left it. Mr. and Ms. Zambrano, of Colombian nationality, applied for refugee status in Belgium. The Belgian authorities refused them this status, but did not sent them back to Colombia because of the civil war in that country. From 2001, they were then registered as resident in Belgium and Mr. Zambrano worked there for a certain time, even though he did not hold a work permit. They later had two children, who obtained Belgian nationality by birth. However, the competent authorities refused to regularise Zambrano's situation.

At the outset, the CJEU held that Directive 2004/38 was not applicable since the children had never moved from Belgium; therefore there was no cross-border element of exercising the right to free movement. However, since the son and daughter of Mr. Ruiz Zambrano were Belgian nationals, Article 20 of the TFEU conferred to them the status of citizens of the Union. After stressing that "citizenship of the Union is intended to be the fundamental status of nationals of the Member States,"[109] the court held that "Article 20

102 Sweden, Migration Court of Appeal (*Migrationsöverdomstolen*), Case No. UM2261-07, 11 December 2007, (Choose: Avancerad; Domstol: Migrationsöverdomstolen; Målnummer: UM2261-07).
103 Spain, Supreme Court, Contentious Administrative Chamber (*Tribunal Supremo, Sala de lo Contencioso Administrativo*), Appeal No. 3173/2012; Roj: STS 3456/2013, Id Cendoj 28079130003201310018 9; 27 June 2013.
104 United Kingdom, England and Wales Court of Appeal (Civil Division), *Siew Lian Lim v. Entry Clearance Officer, Manila,* [2015] EWCA Civ 1383, 28 July 2015.
105 Slovenia, Slovenian Administrative Court (*Upravno Sodišče Republike Slovenije*), Case No. III U 26/2013, 20 September 2013.
106 United Kingdom, England and Wales Court of Appeal (Civil Division), *Aladeselu v. Secretary of State for the Home Department*, [2013] EWCA Civ 144, 1 March 2013.
107 United Kingdom, Regulation 8 of the Immigration (European Economic Area) Regulations 2006, 30 March 2006.
108 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, 8 March 2011.
109 *Ibid.*, para. 41.

TFEU precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union." For the court, the refusal by a Member State to grant the right of residence and a work permit to a third-country national with dependent children who are themselves nationals of that Member State had such an effect. In fact, such a refusal would lead to a situation where those children would have to leave the territory of the EU in order to accompany their parents.

This ruling resulted in more specific questions put before national courts.

The **United Kingdom** Court of Appeal[110] held that, while Zambrano carers have a right to social assistance, this right is derived from the child's citizenship rights and, therefore, they are not entitled to the same level of social assistance as EU citizens lawfully residing in the EU. The amount of social assistance payments is exclusively governed by national law and Member States are only obliged to provide sufficient support to meet the Zambrano carer's basic support needs in order to be able to care for the EU citizen child.

The CJEU has subsequently restrained the scope of the impact of the Zambrano judgment. In *Dereci,*[111] it clarified that the denial of the genuine enjoyment of the substance of the rights conferred by virtue of EU citizen status "refers to situations in which the Union citizen has, in fact, to leave not only the territory of the Member State of which he is a national but also the territory of the Union as a whole".

In *Alokpa,*[112] a Togolese national with children born in Luxembourg, but having French nationality through their father, was refused a right of residence and ordered to leave Luxembourg. Ms. Alokpa and her children were reliant on the State although she had been offered a job, which her lack of residence and work permits prevented her from commencing. The CJEU held that expelling the mother from Luxembourg did not necessarily mean that the children would be forced to leave the EU territory, since they could move to France, where their mother could apply for residence on the basis of *Zambrano*. Consequently, Articles 20 and 21 of the TFEU do not preclude a Member State from denying the right of a third-country national to remain in its territory where his/her children are EU citizens, but do not possess the nationality of the host state where they seek to remain.

This approach was taken by the **Irish** court[113] in a case involving a Nigerian national and mother of a British citizen child born in the United Kingdom, who sought leave to remain in Ireland pursuant to EU law. The court was not convinced that a refusal to reside in Ireland would automatically result in the child having to leave the territory of the EU because, as a UK national, the child would have a right to live in the UK, and her mother by proxy (as per *Zambrano*).

In such situations, the primary carer of a child could still have the right to residency if the national authorities were satisfied that the parent had sufficient resources for that child not to become a burden on the public finances of the host Member State. This rule was established earlier by the CJEU in *Zhu and Chen;*[114] in that case, the CJEU held that "it is sufficient for the nationals of Member States to 'have' the sickness insurance and necessary resources, and that provision lays down no requirement whatsoever as to their origin". Those conditions can be satisfied through a parent who is a third-country national, having sufficient resources for that minor not to become a burden on the public finances of the host Member State. In such circumstances, according to the court, the parent who is that child's primary carer is also allowed to reside with the child in the host Member State.

In *Alokpa* the CJEU confirmed the *Chen* judgment, and held that it is for the referring court to ascertain whether Ms. Alokpa's children satisfy the conditions set out in Article 7 (1) of Directive 2004/38 and have, therefore, the right to reside in a host Member State on the basis of Article 21 of the TFEU. In particular, that national court must determine whether those children have, on their own or through their mother, sufficient resources and comprehensive sickness insurance cover. In this context, the court did not recall or refer to the fact that Ms. Alokpa had been offered a permanent job, although the Advocate General[115] considered this a very relevant factor for the decision, since the job could enable her to satisfy the condition of 'sufficient resources' laid down in Article 7 (1) (b) of Directive 2004/38. The question was left for the referring court to determine.

In the following examples, the national courts took a look at resources from future and potential employment

110 United Kingdom, England and Wales Court of Appeal (Civil Division), *Sanneh and others v. Secretary of State for Work and Pensions and others*, [2015] EWCA Civ 49, 10 February 2015.

111 CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres* [GC], 15 November 2011. *Dereci* concerned several third-country nationals who wished to live with their family members, who were Austrian nationals residing in Austria. It should also be noted that the Union citizens concerned had never exercised their right to free movement and that they were not maintained by the applicants in the main proceedings.

112 CJEU, C-86/12, *Adzo Domenyo Alokpa and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*, 10 October 2013.

113 Ireland, High Court, *A.G.A. & anor v. Minister for Justice Equality and Defence*, [2015] IEHC 469, 16 July 2015.

114 CJEU, *Kunqian Catherine Zhu and Man Lavette Chen v. Secretary of State for the Home Department*, 19 October 2004.

115 CJEU, C-86/12, *Adzo Domenyo Alokpa and Others v. Ministre du Travail, de l'Emploi et de l'Immigration*, Advocate General Opinion, 21 March 2013.

or future possibilities that depended on having a residence permit.

In an **Irish** case, a Kenyan national applied for a residency based on her parentage of a German citizen child, born in Ireland. The High Court decided[116] that when assessing whether the applicant has 'sufficient resources', the authorities should take into account the definite prospect of future resources, such as those arising from a job offer which the applicant has accepted. According to the High Court, a non-EEA[117] national could be granted not only a right to reside in Ireland on the basis of her daughter's German citizenship, but also the right to work in Ireland. A restrictive interpretation of the meaning of sufficient resources would "constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement, which is a central tenet of EU law enshrined in Article 21 TFEU," inconsistent with the CJEU's preference for a broad interpretation of freedom of movement, as expressed in its *Chen* judgment.

Similar reasoning was employed by the **French** Council of State,[118] in a case which concerned a Cameroon national holding a residence permit delivered by Spain, who arrived in France with her daughter, a Spanish national born in Spain. The claimant was refused a residence permit, although she was employed. The authorities found that she did not meet the condition of suitable medical insurance. The Council of State noted that the applicant had worked under a permanent contract, and that this activity provided her with stable and regular resources. It was also shown, from the pay slips in her case file, that the social security contributions she and her employer paid opened the right to medical insurance to her – that she was allowed State medical aid, and it was only because of the absence of a residence permit that she could not benefit from medical insurance coverage, to which she had the right. Under these conditions, the applicant and her daughter could not be considered as placing an unreasonable burden on French public finances.

In *O and S*,[119] the CJEU emphasised that it is the relationship of dependency between the EU citizen child and the third-country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship. At the same time, the CJEU acknowledged that the dependency can be of a legal, financial or emotional nature and the application of *Zambrano* was not confined to blood relationships.

This reasoning was applied in a case before **German** courts. The claimant was a Ghanaian national living with two children as well as the claimant's life partner's daughter from a former relationship – this daughter had Ghanaian and German nationality. The life partner was working part-time, and the claimant was taking care of the children. The German Federal Administrative Court[120] annulled the decision of the the Higher Administrative Court Rhineland-Palatinate (*Oberverwaltungsgericht,* OVG), which had obliged the aliens' registration office to provide the claimant with a residence permit. The Federal Administrative Court referred the case back. However, it confirmed that denying a residence permit to a family member from a 'patchwork-family' who is willing to follow the family may in rare exceptional cases constitute an infringement of Article 20 of the TFEU, even if Directive 2004/38 was not applicable since the claimant was not a family member in the sense of the Directive. The court acknowledged that it had to be prevented that a Union national had no other choice than to leave the EU to live with his or her family, as he or she would in this case be affected in the core components of his or her rights as a EU national. The German court made clear however, that such an interpretation referring to Articles 20 and 21 of the TFEU will only be accepted in exceptional cases.

To summarise, when considering a case involving third-country family members who are the primary carers of an EU citizen child, the first step is to check the applicability of secondary EU law, namely the Directive. National courts should first determine whether the conditions in Articles 3 and 7 of the Directive are met; that is, who the dependent person actually is, and who has sufficient resources, in line with the relevant case law, in particular *Zhu and Chen,* and Article 21 of the TFEU. If those conditions are not met, the next step is to consider a direct application of Article 20 of the TFEU in line with the *Zambrano* doctrine.

2.1.3. Genuine and effective exercise of the right of free movement – what does it mean and how can it affect family reunification under EU law?

In *McCarthy,* the CJEU ruled that a dual citizen of two Member States (the United Kingdom and Ireland) who had not moved from the United Kingdom could not claim rights based on free movement law or EU citizenship: "Article 21 TFEU is not applicable to a Union citizen who has never exercised his right of free movement, who has always resided in a Member State of which he is a national and who is also a national of another Member

116 Ireland, High Court, [2014] IEHC 384, 30 July 2014.
117 European Economic Area (EEA).
118 France, Council of State (*Conseil d'Etat*), Case No.386029, 9 December 2014.
119 CJEU, Joined cases C-356/11 and C-357/11, *O, S v. Maahanmuuttovirasto* and *Maahanmuuttovirasto v. L,* 6 December 2012.
120 Germany, Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG), Case No. 1 C 15.12, 30 July 2013.

State, provided that the situation of that citizen does not include the application of measures by a Member State that would have the effect of depriving him of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States."[121]

The CJEU further clarified the situation of dual citizens in *Lounes*.[122] The case concerned a Spanish citizen, Ms. Ormazabal, who moved to the United Kingdom, subsequently obtained UK nationality whilst maintaining her Spanish nationality, and married a non-EU citizen. She invoked free movement rights when applying for a residence card for her spouse, Mr. Lounes, an Algerian national, who had entered the United Kingdom on a six-month visitor visa and overstayed illegally. The UK government, having changed its law after the McCarthy ruling, argued that they were subject not to EU law, but to the more restrictive family reunion rules applicable to British citizens.

The CJEU ruled that Ms. Ormazabal was not entitled to invoke the free movement rights under Directive 2004/38 (nor the family reunification rules), since she was now a British citizen living in one of the Member States of which she was a national. However, her husband was eligible for a derived right of residence under Article 21(1) of the TFEU (derived from the rights enjoyed by the Union citizen concerned, to ensure that the Union citizen can exercise his/her freedom of movement effectively). The CJEU held that the situation of a national of one Member State, who has exercised her freedom of movement by going to and residing legally in another Member State, cannot be treated in the same way as a purely domestic situation merely because the person concerned has, while resident in the host Member State, acquired the nationality of that State in addition to her nationality of origin. In other words, according to the CJEU, she should not be treated less favourably than those covered by the Directive, as it would be unjust to treat her worse than a Spanish citizen who had moved to the United Kingdom and not acquired UK nationality. Accordingly, Ms. Ormazabal, who is a national of two Member States and has, in her capacity as a Union citizen, exercised her freedom to move and reside in a Member State other than her Member State of origin, may rely on the rights pertaining to Union citizenship, in particular the rights provided for in Article 21(1) of the TFEU, also against one of those two Member States. Those rights include the right to lead a normal family life, together with family members, in the host Member State.

The European Commission highlighted in its 2009 guidelines[123] addressed to Member States that some EU citizens might abuse the right of free movement and escape national immigration rules which prevented them from being joined by their third-country family members in their Member State of origin. They would move to another Member State with the sole purpose of returning to their home country and invoking their rights under EU law. Hence, it is for the Member States to assess, on a case-by-case basis, whether the exercise of the right to free movement and residence in a Member State from which the EU citizens and their family members return was genuine and effective.

The Member State of origin should not, however, inquire into the personal motives that triggered the previous move. According to the Commission's guidelines,[124] national authorities may in particular take into account the following factors:

- the circumstances under which the EU citizen concerned moved to the host Member State (previous unsuccessful attempts to acquire residence for a third-country spouse under national law, job offer in the host Member State, capacity in which the EU citizen resides in the host Member State);
- degree of effectiveness and genuineness of residence in the host Member State (envisaged and actual residence in the host Member State, efforts made to establish in the host Member State, including national registration formalities and securing accommodation, enrolling children at an educational establishment);
- circumstances under which the EU citizen concerned moved back home (return immediately after marrying a third-country national in another Member State).

In light of this, the **Austrian** Supreme Administrative Court ruled[125] that employment in another Member State cannot be required for a relevant exercise of the right of freedom of movement, besides establishment of a place of residence. Austrian law incorporates the exercise of the freedom of movement under Article 21 of the TFEU, which includes the exercise of the right to reside without an economic purpose. If, therefore, the mother of the complainant, as an Austrian citizen, exercised her right under Article 7 of Directive 2004/38/EC and, subsequently, did not merely return to Austria temporarily, the complainant is entitled, as a member of her family, to reside for more than three months or permanently in Austria. If an actual and effective residence in Germany had taken place for more than

121 CJEU, C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 5 May 2011.
122 CJEU, C-165/16, *Toufik Lounes v. Secretary of State for the Home Department [GC]*, 14 November 2017.
123 See COM(2009) 313 final.
124 *Ibid.*, p. 18.
125 Austria, Supreme Administrative Court (*Verwaltungsgerichtshof*, VwGH), Case No. 2010/21/0438, 20 March 2012.

three months, this would provide a sufficient basis for the complainant's right to reside under EU law. All of this should be sufficiently investigated by the authorities.

By contrast, the Administrative Court in the **United Kingdom**,[126] invoking the CJEU judgment in *Surinder Singh,*[127] held that the burden of proof was on the claimants to establish that they were entitled to exercise a right of residence. In that case, Mrs. Benjamin, a Kenyan national married to a British citizen, was refused entry to the United Kingdom. The family had previously been residing together in France, where Mr. Benjamin was registered as self-employed. The authorities claimed that he failed to establish that he had been engaged in genuine and effective employment or self-employment in France sufficiently recently to entitle him and his wife to a right of residence in the United Kingdom. The court found the contested decision lawful. It held that the evidence produced by Mr. Benjamin suggested that, although registered as self-employed, he was in fact relying on the State and his father's support, whilst he engaged in projects that were non-remunerative.

Likewise, the **Danish** Western High Court[128] required the claimant to substantiate that his wife, B., had established a genuine and effective residence in another Member State, in order to avoid abuse of EU citizens' rights. The claimant, a Turkish national, applied for family reunification with his wife, B., who lived in Denmark and became a Danish citizen. The court noted that B. had rented a flat in Germany and that she was registered as a resident there from March to September 2007. She stated that she moved to Germany to open a pizzeria, before giving up the idea for lack of suitable premises; however, she did not speak German. The High Court emphasised that the plans for the establishment of a pizzeria in Germany as a livelihood for B. were very nebulous; that she kept a very close connection with Denmark in relation to work during the period when she was registered in Germany; and that, after her return to Denmark, she moved into the same flat she had lived in before.

According to another ruling of the **Austrian** Supreme Administrative Court,[129] it is not necessary to establish residence in another Member State in order to exercise free movement. In that case, the Austrian wife of a Nigerian complainant travelled to the Czech Republic twice a week (and she returned the same day) for six months to give German lessons. According to the court, the fact that the complainant's wife did not establish a place of residence in the Czech Republic and that she had not "registered" her employment did not counter her right to freedom of movement. The settlement in regard to the exercise of free movement is not of exclusive relevance, but also the freedom to provide services.[130] The court was satisfied that she made use of her freedom of movement with a certain degree of sustainability (i.e. a "real and genuine activity" which is not so small that it is a "completely subordinate and immaterial", as required by the jurisprudence of the CJEU).

On the other hand, the **Dutch** Council of State[131] found that, for a third-country spouse to claim a derived right of residence, the EU citizen must have exercised free movement rights as an EU worker in the host state. The court argued that the exercise of free movement rights by the husband, which took place after the marriage, was of a short duration (one month during which he worked for a church); this does not constitute real and actual work performed, as required by the definition of the notion of EU worker.

As regards Union citizens' right to receive services in another Member State, the **Dutch** Council of State[132] decided that, when a Dutch citizen stays for less than three months on the basis of receiving medical treatment in another Member State, he is regarded as a Union citizen exercising his right of free movement within the EU. He does not have to prove any means of subsistence or continue to work after coming back to the Netherlands for his wife, a third-country national, to be entitled to a right of residence.

2.1.4. Moment and manner of joining the EU family member

In *Metock,*[133] the CJEU determined that the applicability of the Directive does not depend on the family members of a Union citizen having previously resided in a Member State. Furthermore, according to the court, the provisions of the Directive should be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State. In the latter case, it is not necessary to distinguish whether the third-country nationals entered that Member State

126 United Kingdom, England and Wales High Court (Administrative Court), *The Queen on the application of Mark Benjamin and Margaret Benjamin and Secretary of State for the Home Department*, [2016] EWHC 1626 (Admin), 11 July 2016.
127 CJEU, C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department*, 7 July 1992.
128 Denmark, Danish Western High Court (*Vestre Landsret),* Case No. U.2012.2187V, 27 March 2012.
129 Austria, Supreme Administrative Court (*Verwaltungsgerichtshof*, VwGH), Case No. 2009/21/0386, 29 September 2011.
130 CJEU, 186/87, *Ian William Cowan v. Trésor public*, 2 February 1989.
131 The Netherlands, Council of State (*Raad van State*), ECLI:NL:RVS:2007:BA1807, 21 March 2007.
132 The Netherlands, Council of State (*Raad van State*), ECLI:NL:RVS:2009:BK3910, 12 November 2009.
133 CJEU, C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* [GC], 25 July 2008.

before or after the Union citizen or before or after becoming his family members.

In light of this judgment, the **United Kingdom** Court of Appeal[134] clarified that, when seeking a residence card, there was no requirement for an extended family member to have arrived in the United Kingdom after or simultaneously with the EU citizen sponsor. The court considered that the expression "has joined" did not of itself impose a temporal limitation. It held that the CJEU, in *Rahman*,[135] could not have intended to exclude from the scope of Article 3 (2) of the Directive persons who had arrived in the host Member State before the EU citizen and before making their applications; that would have been contrary to the CJEU's approach in *Metock*. Even if such a requirement were to be derived from *Rahman*, it was clear that the respondents had all joined their cousin in the United Kingdom even though they had arrived before her.

It must be noted that Article 5 (2) of the Directive indeed allows Member States to require third-country family members to have an entry visa. However, family members of a Union citizen have not only the right to enter the territory of the Member State, but also the right to obtain an entry visa[136] (free of charge, as soon as possible and on the basis of accelerated procedures). This distinguishes them from other third-country nationals, who have no such right.

2.1.5. Circumstances relating to marriage

This section looks at rights associated with the status of a family member of an EU citizen, definition of a family member and other beneficiaries, and different conditions to be met in relation to entry and residence. It also deals with the problems of marriages of convenience (element of assessment whether a marriage is "false"), and analyses consequences of a divorce or relationship breakdown for the spouse's residence rights.

Marriage of convenience

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience (Article 35 of Directive). Recital (28) defines marriages of convenience as marriages contracted for the sole purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise.

A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage.[137] This definition applies by analogy to other relationships contracted in order to abuse rights, such as (registered) partnerships of convenience, fake adoptions or acknowledgments of paternity.[138]

Measures taken by Member States to fight against marriages of convenience must not undermine the effectiveness of EU law or discriminate on grounds of nationality.

For example, the **German** Administrative Court in Berlin[139] considered that the wording of a national law provision[140] was too wide and was not interpreted in accordance with the Directive. The provision stated that, if the authorities have established that a dependent who is not an EU citizen does not subsequently immigrate to Germany in order to join the EU citizen or does not accompany the EU citizen so that they can live together as a family, the authorities may determine that an entitlement to residence does not exist. In this case, an Indian national, married to a British national living in Germany, was refused a visa by the German Embassy in New Delhi on the ground that the marriage had been contracted for the purpose of enabling the claimant to apply for a visa. The embassy justified this conclusion by contradictions in their description of the marriage proposal and the fact that she had not been introduced to his friends. The Administrative Court ruled that the provision should be interpreted restrictively and in accordance with EU law: a visa may only be refused if a marriage has the sole aim of allowing the accompanying person to immigrate or claim residence in Germany. Here, the wife's passport showed that she regularly travelled to India to meet the claimant. The court also confirmed that the burden of proof lies on the authorities. The Directive does not prevent Member States from investigating individual cases where there is a well-founded suspicion of abuse. However, systematic checks are not allowed.

According to the **Irish** High Court,[141] the review of whether a marriage is a marriage of convenience must, of necessity, take place after the event and must also

134 United Kingdom, England and Wales Court of Appeal (Civil Division), *Temilola Opeyemi Aladeselu, Felix Adelekan Anthony and Paschal Tobechukwu Ashiegbu v. Secretary of State for the Home Department*, [2013] EWCA Civ 144, 1 March 2013.

135 CJEU, C-83/11, *Secretary of State for the Home Department v. Muhammad Sazzadur Rahman, Fazly Rabby Islam, Mohibullah Rahman*, 5 September 2012.

136 CJEU, C-503/03, *Commission of the European Communities v. Kingdom of Spain* [GC], 31 January 2006, para. 42.

137 See COM(2009) 313 final, Section 4.2, p.15.

138 *Ibid*.

139 Germany, Administrative Court in Berlin (*Verwaltungsgericht Berlin*, VG), Case No. 28 K 352.13 V, 4 December 2015.

140 Germany, Act on the General Freedom of Movement for EU Citizens, Freedom of Movement Act/EU (*Freizügigkeitsgesetz/EU, FreizügG/EU*), Sections 2 and 3, amended on 21 December 2015.

141 Ireland, High Court, *Izmailovic and Anor v. Commissioner of an Garda Siochana and Ors,* [2011] IEHC 32, 31 January 2011.

be hedged in with appropriate procedural safeguards. It follows that, no matter how well intentioned, An Garda Síochána[142] are not empowered to prevent the solemnisation of a marriage on the grounds that they suspect – even with very good reason – that the marriage is one of convenience. Such a marriage would be, in any event, for the reasons stated above, a valid marriage for all purposes other than EU Treaty rights. In this case, two members of the Garda National Immigration Bureau arrived at the Civil Registration Office before the marriage solemnisation ceremony and submitted a letter of objection to the Register, "on the grounds that it was a marriage of convenience". The claimant, an Egyptian national who previously had unsuccessfully applied for asylum in Ireland, and was to marry a Lithuanian national, was arrested, and the marriage did not take place. The court found that had the marriage taken place, the claimant would have been able to avail himself of residence rights (provided for in the Directive) as the spouse of an EU national. This might have been limited by Article 35 of the Directive, in the case of a marriage of convenience. However, a proper review can only take place after the "solemnisation".

In its *Handbook on addressing the issue of alleged marriages of convenience*,[143] the European Commission identified a set of indicative criteria that suggest the possible intention to abuse the rights conferred by the Directive or its unlikelihood.

In this regard, the **French** Council of State[144] rejected the appeal of a Tunisian citizen who applied for a short-stay visa for France in order to marry a British national residing there. The French Consul General in Tunis refused to issue him this visa. The Council of State considered several factors: that they had never lived together in France and the duration of the relationship with the British national has not been established; the risk of deviating from the purpose of the visa, taking into account the precariousness of the situation of the claimant, aged 18 years old and with no income in Tunisia, and therefore unable to assure his stay in France; that their plans to marry and to have children quickly could be carried out in the applicant's country or that of his future wife.

In **Finland**, in a case before Hämeenlinnan Administrative Court,[145] the police suspected that the marriage had been contracted to circumvent immigration regulations. However, considering that the couple had known each other for 18 months before their marriage; that the Union citizen, B., had supported his third-country spouse financially when she was still living in her home country; and also considering the reasons for their separation (i.e., quarrels between the spouses, B.'s heavy use of alcohol and his criminal activities), the administrative court held that the marriage had not been contracted solely for the purpose of obtaining the right of residence of a family member of an EU citizen.

The burden of proof falls on the relevant national authorities, and it is for the national courts to verify the existence of abuse in individual cases, evidence of which must be adduced in accordance with national law, without undermining the effectiveness of EU law.[146] Investigations must be carried out in accordance with fundamental rights, in particular with Articles 7 and 9 of the Charter, which correspond to Articles 8 (right to respect for private and family life) and 12 (right to marry) of the ECHR.

In line with this, the Court of Appeal in the **United Kingdom**[147] stated that the legal burden of proof lies with the Secretary of State throughout, but the evidential burden can shift. In that case, Mrs. Rosa, a Brazilian national, was removed from the United Kingdom in 2007 as an overstayer. In 2008, she married a Portuguese national, and joined him in the United Kingdom three months after the wedding. Mrs. Rosa's application for a residence card was refused on the ground that her marriage was a "marriage of convenience". The Court of Appeal found that the lower instance court (the Upper Tribunal) was in error in proceeding on the basis that the appellant had the burden of proof. However, according to the court, that error was not material because the findings of the tribunal had been sufficient to shift the evidential burden to the appellant. The court concluded that the previous tribunal had reached a decision that the marriage was one of convenience because of inconsistencies in the evidence of the husband and wife. Its decision would not have been different if it had approached the burden of proof differently.

142 "The Guardian of the Peace" is the police force of the Republic of Ireland.

143 See COM(2009) 313 final; European Commission (2014c), *Commission staff working document Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens*, SWD(2014) 284 final, 26 September 2014.

144 France, Council of State (*Conseil d'Etat*), Case No. 280348, 9 October 2006.

145 Finland, Hämeenlinnan Administrative Court (*Hämeenlinnan hallinto-oikeus/Tavastehus förvaltningsdomstol*), Case No. 02759/13/3199, 29 April 2015.

146 CJEU, C-110/99, *Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas*, 14 December 2000.

147 United Kingdom, England and Wales Court of Appeal (Civil Division), *Luciara Machado Rosa v. Secretary of State for the Home Department*, [2016] EWCA Civ 14, 15 January 2016.

In a more recent case,[148] the Supreme Court of the **United Kingdom** confirmed that the burden of proof of establishing that the proposed marriage is one of convenience falls on the Secretary of State. The appellants were Ms. Sadovska – a Lithuanian citizen who had lived in the United Kingdom for the past 10 years and acquired the right of permanent residence – and her husband, a citizen of Pakistan, whom she intended to marry after his visa had expired. They were detained before they were able to marry and served with notice that they were persons liable to removal from the United Kingdom – Ms. Sadovska on the 'reasonable grounds to suspect the abuse of her EU right of residence.' The Supreme Court could not conclude that, had the case been approached in the right way, the outcome would have inevitably been the same. In particular, it was not possible for the Supreme Court to conclude that the Secretary of State had proved that the narrow grounds for taking away Ms. Sadovska's established rights existed. Consequently, the appeal was allowed and the case remitted for a full rehearing by the First-tier Tribunal, "at which the inconsistencies in the appellants' interviews will be considered along with their evidence supportive of a genuine relationship dating back several months, and the circumstances in which the interviews took place will also be taken into account." Another issue to be re-examined by the lower court was whether the removal of Ms. Sadovska from the country where she had lived and worked for so long with other family members would be a proportionate response to the abuse of rights, rather than merely the prevention of the marriage.

The Administrative Court in Berlin,[149] in the above-mentioned ruling, also concluded that the burden of proof fell on the authorities.

As regards possible consequences or sanctions for concluding a marriage of convenience, Article 35 of the Directive explicitly stipulates that any measure adopted to fight abuse of rights shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

The principle of proportionality – established in Article 5(4) of the TUE and a general principle of EU law stemming from the case law of the CJEU[150] – requires an individual assessment of every case and prohibits considerations of general prevention. According to the Commission's 'Handbook on addressing the issue of alleged marriages of convenience…,' in the event of a marriage of convenience, removal of one or both spouses from the host EU country is a possible sanction, provided such as measure is justified and proportionate to the objective pursued, as explained therein.[151]

In this context, the **Czech** Supreme Administrative Court[152] considered that the sole fact of concluding a marriage of convenience cannot be understood as a violation of public order. In most of the cases, it does not represent a real, current and sufficiently serious endangering of some of the basic interests of the society that would on its own serve as grounds for such a serious intrusion into the rights of a foreign national, as expulsion from the territory of the Czech Republic.

On the other hand, the Supreme Court of **Cyprus** confirmed[153] that conducting a marriage of convenience to enable one of the spouses to stay in Cyprus was a genuine, present and sufficiently serious threat to public order. The court upheld the decision of the Minister of the Interior, who had cancelled the visa of both applicants (the British man and his Ukrainian spouse) and ordered them to leave Cyprus on the ground of having conducted a marriage of convenience.

The Commission's Handbook stipulates in particular that "where one or both of the spouses have parental responsibility for a child, the child's welfare must be given sufficient weight in deciding whether the person(s) with parental responsibility should be removed. The protection of children is even more relevant where the child's welfare is jeopardised by conduct which is not of their making, but of the parents' making. In principle, children and their parents enjoy together a single family life and whether or not the removal of a parent would interfere disproportionately with their family life has to be looked at by reference to the family unit as a whole and the impact of removal upon each family member".

148 United Kingdom, Supreme Court, *Sadovska and another v. Secretary of State for the Home Department (Scotland)*, [2017] UKSC 54, 26 July 2017. This case is not included in the national report from the United Kingdom.

149 Germany, Administrate Court in Berlin (*Verwaltungsgericht Berlin*, VG), Case ref. 28 K 352.13 V, 4 December 2015.

150 CJEU, 8/55, *Fédération Charbonnière de Belgique v. High Authority of the European Coal and Steel Community*, 29 November 1956; 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 17 December 1970; C-331/88, *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*, 13 November 1990.

151 European Commission (2014c), *Commission staff working document Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, 26 September 2014, SWD(2014) 284 final, p. 25.*

152 Czech Republic, Supreme Administrative Court (*Nejvyšší správní soud*), Case No. 3 As 4/2010 – 151, 26 July 2011.

153 Cyprus, Supreme Court (*Ανώτατο Δικαστήριο Κύπρου, Αναθεωρητική Δικαιοδοσία*), Case No. 805/2012, 23 September 2014.

However, the approach of national courts even in the same Member State is not always consistent. In two cases before the Supreme Court of **Cyprus**, the claimants failed to appeal a decision declaring their marriage as one of convenience. As a result of those decisions, the Pakistani spouses lost their status as family members of a Union citizen (respectively, a Bulgarian and Romanian citizen) and lost the right to reside in Cyprus. Expulsion orders were issued, which the claimants challenged, arguing that the prior decisions annulling the marriage were taken without due investigation and in violation of procedural safeguards. Both claimants had children together (but in the second case, the child stayed in Pakistan with the grandfather). In the first case, the Bulgarian citizen was also ordered to leave Cyprus because, according to authorities, her act of entering into a marriage of convenience with a prohibited migrant rendered her a genuine, present and sufficiently serious threat to public order.

In the first ruling,[154] the court concluded that the decision to declare the applicant's marriage as fake was based on erroneous assumptions, and therefore inadequately investigated. Namely, the authorities suspected that the husband was not the child's natural father, which later proved incorrect through a genetic test. According to the court, an applicant seeking to annul an administrative decision does not need to prove the error itself, but only a probability of an error. Moreover, the court did not examine solely the administrative act challenged (the cancellation of the applicant's right to reside), but went further to review the original act on which the cancellation was based (the declaration of the marriage of convenience), although the latter had already become final.

In the second judgment,[155] the court chose not to correct the alleged unfairness of the procedure, which resulted in denying the claimant's protection under the Directive, since the decision which declared their marriage as unlawful was not appealed against, meaning it became final and could no longer be challenged (although not due to the applicants' fault). The court stated that "in the course of the present procedure and given the autonomy of each act of the Administration, the applicants are prevented from raising questions concerning the act of declaring the marriage unlawful".

154 Cyprus, Supreme Court (*Ανώτατο Δικαστήριο Κύπρου, Αναθεωρητική Δικαιοδοσία*), Case No. 67/2013, 18 February 2013.

155 Cyprus, Supreme Court (*Ανώτατο Δικαστήριο Κύπρου, Αναθεωρητική Δικαιοδοσία*), Case No. 6296/2013, 2 December 2013.

Moment of concluding a marriage and its relevance for immigration procedures and other rights

The CJEU clarified in *Metock*[156] that a third-country spouse of a Union citizen residing in another Member State, who accompanies or joins that Union citizen, benefits from the provisions of the Directive, irrespective of when and where their marriage took place and of how the third-national entered the host Member State. The CJEU recalled that none of the provisions of the Directive requires that the EU citizen must already have founded a family at the time of moving to the host Member State in order for his family members to enjoy the rights established by that directive. It is therefore possible for EU citizens, under the Directive, to found a family only after exercising their right of freedom of movement.

The CJEU further explained that the words 'family members' in Article 3 (1) of the Directive refer both to the family members of a Union citizen who entered the host Member State with him and to those who reside there with him. In the latter case, it does not matter whether the third-country nationals entered that Member State before or after the Union citizen or before or after becoming his family members.

Finally, there is no requirement in the Directive as to the place where the marriage of the Union citizen and the third-country national is solemnised.[157]

This rule was applied accordingly by the **Austrian** Supreme Administrative Court.[158] It decided that the relevant authority's assumption that the application of the Directive required the complainant to marry his (British) wife prior to his entry into Austria resulted in the unlawfulness of that decision. In this case, the complainant, a Nigerian national, married a British citizen while his prior application of asylum was still pending.

However, in a case decided in **Malta**, failing to obtain a visa prolongation in the country made it impossible to conclude a marriage. One of the applicants was a third-country national whose visa had expired and subsequent requests for extension were denied. He wished to marry a German national studying in Malta, whom he had met a couple of years earlier. In Malta, no marriage may be celebrated without the certificate of publication of marriage banns. As their request for the publication of the banns was denied by the Marriage Registrar because the third-country national did not

156 CJEU, C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform* [GC], 25 July 2008.

157 *Ibid.*, paras. 87-90, 93, 98-99.

158 Austria, Supreme Administrative Court (*Verwaltungsgerichtshof*, VwGH), Case No. 2008/22/0175, 14 December 2010.

have a valid visa, the marriage could not take place. The First Hall Civil Court of Malta[159] ruled that third-country nationals without a valid visa or residence permit cannot marry in Malta, even when the intended spouse is an EU national residing regularly in Malta.

The **Irish** High Court[160] had to decide whether the right to employment of a spouse of a Union citizen accrues at the time of arrival in the country (if already married), from the date of marriage, or only from the issuance of a residence card. The court stated that, unlike the right to residence, it could not be said that the right to employment derives from EU law. However, the court was of the opinion that once the family member had the right to residence, he or she was also entitled to take up employment, and therefore, this entitlement operates in parallel or as an adjunct of the right of residence. This parallel right operates irrespective of nationality. The court granted declaratory relief to the applicants to take up employment from the moment of issuance of the acknowledgment letter for their application for a residence card.

Effect on partner's residence rights in case of divorce or relationship breakdown, or death or departure of EU citizen

The right of family members to accompany or join the Union citizen in the host Member State is dependent on the sponsor's Union citizenship rights. Consequently, the Union citizen's death, departure or termination of family ties affects the family members' legal position in the host Member State.[161]

The situation of family members differs with respect to whether they are themselves Union citizens or not. If they are Union citizens, their right to reside is not affected if they meet the conditions on their own.

For third-country family members, it will depend on the reason the family ties ceased to exist, and on their personal situation.

Third-country family members will keep the right of residence in case of the Union citizen's death, if they have been residing in the host Member State as family members for at least one year before the death (Article 12(2) of the Directive).

The departure or death of the Union citizen does not entail the loss of the right of residence of the children or the parent who has actual custody of them, irrespective of their nationality, if the children reside in the host Member State and are enrolled at an educational establishment, until the completion of their studies (Article 12 (3) of the Directive).[162]

Otherwise, in case of departure of the Union citizen from the host Member State, third-country family members do not retain their right of residence, or at least the Directive does not provide for any precise rules in such a situation (see below).

Article 13 of the Directive allows, under certain conditions, for the retention of the right to reside by family members in the event of termination of family ties (divorce, annulment of marriage or termination of registered partnership).

In particular, third-country family members can acquire an autonomous right to residency if, prior to initiation of the divorce proceedings or termination of the registered partnership, the marriage or registered partnership has lasted at least three years, including one year in the host Member State (Article 13 (2)(a)); or where termination of the relationship was warranted by particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting (Article 13 (2)(c)).

In this regard, the **Belgian** Constitutional Court[163] observed that the Minister can terminate the residence permit of a third-country national authorised to reside as a spouse or partner of a Belgian or EU national when there is a relationship breakdown within the first two years. However, the minister cannot terminate the residence permit if the person has been the victim of domestic violence, as long as that person works or has sufficient means in order not to become a burden for the social security system. Therefore, in such a situation, the third-country nationals do not have a right to keep their residence permit that is enforceable against the authority – but they do not automatically lose their residence permit. The minister holds discretionary power in this matter and will need to consider many elements, such as the reason why the third-country national ended the relationship, including possible domestic violence.

159 Malta, First Hall Civil Court (*Qorti Ċivili Prim' Awla, Ġurisdizzjoni Kostituzzjonali*), Case No. 54/2008, 24 May 2010.

160 Ireland, High Court, *Peter Decsi and Huan Zhao v. Minister for Justice, Equality and Law Reform and Inga Levalda and Moinuddin Syed v. Minister for Justice, Equality and Law Reform,* [2010] IEHC 342, 30 July 2010.

161 See European Commission (2013).

162 This provision is a confirmation of a rule established by the CJEU in *Baumbast* (before entry into force of the Directive). The CJEU ruled that, since Regulation 492/2011 on freedom of movement for workers within the Union gives the children of EU workers (or former workers) a right of access to education, after the divorce they were entitled to stay on the territory to exercise that right. The non-EU parent who cared for that child had a right to stay, too (regardless of any divorce from the EU citizen), otherwise the child's right would be ineffective.

163 Belgium, Constitutional Court (*Grondwettelijk Hof/Cour Constitutionnelle*), Case No. 121/2015, 17 September 2015.

In any case, the family member's personal situation, and possibility of entitlement to residence on a personal basis, should be examined.

This was confirmed by the **Austrian** Supreme Administrative Court[164] in a case concerning a Tunisian national who was married to a Slovakian citizen and, after moving to Austria, received a permanent residence card. Austrian authorities issued a return decision and a residence ban of 18 months against him after he submitted the divorce decision, which showed that, at time of the divorce, the marriage had not existed for three years. According to the Independent Authority Board, the complainant no longer had a right to reside there after the divorce. The court noted that the conditions for a right to residence derived from Union law had ceased to exist. However, despite of this fact, a third-country national should be able to "switch to" a residence permit suitable for their future residence, without risking that their stay would be unlawful during that procedure.

Likewise, the **Swedish** Migration Court of Appeal[165] ruled that the claimant (a third-country national family member) had the right to permanent residence on the grounds of his extended time of residence in Sweden, in accordance with the Directive, even though he had separated from his EU citizen partner and his five-year EEA-permit expired after the implementation of the Directive into Swedish law.

According to CJEU case law beginning with *Diatta,*[166] a 'spouse' remains a spouse (and therefore still entitled to derived free movement rights, if that spouse is a non-EU citizen) even if the couple in question is separated, up until the date when the divorce becomes final.

Consistent with this, the Administrative Court in **Finland** confirmed[167] that, although the claimant and her spouse lived separately, their marriage had not been officially terminated by a decision of the competent authority. The claimant was thus still regarded as a family member of an EU citizen and the residence card could not be cancelled solely on grounds that the couple no longer led a family life.

However, the right to residence during separation can be relied upon only as long as the EU citizen spouse remains in the country.

As mentioned above, the Directive provides for a rule regarding the Union citizen's departure from the host Member State only in the case of children until completion of their studies. Consequently, it has been understood that, in other cases, third-country family members do not retain their right of residence.

But what if a departure precedes a divorce? That is, the EU citizen leaves the host country, leaving behind their third-country spouse? The Directive is very unclear about the relationship between divorce and departure, while the CJEU's jurisprudence in this matter is considered problematic by many academic commentators.[168]

In *Kuldip Singh and Others,*[169] the Irish authorities wanted to withdraw the residence permit of an Indian national whose Latvian wife left him after more than four years of marriage in Ireland, and started divorce proceedings in Latvia a couple of months later. The Irish authorities argued that Singh's right to residency ceased to be valid the moment his wife ceased to exercise her right to reside in Ireland. The applicants argued that Article 13(2) of Directive 2004/38 establishes a personal right to residence for the non-EU spouse remaining in the host member state following divorce from the EU national (a marriage that lasts at least 3 years, including 1 year in the host member state). The High Court of Ireland asked[170] the CJEU whether Singh's right of residency could be retained when the divorce took place after his wife had left the country. The CJEU found that, if the EU spouse leaves the host country before initiation or the completion of divorce proceedings, the non-EU husband/wife loses the right to residence under Article 7(2) of the Directive and does not qualify for Article 13(2), and the latter article cannot be revived once the divorce proceedings are finalised.

What if the abandoned third-country spouse was a victim of domestic violence? Article 13(2)(c) of the Directive expressly provides protection in the case of divorce for a third-country spouse who has been a victim of domestic violence while the marriage or registered partnership was subsisting. However, the CJEU seemed to refuse to provide for such protection in a case involving a EU spouse who left the host Member State before the divorce. In *Secretary of State for the Home Department v. NA*[171], NA, a national of Pakistan married KA, a German national, in 2003; the couple

164 Austria, Supreme Administrative Court (*Verwaltungsgerichtshof*, VwGH), Case No. 2012/18/0005, 18 June 2013.
165 Sweden, Migration Court of Appeal (*Migrationsöverdomstolen*), Case No. UM8184-09, 2 June 2010.
166 CJEU, 267/83, *Aissatou Diatta v. Land Berlin*, 13 February 1985.
167 Finland, Administrative Court (*Hämeenlinnan hallinto-oikeus/Tavastehus förvaltningsdomstol*), Case No. 02759/13/3199, 29 April 2015.
168 See Peers, S. (2015a); Peers, S. (2015b); Strumia, F. (2016). See also Neergaard U., (ed.), Jacqueson C., (ed.) and Holst-Christensen N. (ed.). (2014); Guild, E., Peers, S., and Tomkin, J. (2014).
169 CJEU, C-218/14, *Kuldip Singh and Others v. Minister for Justice and Equality* [GC], 16 July 2015.
170 Ireland, High Court, *Singh v. Minister for Justice and Equality; Njume v. Minister for Justice and Equality,* [2016] IEHC 202, 4 August 2016.
171 CJEU, C-115/15, *Secretary of State for the Home Department v. NA*, 30 June 2016.

moved, in March 2004, to the United Kingdom. The marriage subsequently deteriorated, and NA became a victim of domestic violence. In 2006, KA left the marital home and returned to Germany. Two years later, in 2008, NA issued divorce proceedings in England and the divorce was pronounced the following year. The CJEU was asked to rule upon whether NA retained a right of residence in the United Kingdom.

The CJEU invoked *Singh and Others* when holding that NA could not rely on Article 13(2)(a) – despite 3 years of marriage, including 1 year in the United Kingdom – because the non-EU national's derived right of residence comes to an end with the departure of the EU citizen spouse. The CJEU further held that a non-EU national who is divorced from an EU citizen at whose hands they have been the victim of domestic violence cannot rely on the retention of their right of residence in the host Member State on the basis of Article 13(2)(c), where the commencement of the divorce proceedings post-dates the EU citizen's departure from the host Member State.

2.2. Entry and residence up to three months

Union citizens have a right of residence on the territory of another Member State for up to three months without any conditions or any formalities other than the requirement to hold a valid identity card or passport (Article 6).

According to Article 5(4) of the Directive:

"Where a Union citizen, or a family member who is not a national of a Member State, does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned shall, before turning them back, give such persons every reasonable opportunity to obtain the necessary documents or have them brought to them within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence."

In this connection, **Estonian** courts examined a complaint filed by Deutsche Lufthansa Aktiengesellschaft against a German citizen for damages. The defendant purchased a plane ticket to Bulgaria through the airplane's franchise. The Bulgarian border guard refused to admit the defendant to the country on the ground that the defendant lacked the necessary documents to enter – he only held an Estonian ID card that mentioned that he was granted a residence permit. EU citizens receive Estonian ID cards that are legal identification documents. Bulgaria's Ministry of Interior issued a penalty decision against Lufthansa AG, ordering them to pay 6000 leva (€ 3,067.75) for failing to check the defendant's travel documents before providing him travel services, and allowed the defendant to travel to Bulgaria with only a residence permit. Before Estonian courts, Lufthansa AG argued that, as Bulgaria was not part of the Schengen treaty, it had a right to impose additional limitations on the permissible travel documents in accordance with the Directive. An Estonian ID card was an official identity document only for Estonian citizens. The Tallinn Circuit Court[172] dismissed the claim and found that the defendant was carrying a legal identification document and that the Bulgarian authorities mistakenly decided that it was a residence permit. Residence permits are clearly separate documents. The defendant carried an Estonian ID card that was entered into the PRADO system as an official ID card granted to EU citizens, and it was a formal identification document that provided the right to enter Bulgaria.

In **Italy**, a Lithuanian citizen challenged the decision of the Police Commissioner of L'Aquila to deny a tourism visa to the complainant. The visa was denied because she could not be found at the address she had communicated to the authorities and due to her irregular working status ascertained by the Police Headquarters of Sulmona (Abruzzo). The Abruzzo Regional Administrative Court [173] recalled the right to free movement of EU citizens, enshrined in Directive 2004/38 as implemented by Legislative Decree No. 30/2007, which entails the possibility to move to, and live in, all the other EU Member States without complying with specific administrative requirements. This right can be limited only in case of relevant and objective dangers for public security. According to the court, the Police Commissioner's decision was to be considered invalid because it was in breach of EU legislation and, consequently, of Legislative Decree No. 30/2007.

Under Article 5(2), Member States may require third-country family members moving with or joining an EU citizen to whom the Directive applies to have an entry visa. Such family members have not only the right to enter the territory of the Member State, but also the right to obtain an entry visa. Third-country family members should be issued as soon as possible and on the basis of an accelerated procedure with a free of charge short-term entry visa.[174]

In **Poland**, the Regional Administrative Court[175] in Warsaw clarified for the authorities – in particular the Border Guard – how to interpret the need for "facilitation" of entry of "extended family members" of a Union citizen.

172 Estonia, Tallinn Circuit Court (*Tallinna Ringkonnakohus*), Case No. 2-15-1641/28, 5 April 2016.

173 Italy, Abruzzo Regional Administrative Court (*Tribunale Amministrativo Regionale per l'Abruzzo*), Judgment No. 00062/2009, 10 February 2009.

174 See other aspects of the right to entry of family members discussed in Section 2.1.

175 Poland, Regional Administrative Court in Warsaw (*Wojewódzki Sąd Administracyjny w Warszawie*), Case No. IV SA/Wa 2093/12, 22 May 2013. See discussion of 'Same-sex spouse/partner' in Section 2.1.1.

A citizen of the Philippines was denied entry to Poland when travelling as a tourist with his Polish same-sex partner (registered in the United Kingdom), because he did not possess any visa or transit documents entitling him to cross the Polish border (but he did possess his passport and a family member residence card issued in the United Kingdom). The court clarified that "facilitation" means a thorough examination of whether the claimant meets the conditions set in Article 3(2) of the Directive, and not the possibility to obtain a visa.

In this regard, the CJEU found in *McCarthy and Others* that the Member States cannot refuse third-country family members of a Union citizen who hold a valid residence card, issued under Article 10 of the Directive, the right to enter their territory without a visa, where the competent national authorities have not carried out an individual examination of the particular case. The Member States are therefore required to recognise such a residence card for the purposes of entry into their territory without a visa, unless doubt is cast on the authenticity of that card and the correctness of the data appearing on it by concrete evidence that relates to the individual case in question and justifies the conclusion that there is an abuse of rights or fraud.[176]

2.3. Residence for more than three months

According to the Directive (Article 7), Union citizens have a right of residence in the host Member State if they are economically active there. Students and economically inactive EU citizens must have sufficient resources for themselves and their family members to not become a burden on the social assistance system of the host Member State during their period of residence; and have comprehensive sickness insurance cover.

2.3.1. Sufficient resources and becoming an unreasonable burden on the social assistance system

Under EU law, the notion of 'sufficient resources' must be interpreted in light of the Directive's objective, which is to facilitate free movement, as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State. [177]

The first step in assessing the existence of sufficient resources should consist of determining whether the EU citizen (and family members who derive their right of residence from the citizen) would meet the national criteria for receiving the basic social assistance benefit. EU citizens have sufficient resources where the level of their resources is higher than the threshold under which a minimum subsistence benefit is granted in the host Member State.[178]

It must be noted, however, that Article 8(4) of the Directive prohibits Member States from laying down a fixed amount to be regarded as 'sufficient resources', either directly or indirectly, below which the right of residence can be automatically refused. The authorities of the Member States must take into account the personal situation of the individual concerned, including resources from a third person.

The CJEU stressed in *Brey*[179] that "the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State".

Recital (16) of the Directive provides sets of criteria that help determine whether the holder of the right of residence has become an unreasonable burden on the social assistance system, which would justify their expulsion. The host Member State should:

1) examine whether it is a case of temporary difficulties and
2) take into account the duration of residence, the personal circumstances and the amount of aid granted.

In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the CJEU save on grounds of public policy or public security (recital (16) of the Directive, last sentence).

In this context, the CJEU clarified in *Dano*[180] that a person who moved for the 'sole' purpose of claiming benefits would not have a right to reside in a Member State under EU law.

Ms. Dano lived with her son in Germany. She did not seek employment, nor had she been trained in a profession and she had never worked in Germany or Romania. They lived with Ms. Dano's sister, who provided for them. According to the CJEU, the Directive does not oblige the host Member State to grant social assistance during the first three months of residence. Where the period of residence is longer than three months but less

176 CJEU, C-202/13, *The Queen, on the application of Sean Ambrose McCarthy and Others v. Secretary of State for the Home Department* [GC], 18 December 2014, para. 53.
177 See COM(2009) 313 final and CJEU, C-140/12, *Pensionsversicherungsanstalt v. Peter Brey*, 19 September 2013.
178 See COM(2009) 313 final.
179 CJEU, C-140/12, *Pensionsversicherungsanstalt v. Peter Brey*, 19 September 2013.
180 CJEU, C-333/13, *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, 11 November 2014.

than five years, as in the present case, economically inactive persons must have sufficient resources of their own in order to have a right of residence. The Directive thus seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence. A Member State must therefore have the possibility of refusing to grant social benefits to economically inactive Union citizens who do not have sufficient resources to claim a right of residence and who exercise their right to freedom of movement *solely* in order to obtain another Member State's social assistance. For this purpose, each individual case must be examined without taking account of the social benefits the EU citizen claims in the host Member State.

The **Belgian** Council for Alien Law Litigation[181] considered that the receipt of unemployment benefits does not automatically mean that one constitutes an unreasonable burden on the social assistance system. The Council found that, when determining whether one has "sufficient resources", the traditional social insurances that are part of the social security system and that count as income replacement benefits – such as occupational accident insurance, old-age pensions, family benefits and unemployment benefits – must in principle be considered.

In **Finland**, the Helsinki Administration Court[182] noted that Member States may not lay down a fixed amount which they regard as "sufficient resources". There is also no rule on for how long these funds should last. The court clarified that the required funds shall be sufficient to cover living expenses for the time being. The applicant enjoys the right of residence as long as he/she has sufficient funds. The host state can monitor whether the requirements for a right of residence are met throughout the applicant's residence.[183] In this case, a Spanish citizen had arrived in Finland to work and study, but his small and irregular income did not allow considering him a worker. The national court concluded that the applicant's right of residence should have been registered on the basis of sufficient resources.

The question of how a specific benefit is classified in a national system may also have an impact on the evaluation of the citizen's personal situation, although it is not decisive for its qualification under EU law.[184]

The **Swedish** Migration Agency considered maintenance support for elderly persons and housing supplements as social assistance, and consequently as proof that the applicant, who received this assistance from the Swedish Social Insurance Agency (*Försäkringskassan)*, could not be considered to have sufficient resources to support herself. The Migration Agency decided to expel the applicant for abuse of rights. However, according to the Migration Court of Appeal,[185] the fact that a person receives maintenance support for elderly persons and a housing supplement should not in itself be interpreted as the inability to be self-sufficient, resulting in losing a right to residence, since these allowances are not granted in accordance with the Social Service Act. Considering that the applicant was retired and suffering from severe health problems, her need for longer support from the social assistance system, although not temporary, was justified.

A case from **Finland**[186] provides an example of claimants being considered as a burden for the social assistance system. It concerned a couple of German nationality and their four children. When they arrived in Finland in March 2011, the first claimant registered as a worker; the second registered as a family member and was unemployed during the whole stay in Finland. The first claimant's contract was not continued after a two-month trial period, and she became unable to work for health reasons. Although they claimed that they were taking Open University courses, studying was not the main purpose of their stay. As of June 2011, the family resorted to social assistance. The question before the court was whether they could be deported to Germany. The Supreme Administrative Court ruled that they could not be considered employed or

181 Belgium Council for Alien Law Litigation (*Raad voor Vreemdelingenbetwistingen/Conseil du Contentieux des Etrangers*), Case No. 129 028, 10 September 2014.

182 Finland, Helsinki Administration Court (*Helsingin hallinto-oikeus/Helsingfors förvaltningsdomstol*), Case No. 16/0082/6, 25 January 2016. See the case summary.

183 The court relied on Directive 2004/38/EC and the case law of the CJEU (namely C-408/03, *Commission of the European Communities v. Kingdom of Belgium* [GC], 23 March 2006).

184 The qualification of a social benefit under national law is not decisive for its qualification under EU law (notably whether it is social security or social assistance under EU law). The Swedish financial support for the elderly is a special non-contributory benefit covered by Regulation 883/2004 on the coordination of social security schemes. It may only then also be considered a social assistance benefit under Directive 2004/38 – and therefore potentially affect residence rights – if it meets the definition in CJEU, C-149/12, *Brey*, para. 61: "all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State".

185 Sweden, Migration Court of Appeal (*Migrationsöverdomstolen*), Case No. UM10307-09, 16 June 2011.

186 Finland Supreme Administrative Court (*Korkein hallinto-oikeus/Högsta förvaltningsdomstolen*), Case No. KHO:2016:75; 3018/1/14 and 3109/1/14; 2234, 20 May 2016.

self-employed persons, students or persons seeking employment in Finland. The first claimant had not become unemployed involuntarily, her incapacity to work was not temporary, and the Open University courses were not related to vocational training. By the time the Immigration Service decided to deport them (in 2013), neither of them had resided in Finland legally as an EU citizen for a continuous period of five years in order to gain the right of permanent residence (in which case deportation would have been possible only on serious grounds of public order or security). The family had resorted to social assistance immediately after their arrival in Finland and had continued to do so on a regular basis; this was not a case of temporary difficulties. The applicants could therefore be considered a burden on the social assistance system. Having considered the duration of the applicants' residence, their age, state of health, family situation, their integration in the country and the best interests of the child, the national court concluded that the arguments for deportation outweighed those against deportation.

However, specific circumstances can lead a court to annul a deportation order despite a person not meeting the required criteria at first glance. A woman of Portuguese nationality who had registered in **Luxembourg** as a worker had her residence permit withdrawn by the authorities as she was considered unable to prove that she had sufficient resources. The woman's employers had not declared the full amount of her work, meaning that she had formal employment of only 12 hours per week. In her appeal, the woman provided further details regarding the situation of exploitation in which she had found herself, and proved that she had continued to work part time as an employee as well as a volunteer for the Red Cross. The Higher Administrative Court[187] clarified that a person can, under certain specific circumstances, qualify as a worker despite having been formally employed for a mere 12 hours per week, and that other elements could influence the granting of worker status.

2.3.2. Sickness insurance

According to the CJEU, any insurance cover, private or public, contracted in the host Member State or elsewhere, is acceptable in principle, as long as it provides comprehensive coverage and does not create a burden on the public finances of the host Member State. In protecting their public finances when assessing the comprehensiveness of sickness insurance cover, Member States must act in compliance with the limits imposed by EU law and in accordance with the principle of proportionality.[188]

The European Health Insurance Card[189] offers such comprehensive cover when the EU citizen concerned does not move the residence in the sense of Regulation (EC) No. 883/2004[190] to the host Member State and has the intention to return, e.g. studies or posting to another Member State.[191]

The Court of Appeal of the **United Kingdom** found,[192] however, that free access to the National Health Service (NHS) was not sufficient to comply with that obligation. According to the court, the comprehensive sickness insurance cover cannot include the public healthcare system of the host state because that would defeat the object of the Directive – namely, it would not relieve that state of the cost of providing healthcare in the first five years. In this case, a Pakistani national was refused permanent residence as a spouse of an EEA citizen as he did not have comprehensive sickness insurance cover. His Danish wife had entered the United Kingdom as a worker but had become a student and was therefore required to have sickness insurance, but had failed to obtain it. The court also noted that it was common ground that if Mrs. Ahmad could prove that there were reciprocal arrangements between the United Kingdom and Denmark enabling the United Kingdom to reclaim from Denmark the costs of Mrs. Ahmad's healthcare, that would be sufficient to constitute comprehensive insurance cover. However, there was no evidence that Mrs. Ahmad, who had been in the United Kingdom since 2006, was still entitled to healthcare in Denmark. Furthermore, nothing obliged the Secretary of State to investigate whether the costs of healthcare could be recovered from Denmark.

FRA's research did not identify judgments in other Member States on this issue.

2.4. Eligibility for social benefits

A comprehensive overview of the EU legal framework is beyond the scope of this report; therefore, only the most basic concepts from CJEU case law are presented.

Workers and their family members have access to the host Member State's social security system under the same conditions as nationals. Typical social security benefits include old-age pensions, survivor's pensions, disability benefits, sickness benefits, birth

187 Luxembourg, Higher Administrative Court (*Cour administrative*), Case No. 32144C, 4 June 2013.
188 CJEU, C-413/99, *Baumbast and R v. Secretary of State for the Home Department*, 17 September 2002, paras. 89-94.
189 See the European Commission's release on the European health insurance card.
190 Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30 April 2004, pp.1-123.
191 See COM(2009) 313 final.
192 United Kingdom, England and Wales Court of Appeal (Civil Division), *Ahmad v. Secretary of State for the Home Department*, [2014] EWCA Civ 988, 16 July 2014.

grants, unemployment benefits, family allowances and healthcare (Article 3 of Regulation 883/2004).[193]

Directive 2004/38 does not provide for equal treatment from day one for economically inactive mobile Union citizens for up to three months. Economically inactive EU citizens include students, pensioners, unemployed persons who are not jobseekers, and jobseekers who have no genuine chance of finding a job in the host Member State. In contrast to workers and other economically active migrants, their access to benefits is based on their integration into the host society in a social rather than an economic context. Known as the 'incremental approach', this means that the longer migrants reside in a Member State, the greater the number of benefits they can receive on equal terms with nationals, thus ensuring integration into and solidarity from the host society.[194]

As clarified in CJEU case law, to be eligible for welfare benefits, non-active EU citizens, besides not becoming an unreasonable burden to public finances,[195] should display a genuine link with the labour market of the host country[196] or should show 'a certain degree of integration' into the society of the host country.[197]

According to the Directive, jobseekers have a mixed status: they are not contributing to the productivity of the host society, but they are potential members of the labour force. The Directive distinguishes between those jobseekers who used to be employed in the host Member State before involuntary losing their employment and 'first-time jobseekers' who move to the host Member State to seek employment there. Under certain conditions, those who have worked in the host Member State retain their status as a worker or self-employed after their employment has ended (Article 7(3) of the Directive). For employment lasting less than a year, Union citizens lose their status of worker after 6 months of unemployment. First-time jobseekers, in contrast, have no worker status to 'retain' as they have never worked in the host Member State. Article 24(2) of the Directive provides an exemption from equal treatment with nationals regarding social assistance for the first three months of residence, extending longer for jobseekers. Accordingly, Member States are not obliged to grant jobseekers benefits that fall under social assistance.

193 European Parliament, European Parliamentary Research Service (2014).
194 *Ibid.*
195 CJEU, 184/99, *Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, 20 September 2001.
196 CJEU, C-138/02, *Brian Francis Collins v. Secretary of State for Work and Pensions*, 23 March 2004; CJEU, Joined cases C-22/08 and C-23/08, *Athanasios Vatsouras* and *Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*, 4 June 2009.
197 CJEU, C-209/03, *The Queen, on the application of Dany Bidar v. London Borough of Ealing and Secretary of State for Education and Skills* [GC], 15 March 2005.

Under EU law, it is in the Member States' competence to organise their welfare systems and eligibility conditions. In *Brey,*[198] the CJEU found that Member States are allowed to maintain a condition requiring a right to reside in order to be eligible for particular social security benefits, not just social assistance benefits. Therefore, EU migrants claiming social benefits can in principle be subject to a right to reside test not applied to own nationals. Verification by the national authorities of the lawfulness of residence must comply with the requirements set out in Article 14(2) of the Directive. That means such verification should not be carried out systematically, should satisfy the conditions of proportionality, be appropriate for securing the attainment of the objective of protecting public finances, and should not go beyond what is necessary to attain that objective.[199]

In *Alimanovic* and *Garcia Nieto*, the CJEU explained that EU nationals are not entitled to social assistance benefits during their first three months of stay in a host Member State, or at any point at which they are considered a 'jobseeker'. EU jobseekers are entitled to claim benefits that facilitate access to the labour market, but not where the benefit has a social assistance element.[200] In this context, different kinds of questions arose before national courts regarding the eligibility of migrant EU citizens for certain social benefits.

For example, the **Danish** National Social Appeals Board[201] had to decide whether an EU citizen could receive social benefits while their application for an EU registration certificate was being processed. The National Social Appeals Board found that the municipality had no right to stop the payment of social security benefits and special support benefits, since the citizen concerned was allowed a procedural stay[202] in Denmark as long as the issue of the registration certificate was being

198 CJEU, C-140/12, *Pensionsversicherungsanstalt v. Peter Brey*, 19 September 2013. Mr. Brey was a German national receiving a modest German pension. He moved to Austria and applied there for a compensatory supplement to his pension. To prevent pensioners from other Member States who have never contributed in Austria from benefiting from this supplement, Austrian legislation provided that only persons legally residing in Austria are entitled to it, and that in order to reside legally, non-active persons must have sufficient resources.
199 CJEU, C-308/14, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, 14 June 2016.
200 CJEU, C-67/14, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others* [GC], 15 September 2015; C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna García-Nieto and Others*, 25 February 2016.
201 Denmark, National Social Appeals Board (*Ankestyrelsen*), Case No. A-27-07, 21 December 2007.
202 'Procedural stay' means that one can stay in Denmark while the application for a residence permit is processed. When on procedural stay, a person is generally not allowed to work and, therefore, the right to medical care is limited. See New to Denmark's webpage and the Danish Immigration Service and SIRI's information on procedural stay.

processed by the Immigration Service. The Appeals Board also emphasised that the citizen had applied for a new registration certificate in due time before the departure deadline.

The **Greek** Council of State[203] clarified that that under national law family benefits are at the same time a social advantage and a social security benefit and can also be allocated to a third-country national who is a spouse of an EU citizen legally residing and working in Greece or a mother of children with EU nationality. The court decided that national provisions that do not allow the allocation of those benefits to such third-country nationals are contrary to EU law and therefore invalid and inapplicable.

In **Finland**, there were no specific provisions in the Social Assistance Act concerning the right of EU citizens or immigrants to social assistance. The Supreme Administrative Court[204] clarified that granting social assistance to economically inactive EU citizens who do not yet have a right of permanent residence can be made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host state. If sufficient resources are required, the resources as established in connection with registration of residence may be taken into account when assessing the applicant's need for social assistance, including when those resources partly derive from a family member. The court agreed with the authorities that it does not follow from registration alone that an applicant who is economically inactive and has resided in the country for more than three months but less than five years is entitled to social assistance on the same grounds and to the same extent as a Finnish citizen in a similar situation. Such EU citizens therefore must have sufficient resources.

In the case of a Polish national who lost her job in the United Kingdom due to a reduction of available work places, the **Polish** courts had to decide whether she was eligible to obtain a pre-retirement benefit in **Poland**. The Social Security Institution claimed that the requirement to lose one's job from reasons attributable to the employer would only be fulfilled if the employer was located in Poland. The Court of Appeal[205] however agreed with the Regional Court that such an interpretation would be contrary both to Regulation (EC) No 883/2004 and Directive 2004/38/EC, as well as Article 21(1) of the TFEU.

The **Spanish** Insurance authority refused to recognise Spanish applicants' right to receive retirement benefits resulting from intermittent working periods in Czechoslovakia between 1969 and 1983. The High Court of Justice[206] found that the accumulation of all the periods taken into consideration by the different national legislations to acquire and retain the right to social benefits, as well as for calculating these amounts, constituted one of the pillars of the free movement of workers as described in Articles 48 to 52 of the TFEU.

2.4.1. Difference between "social assistance" and benefits relating to labour market access

As mentioned above, job seekers have the right to equal treatment in relation to access to employment and benefits that support access to the employment market. Nevertheless, they do not have a general right to social assistance during the period of seeking employment, even if it is longer than three months (Article 24(2) read in conjunction with Article 14(4)(b) of the Directive).

The CJEU held in *Vatsouras*[207] that, in view of the establishment of citizenship of the Union, jobseekers enjoy the right to equal treatment for the purpose of claiming a benefit of a financial nature intended to facilitate access to the labour market. The *Vatsouras* case concerned the German basic benefit for jobseekers, which the German authorities considered to be 'social assistance' in the sense of Article 24(2) of Directive 2004/38. The CJEU argued, however, that benefits such as the one in question, which are aimed at ensuring that jobseekers are capable of earning a living, are likely to be aimed at facilitating access to employment and thus cannot constitute 'social assistance', regardless of their formal status under national law.

However, it may be difficult to distinguish between 'social assistance' and benefits that are meant to facilitate access to employment.

In *Dano* and *Alimanovic*, the benefits at issue were characterised as 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, i.e. benefits which were intended to cover subsistence costs for persons who cannot cover them themselves and are not financed through contributions, but through tax revenue. The CJEU considered that those benefits were also covered by the concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38. This article refers to all assistance schemes established by the public authorities to which

203 Greece, Council of State (*Συμβούλιο της Επικρατείας, Α Τμήμα, επταμελής σύνθεση*), Case No. 1485/2016, 4 July 2016.
204 Finland, Supreme Administrative Court (*Korkein hallinto-oikeus/Högsta förvaltningsdomstolen*), Case No. KHO:2015:173, 919/2/14; 3579, 9 December 2015.
205 Poland, Court of Appeal (*Sąd Apelacyjny w Gdańsku*), Case No. III AUa 1385/15, 22 January 2016.
206 Spain, High Court of Justice (*Tribunal Superior de Justicia de Asturias, Oviedo, Sala de lo Social*), Case No. 168/2011, Appeal No. 2496 /2010, 21 January 2011.
207 CJEU, Joined cases C-22/08 and C-23/08, *Athanasios Vatsouras* and *Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*, 4 June 2009.

recourse may be had by an individual who does not have resources sufficient to meet his/her own basic needs and those of his/her family and who by reason of that fact may, during his/her period of residence, become a burden on the public finances of the host Member State, which could have consequences for the overall level of assistance that may be granted by that State.[208]

In a case before **British** courts, the claimant had been living in the **United Kingdom** since 2010. She had initially received a jobseeker's allowance, but this ended because she was unable to take up employment due to ill health. She then applied for employment and support allowance (ESA), but this was denied by the Secretary of State because she did not have the right to reside in the United Kingdom. The questions before the Court of Appeal[209] concerned the test for distinguishing between social assistance and labour-market related benefits. The court referred to CJEU case law on the distinction between social assistance and labour market-related benefits.[210] The court stated that, according to the CJEU, the test was whether the benefit was paid predominantly for the purpose of facilitating access to the labour market. When applying the test to the facts of the case, the court held that ESA was primarily provided for those who cannot work or who are on the borderline due to some disability or past episode in their lives. Even though one of the aims of ESA is to provide support to enable claimants to work in the future, this was not the predominant function. The court noted that roughly 87 % of those eligible for ESA are treated as having limited capability to both work and carry out work-related activity and are not required to perform any work-related activity for that reason. It does not make sense to treat the benefit paid to them as intending to facilitate their access into the labour market. The court concluded that ESA was social assistance rather than a labour-market related benefit and, therefore, did not have to be made available to the claimant.

The High Court[211] of **Ireland** had to determine the characteristics of jobseekers' allowance when examining the case of a Romanian citizen living in Ireland with her partner and two children, who applied for a jobseekers' allowance and child benefit a couple of years after arriving in Ireland. She was refused on the basis that her right to reside expired when her period of self-employment ended. This self-employment consisted of selling the *Big Issue,* a street newspaper that is sold by individuals who are homeless or almost homeless, vulnerably housed or marginalised in some way.

The court recalled that a citizen of the Union who is a jobseeker and can show a real link with the labour market of the host State may not be excluded from benefits intended to facilitate access to employment. The court concluded that the applicant was never a worker in Ireland; her sole economic activity was as a vendor of the *Big Issue*, which ceased during the year prior to her applications. Therefore, she was an economically inactive person who had not shown a real link to the Irish labour market. The court further found that jobseekers' allowance is a special non-contributory cash benefit, as it is clearly intended as a substitute cover for the risk covered by unemployment benefits; it guarantees a minimum subsistence income, is funded from taxation, and is not dependent on contributions made by the beneficiary. In those circumstances, even if there were some element of an intention to assist persons seeking access to the labour market, the conditions for eligibility for jobseekers' allowance are solely a matter for national legislation. The same goes for child benefits, which is clearly a social security benefit. A statutory requirement of lawful residence in the State to be eligible for such benefits is not precluded by EU law.

The Higher Administrative Court[212] in **Luxembourg** decided that receiving minimum guaranteed income amounts to receiving social assistance even if the aim of the person is to gain access to the labour market. A British citizen and her four children had their residence permits withdrawn, because she had a contract granting her a monthly salary below the guaranteed minimum wage. Therefore, the Minister of Labour, Employment and Immigration (*Ministre du Travail, de l'emploi et de l'immigration*) concluded that she did not qualify as a worker and did not have sufficient resources in order to not become a burden on the social assistance system. The claimant argued that she was regularly registered with the national employment agency (*Agence pour le développement de l'emploi*, ADEM) and that she had received a minimum income as part of a programme to help people integrate into the labour market. The court maintained that the financial assistance received was a form of social assistance and did not fall under labour market integration measures (*mesures d'insertion*).[213]

208 CJEU, C 333/13, *Elisabeta Dano and Florin Dano v. Jobcenter Leipzig*, 11 November 2014, para. 63, and C-67/14, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others* [GC], 15 September 2015, paras. 43-44. See also Lanceiro, R. (2017), pp. 63-77.

209 United Kingdom, England and Wales Court of Appeal (Civil Division), *Alhashem v. Secretary of State for Work and Pensions*, [2016] EWCA Civ 395, 21 April 2016.

210 CJEU, Joined Cases C-22/08 and C-23/08, *Athanasios Vatsouras* and *Josif Koupatantze v. Arbeitsgemeinschaft (ARGE) Nürnberg 900*, 4 June 2009; C-67/14, *Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others* [GC], 15 September 2015; C-299/14, *Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna García-Nieto and Others*, 25 February 2016.

211 Ireland, High Court, *Loti Munteanu v. Minister for Social Protection, Ireland and the Attorney General,* [2017] IEHC 161, 3 March 2017.

212 Luxembourg, Higher Administrative Court (*Cour administrative*), Case No. 34238C, 3 July 2014.

213 Possible expulsion was not an issue in this case, but the court noted that the claimant has since found full-time employment and no longer risked an expulsion measure.

2.5. Restrictions of right to move and reside freely on grounds of public policy or public security

The freedom of movement of persons is one of the foundations of the EU. Consequently, the provisions granting that freedom must be given a broad interpretation, whereas derogations from the principle must be interpreted strictly.[214] However, the right of free movement within the EU is not unlimited and carries with it obligations on the part of its beneficiaries, which include complying with the laws of their host country.

In accordance with Article 27 of the Directive, and subject to procedural and other safeguards specified in following provisions, Member States may restrict the freedom of movement and residence of Union citizens and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds may not be invoked to serve economic ends. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State (Article 14(3) of the Directive). Expiry of the identity card or passport on the basis of which the person concerned entered the host Member State and was issued a registration certificate or residence card shall not constitute a ground for expulsion from the host Member State (Article 15(2) of the Directive).

Member States retain the freedom to determine the requirements of public policy and public security in accordance with their needs, which can vary from one Member State to another and from one period to another. However, when they do so in the context of the application of the Directive, they must interpret those requirements strictly.[215]

It is crucial that Member States define clearly the protected interests of society, and make a clear distinction between public policy and public security.[216] Public policy is generally interpreted along the lines of preventing disturbance of social order.[217] Public security is generally interpreted to cover both internal and external security,[218] with a view to preserving the territorial integrity of a Member State and its institutions. The CJEU has held that a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security.[219]

Previous criminal convictions shall not in themselves constitute grounds for taking such measures. The personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted (Article 27(2)).

For example, in the case of a **Slovenian** citizen sentenced on two occasions for theft – including a car theft – and petty thefts – the second time resulting in a three-month prison sentence – the Swedish Court of Appeal[220] argued that, even if there was a risk of committing further crimes, his actions could not be seen as representing a serious enough threat to the interests of society that would justify expulsion.

On the other hand, the **Danish** Supreme Court[221] upheld a decision ordering the deportation of and five-year entry ban for a Lithuanian citizen who entered Denmark and on the same day committed theft in a department store (for a total value of DKK 4,700).[222]

The Supreme Administrative Court[223] in **Finland** found that road safety can be considered a fundamental interest of society that falls within the scope of the protection of public order or security. The claimant in this case was an Estonian citizen occasionally working in Finland on short-term contracts and with no family ties there. Considering the frequency of the claimant's acts within a short period of time and their aggravated nature as far as drunken driving is concerned, the court considered that his behaviour represented a genuine, immediate and sufficiently serious threat to road safety. The court upheld a three-year entry ban.

214 CJEU, 139/85, *R. H. Kempf v. Staatssecretaris van Justitie*, 3 June 1986, para. 13; and C-33/07, *Direcția Generală de Pașapoarte București v. Gheorghe Jipa*, 10 July 2008, para. 23.
215 CJEU, 36/75, *Roland Rutili v. Ministre de l'intérieur*, 28 October 1975, para. 27; 30/77, *Régina v. Pierre Bouchereau*, 27 October 1977, para.33; and C-33/07, *Direcția Generală de Pașapoarte București v. Gheorghe Jipa*, 10 July 2008, para 23.
216 See COM(2009) 313 final, p. 10.
217 *Ibid.*
218 CJEU, C-423/98, *Alfredo Albore*, 13 July 2000, para. 18 and the following; and C-285/98, *Tanja Kreil v. Bundesrepublik Deutschland*, 11 January 2000, para 15.
219 CJEU, C-145/09, *Land Baden-Württemberg v. Panagiotis Tsakouridis*, 23 November 2010, paras, 40-44.
220 Sweden, Swedish Court of Appeal (*Hovrätten för Västra Sverige*), Case No. B2390-06, 25 May 2006, (Choose: Avancerad; Domstol: Hovrätten för Västra Sverige; Målnummer: B2390-06).
221 Denmark, Supreme Court (*Højesteret*), Case No. U.2009.813H or TfK2009.236/2, 29 December 2008.
222 Approximately € 630.
223 Finland, Supreme Administrative Court (*Korkein hallinto-oikeus/Högsta förvaltningsdomstolen*), Case No. KHO:2016:11; 1385/1/13; 340, 8 February 2016.

The Swedish Police ordered the expulsion of a Romanian woman, deeming her work as a prostitute in **Sweden** a serious threat to the fundamental interests of society. This view was supported by the Migration Agency, which reasoned that, even though prostituting oneself was not illegal, it encouraged buying sex, which is a criminal offence. The Migration Court,[224] however, affirmed that the woman had not committed a crime by working as a prostitute, and that her behaviour could not be interpreted as such a serious threat to the fundamental interests of society to justify her expulsion (even interests such as the Swedish authorities' fight against trafficking of human beings and prostitution).

The CJEU affirmed the rule, provided for in Article 27(2) of the Directive, that EU law precludes the adoption of restrictive measures on general preventive grounds.[225] Consequently, in **Poland**, the Regional Administrative Court[226] in Warsaw repealed the expulsion order of a claimant, which had been justified by the administration as a preventive measure due to his criminal offences, including sexual harassment. The court held that the assessment of whether the claimant currently posed a threat to the public interest and whether this threat was sufficiently serious to issue a decision on expulsion should be made on the basis of, e.g., experts' opinions. The court noted that the administrative authority had not carried out such assessments, explicitly stating that the decision to expel the claimant from Poland was of a preventive nature.

The majority of case law collected for this report related to grounds of public policy and public security. The ground of public health was invoked in one of the reported cases.

The authorities in **Cyprus** rejected a claimant's visa application on the ground that he was a risk to public health (he was a carrier of Hepatitis B) and asked him to leave Cyprus. He was a Nigerian national who first applied for asylum, but subsequently married a Latvian citizen and applied for a visa as the spouse of a Union national. The authorities asked him to undergo a blood test as a precondition for examining his application. The Cyprus Supreme Court[227] concluded that the authorities' decision to deport him solely on the ground of his illness, without taking into account any other circumstances, violated the principles of equality and proportionality and the duty to conduct an adequate investigation.

224 Sweden, Migration Court (*Migrationsdomstolen*), Case No. UM 832-11, 8 April 2011. (To access the case, choose: Avancerad; Domstol: Migrationdomstolen; Målnummer: UM 832-11).

225 CJEU, 67/74, *Carmelo Angelo Bonsignore v. Oberstadtdirektor der Stadt Köln,* 26 February 1975, paras. 5-7.

226 Poland, Regional Administrative Court (*Wojewódzki Sąd Administracyjny w Warszawie*), Case No. V SA/Wa 1451/09, 11 May 2010.

227 Cyprus, Cyprus Supreme Court (*Ανώτατο Δικαστήριο Κύπρου*), Case No. 857/2010, 24 April 2013.

2.5.1. Proper scrutiny of individual circumstances and principle of proportionality

Before taking an expulsion decision on the grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State, and the extent of his/her links with the country of origin (Article 28 of the Directive).

Measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned (Article 27(2)).

The CJEU has recently reaffirmed[228] that, in order to adopt an expulsion decision with due regard to the principle of proportionality, account must be taken of, amongst others:

- the nature and gravity of the alleged conduct of the individual concerned;
- the duration and, when appropriate,
- the legality of his/her residence in the host Member State;
- the period of time that has elapsed since that conduct;
- the individual's behaviour during that period;
- the extent to which he/she currently poses a danger to society;
- and the solidity of social, cultural and family links with the host Member State.

The approach of national courts in this regard does not seem to be consistent. In the case of a Romanian citizen found guilty of grand larceny against an elderly women, the **Slovenian** Koper Higher Court[229] found that the expulsion was justified for the purpose of protecting the public order due to the mere fact that the defendant was found guilty of a criminal offence. The court did not perform a detailed analysis of the defendant's conduct (apart from the offence itself).

Sometimes even decisions of the same court of a Member State are not entirely consistent, which can undermine authorities' understanding and proper application of the Directive.

228 CJEU, Joined cases C-331/16 and C-366/16, *K. v. Staatssecretaris van Veiligheid en Justitie, and H. F. v. Belgische Staat* [GC], 2 May 2018.

229 Slovenia, Koper Higher Court (*Višje sodišče v Kopru),* Case No. Kp 213/2007, 17 October 2007.

In one case before the Supreme Court of **Cyprus**,[230] an expulsion order and 20-year entry ban were imposed on a Bulgarian national based on communication from the police that, according to confidential information, he was a member of a criminal group. The claimant alleged that the administrative orders were inadequately justified and investigated and that he was not offered the right to be heard regarding the allegations against him. The court found that the administration has no obligation to provide any explanation for an entry ban issued for reasons of public security. The court does not look into reasons pertaining to public safety, which are primarily matters for the executive branch. Furthermore, according to the court, the authorities have no duty to justify their decision by providing details that would enable the Union nationals affected to argue against the allegations which provided the basis for their expulsion. In the context, 'public security' is interpreted widely to include criminal activity of any scale.

In a subsequent decision, the Supreme Court of Cyprus[231] held that, in cases where a criminal conviction on its own does not conclusively lead to a public security risk, the administration must demonstrate a sufficiently justified and reasoned decision, in compliance with the principles of proportionality and good administration, assessing the nature and circumstances of the offence and any other relevant element of the applicant's family and personal situation. This, however, does not imply an obligation on the part of the administration to explicitly contrast the family circumstances of the expelled citizen with the overriding reasons of public interest. It suffices to show that all the relevant factors were investigated and taken into account.

The Supreme Court of Cyprus upheld this interpretation[232] in a case of a Greek priest imprisoned for the import and possession of cannabis. The court stated that, when the administration relies on overriding reasons of public security, it is expected to establish not only that there is a breach of public security but also that this violation is particularly serious. This excludes any generalities and instead imposes a duty for positive and concrete justification relying on facts.

As regards the proportionality test, the **Danish** Supreme Court[233] struck a balance between the claimants' family ties in Denmark and the nature of the committed isolated act of violence. The claimant was a British citizen born and raised in Great Britain, but three of his siblings lived and worked in Denmark; he assaulted a bus driver for not allowing his friend to bring a bottle of spirits on board. The court argued that a deportation would be contrary to the principle of proportionality.

2.5.2. Serious or imperative grounds of public security

The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security (Article 28(2) of the Directive).

A minor[234] EU citizen may not be expelled, except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Child of 20 November 1989, and the decision is based on imperative grounds of public security (Article 28(3)(b)).

A Union citizen who has resided in the host Member State for the previous 10 years may not be expelled, except if the decision is based on imperative grounds of public security, as defined by Member States (Article 28(3)(a)).

The CJEU has provided some guidelines as to the interpretation of that provision. In *Tsakouridis*,[235] the court concluded that the fight against crime in connection with dealing in narcotics as part of an organised group is covered by the concept of 'serious grounds of public policy or public security'. It can also be covered by the concept of 'imperative grounds of public security', which may justify a measure expelling a Union citizen who has resided in the host Member State for the preceding 10 years.

In this context, the CJEU held in *M.G.*[236] that periods of imprisonment cannot be taken into account for the purposes of granting the enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and that, in principle, such periods interrupt the continuity of the period of residence for the purposes of that provision. The ten-year period of residence referred to in Article 28(3)(a) must be continuous and be calculated by counting back from the date of the decision ordering the expulsion. However, the fact that the person resided in the host Member State for 10 years prior

230 Cyprus, Supreme Court (*Ανώτατο Δικαστήριο Κύπρου, Αναθεωρητική Δικαιοδοσία*), Case No. 718/2012, 26 February 2014.
231 Cyprus, Supreme Court (*Ανώτατο Δικαστήριο Κύπρου, Αναθεωρητική Δικαιοδοσία*), Case No. 483/2015, 9 July 2015.
232 Cyprus, Supreme Court (*Ανώτατο Δικαστήριο Κύπρου, Αναθεωρητική Δικαιοδοσία*), Case No. 300/2015, 22 October 2015.
233 Denmark, Supreme Court (*Højesteret*), Case No. U.2009.808H or TfK2009.236/1, 29 December 2008.
234 The reference to the UN Convention of the Rights of the Child suggests that a minor should be considered a person below 18 years old, unless under applicable law majority is attained earlier.
235 CJEU, C-145/09, *Land Baden-Württemberg v. Panagiotis Tsakouridis* [GC], 23 November 2010. The case concerned an individual of Greek parentage who had been born in Germany and who had lived there for over 30 years.
236 CJEU, C-400/12, *Secretary of State for the Home Department v. M. G.*, 16 January 2014.

to imprisonment may be taken into consideration as part of the overall assessment required to determine whether the integrating links previously forged with the host Member State have been broken.

Relying on this judgment, the **Irish** High Court[237] concluded that any period of imprisonment should not be included in the calculation of residency. Consequently, the court held that, in the instant case, the authorities should have asked whether the applicant had resided in Ireland for ten years prior to the commencement of his prison sentence (16 November 2011), and not the date of the expulsion decision (5 July 2013).

The Irish court also noted the difference between the concepts of residence in Article 16(1) and in Article 28(3). Article 16(1) of the Directive provides that, once a person obtains a right of permanent residence, that right is not subject to the conditions contained in chapter three of the Directive. In other words, once a Union citizen has obtained the status of permanent residence, the right of residence in the host Member State is no longer conditional upon being a worker or self-employed, or on having sufficient resources or being enrolled in a course of study. Therefore, according to the court, when inquiring whether a person has resided in the state for a period of ten years within the meaning of Article 28(3)(a), the inquiry is completely different to that conducted when asking whether a person was legally resident for the purposes of Article 16(2).

The court added that the purpose of the enhanced protection from expulsion, according to the decisions of the CJEU, is to protect the integration achieved by a migrant in a host state. The longer the presence, the deeper the integration, and so the greater the protection from expulsion. In this sense, the ten-year period of residence should be examined as one which is related to the exercise of treaty rights. "Thus, it is appropriate for the decision maker to inquire whether the migrant claiming ten years residence was, during the first five year period, exercising E.U. treaty rights and, in particular, whether the applicant was engaged in the activities or covered by the circumstances described in art. 7(1) of the directive. No such question may be asked in relation to the second five year period because a right of permanent residence is achieved after five years and, thereafter, one is not required to be art. 7(1) compliant in order to remain in the host state."

In contrast, the **United Kingdom** Court of Appeal[238] held that the fact that the claimant had been imprisoned did not affect his residence in the United Kingdom for a continuous 10-year period immediately prior to the deportation decision. The court held that whether the requirement of a continuous 10-year period of residence was established at the date of the decision to deport turned on the degree of integration established at that time. Periods of absence within the 10 years immediately preceding the decision did not of themselves disqualify someone, and neither did a period of imprisonment (4 years in this case). The period of imprisonment was, however, a factor to be considered when deciding upon integration at the date of decision. The decision would turn on an overall qualitative assessment having regard to all relevant factors, including the length of residence, family connections and any interruptions in integration.

That case was subsequently referred to the CJEU for a preliminary ruling by the Supreme Court. In April 2018, the CJEU clarified the interpretation of Article 28(3)(a) of the Directive in *Vomero.*[239] According to the CJEU, in the case of a Union citizen who is serving a custodial sentence and against whom an expulsion decision is adopted, the condition of having "resided in the host Member State for the previous ten years" may be satisfied where an overall assessment of the person's situation, taking into account all the relevant aspects, leads to the conclusion that, notwithstanding that detention, the integrative links between the person concerned and the host Member State have not been broken. Those aspects include, among others, the strength of the integrative links forged with the host Member State before the detention of the person concerned, the nature of the offence that resulted in the period of detention imposed, the circumstances in which that offence was committed, and the conduct of the person concerned throughout the period of detention.

More precisely, a Union citizen who has already resided in the host Member State continuously for 10 years by the date on which he/she receives a custodial sentence accompanied by an expulsion measure is entitled to the enhanced protection against expulsion provided for in Article 28(3)(a) of the Directive. Conversely, as regards a citizen against whom an expulsion measure is adopted after his/her detention, the question arises whether that detention interrupts the continuity of residence, thus depriving him/her of that enhanced protection. According to the CJEU, where a Union citizen has already resided in the host Member State for a period of 10 years when his/her detention begins, the fact that the expulsion measure is adopted during or at the end of the period of detention (thus, the period of detention forming part of the 10-year period preceding the expulsion measure), do not automatically entail a discontinuity of that 10-year period. In such a case, the situation of the citizen concerned must still be subject to an overall assessment.[240]

237 Ireland, High Court, *Ionel Sandu v. The Minister for Justice and Equality,* [2015] IEHC 683, 31 July 2015.
238 United Kingdom, England and Wales Court of Appeal (Civil Division), *Secretary of State for the Home Department v. FV (Italy),* [2012] EWCA Civ 1199, 14 September 2012.
239 CJEU, Joined cases C-316/16 and C-424/16, *B v. Land Baden-Württemberg* and *Secretary of State for the Home Department v. Franco Vomero*, 17 April 2018.
240 *Ibid.*, paras. 77-81.

3

Political rights of EU citizens – scope and prerequisites

This chapter analyses possible obstacles to enjoying the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in the Member State of residence under the same conditions as nationals of that State. It does not cover the issue of disenfranchisement (the loss of voting rights in national elections by EU citizens who decide to live in another EU Member State).[241]

EU citizenship gives every EU citizen the right to vote and stand as candidate in municipal and European Parliament elections, regardless of whether they are a national of the EU country in which they reside, and this under the same conditions as nationals. This right is enshrined in Article 22(1) of the Treaty on the Functioning of the European Union. The detailed arrangements for the exercise of this right are laid down by Council Directive 94/80/EC[242] and Council Directive 93/109/EC.[243]

However, two restrictions exist. First, a Member State may decide that only its own nationals are eligible to run for head of the executive body of a basic local government unit. Second, if more than 20 % of the eligible voting population are non-nationals, a Member State may require an additional period of residence to take part in municipal elections.

Limited case law relating to political rights of EU citizens was collected. Some of the cases dealt with the question of whether the right to vote in municipal elections also covers other forms of exercising direct democracy in the host Member State, such as local referendums, etc.

The **Austrian** Constitutional Court[244] found that restricting the entitlement to vote in a municipal referendum only to Austrian citizens does not violate EU law, since Article 22 of the TFEU encompasses only participation in municipal elections and thus does not provide for any other direct democratic rights. The court also considered that Article 40 of the EU Charter of Fundamental Rights does not grant any rights beyond Article 22 of the TFEU.

In **Germany**, the Constitutional Court of Bremen[245] clarified that federal states may not enact provisions that allow EU nationals to vote in state elections. This would only be possible if the **German** Constitution were to be changed. The Federal Constitutional Court,[246] however, held that federal states may adopt provisions that allow EU nationals to take part in public decisions and petitions in municipalities and rural districts,

241 In January 2014, the European Commission published two guidance documents for EU countries on the loss of voting rights for citizens in national elections: (1) European Commission (2014a), *Recommendation addressing the consequences of disenfranchisement of Union citizens exercising their rights to free movement*, 2014/53/EU, 29 January 2014; and (2) European Commission (2014b), *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions addressing the consequences of disenfranchisement of Union citizens exercising their right to free movement*, COM(2014) 033 final, 29 January 2014.

242 Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, OJ L 368.

243 Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals, OJ L 329.

244 Austria, Constitutional Court (*Verfassungsgerichtshof*, VfGH), Case No. WIII4/2013, 18 September 2013.

245 Germany, Constitutional Court of Bremen (*Staatsgerichtshof der Freien Hansestadt Bremen*, StGH), Case No. St 1/13, 31 January 2014.

246 Germany, Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), Case No. 2 BvR 1576/13, 31 March 2016.

besides communal elections, even if it is not expressly mentioned in the Constitution.

Several of the collected cases related to administrative requirements for voting in municipal or European Parliament elections, in particular the definition or required length of residence.

In **Bulgaria**, the legislation envisaged certain restrictions to the right to vote and stand as candidate in local elections and elections to the European Parliament. To vote and stand as candidates in local elections, citizens of EU Member States had to have lived in the respective locality for the previous 12 months. To stand as candidates in elections to the European Parliament, EU citizens had to have lived in Bulgaria or another EU Member State for the previous two years. The Constitutional Court noted that the requirement of residence in a certain locality is also considered legitimate by the Venice Commission and the European Court for Human Rights. At the same time, the court found that the introduction of an excessively long period can turn the requirement into an obstacle to the effective exercise of electoral rights. According to the Venice Commission, such a requirement should not exceed six months. Consequently, the court found a violation of the constitutional principle of proportionality.

Article 22 of the TFEU does not distinguish between permanent and temporary residence. Yet, in the **Czech Republic**, permanent residence was required to be registered to vote in municipal elections, and the claimant, who held temporary residence, was refused. However, the term "permanent residence" had a different meaning for Czech citizens (it refers to the register of population), while permanent residence for EU citizens is regulated by the Act on the Residence of Foreign Nationals and is more difficult to obtain. The Regional Court in Brno[247] found that EU citizens have the right to vote in municipal elections even if they only have temporary residence in the Czech Republic. According to the court, Council Directive 94/80/EC had been incorrectly transposed. It is not possible to interpret the Act on Elections to Municipal Councils in a manner inconsistent with EU law, and the directive had direct effect in this case.

In **Greece**, a different procedure was foreseen for EU citizens to register their presence after expiration of the three-month period, and a separate one to be enrolled in an electoral register to vote and to stand as candidates for EU Parliament elections. The French national who only relied on his residence was not allowed to vote. The Council of State[248] confirmed that voters who intended to vote in Greece must follow the special procedures provided for in the electoral legislation.

In the Municipality of Galeata in **Italy**, some Italian citizens challenged the legitimacy of municipal elections – among others because four EU citizens who regularly lived in the municipal territory but who did not hold an Italian ID were included in the electoral register. The Council of State confirmed that the legislation concerning the right to vote of EU citizens living in the Italian Republic did not set any specific requirements as to ID documents of the subjects entitled to vote; therefore, any form of ID documents shall be considered valid as long as they allow for the proper identification of the subject. Moreover, it is legitimate that EU citizens who live in Italy but are not Italian citizens do not hold an ID document released by Italian authorities. In any case, the documents released by the EU Member States of origin are valid for the free circulation within the EU and are consequently suitable for the identification of the subjects holding them.

A case from **France** concerned a refusal to be registered to vote in the local elections because the claimant had not provided an attestation indicating that she had not been stripped of her voting rights in her country of origin. The Court of Cassation[249] held that signing a form mentioning that "the undersigned voter declares that they have not asked to be registered to vote in local elections in any other municipality in France and that they have not been stripped of their voting rights in the State from which they originate" was sufficient and in conformity with the relevant requirements.

247 Czech Republic, Regional Court in Brno (*Krajský soud v Brně*), Case No. 64 A 6/2014 – 20, 19 September 2014.

248 Greece, Council of State (*Συμβούλιο της Επικρατείας*), Case No. 2053/2009, 16 June 2009.

249 France, Court of Cassation (*Cour de cassation, Chambre civil 2*), Appeal No. 08-60266, 13 March 2008.

Conclusions - the way forward

Freedom of movement, a core principle of the European Union, is highly appreciated by its citizens. In autumn of 2017, 57 % of Europeans considered "the free movement of people, goods and services within the EU" the most positive achievement of the European Union.[250] Directive 2004/38/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 was designed to encourage the exercise of this right, reducing administrative formalities. However, serious shortcomings in its implementation have been consistently highlighted by Commission reports and European Parliament studies. The case law presented in this report again highlights a number of challenges to the fulfilment of this fundamental right.

Difficulties in identifying relevant national jurisprudence

The research revealed considerable difficulties in several Member States in identifying relevant case law. The information regarding the practice of national authorities and national courts when applying provisions relating to freedom of movement and other Union citizens' rights is not systematically collected or catalogued, hence the information available is scarce and difficult to access. This makes it difficult to analyse trends and assess progress made. Therefore, Member States need to collect data systematically on administrative and judicial proceedings relating to the application of Directive 2004/38 and other citizens' rights.

The European Commission could further promote such practices by asking Member States to regularly submit information on relevant case law – for example, in the newly established database on the e-justice portal – in a comparable way, to foster exchange of national practices. This would also contribute to more effective monitoring of the application of the directive.

More guidance for the legal interpretation of Directive 2004/38/EC

Issues covered by the case law presented in this report, such as on entry and residence requirements or on nationality-based discrimination, have also been the subject of considerable jurisprudence of the CJEU. However, there are many aspects of the right to freedom of movement for which no specific guidance by the CJEU is available. The research suggests that national authorities do not always apply the relevant legislation correctly, possibly because they are not fully aware of its requirements and the case law of the CJEU or their own national jurisprudence.

The research also shows that the interpretation of certain provisions and terms by national courts differs not only across Member States, but sometimes also within the same jurisdiction. This does not serve predictability of legal approaches and legal certainty for EU citizens seeking to enforce their rights.

Evidently, there is a need for better and updated EU guidance – for example, in the form of a handbook for legal practitioners – which would incorporate developments of the CJEU's jurisprudence. Additional clarifications should include the interpretation of basic concepts, such as 'sufficient resources' or 'burden for social assistance', or the consequences of a relationship breakdown for third-country family members, depending on the legal status, moment in time, reasons of separation and family situation. The scope of the principle of non-discrimination on the grounds of nationality should also be further clarified.

Furthermore, the European Commission could consider strengthening the assistance provided to Member States to exchange information on national jurisprudence and approaches between courts and public administration, as well as continue raising awareness of the relevant EU legal framework and the CJEU's jurisprudence. More intensive and systematic training of legal professionals, in particular judges and public officials responsible for the directive's application in EU Member States, should highlight the link of relevant national legislation with the provisions of EU law.

Interpreting national law in conformity with EU law and fundamental rights standards

National law must be interpreted and applied in full conformity with EU law. According to the CJEU's jurisprudence, every national court is a European Union court of general jurisdiction, with power to apply all rules of EU law. Every national court must apply EU law in its entirety and protect rights which it confers on individuals. To do so, the national court should apply and interpret domestic law in a way that ensures that EU law is fully effective and the outcome consistent with the objective pursued by it.[251] If this is not possible, the courts must set aside any provision of national law which may conflict with EU law.[252]

250 Standard Eurobarometer (2017).

251 CJEU, C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique, Préfet de la région Centre* [GC], 24 January 2012, para. 27 and the case law cited.

252 CJEU, 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, 9 March 1978, para. 21.

The collected evidence provides examples of cases where national courts were obliged to disapply (set aside) national legislation which did not correctly reflect the requirements of the Directive or were found to be in violation of other provisions or principles of EU law. Furthermore, in line with CJEU case law, Directive 2004/38/EC must be interpreted and applied in accordance with fundamental rights,[253] including in particular the right to respect for private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy as guaranteed in the ECHR and reflected in the EU Charter of Fundamental Rights. The CJEU stated that any national measure liable to obstruct the exercise of free movement of persons may be justified only where it is consistent with the fundamental rights guaranteed by the Charter. However, the analysis of the case law collected in the research indicates that national courts do not refer to the fundamental rights guaranteed by the Charter and the ECHR systematically and consistently.

Discrimination on the grounds of nationality a potential obstacle to free movement

FRA's research identified court cases on discrimination in accessing employment, in accessing different services, such as renting a car or an apartment, or certain banking services, as well as in the area of education and taxes. Often discrimination does not result strictly from the implementation of Directive 2004/38/EC and does not relate directly to the right of entry and residence. Nevertheless, discrimination on the grounds of nationality may create barriers to free movement of Union citizens even if it does not directly relate to the implementation of free movement legislation. For this reason, the EU and Member States should particularly monitor such discrimination cases to assess whether they result from incorrect transposition of EU law or lack of awareness by private companies, labour unions or public authorities, in order to reinforce rights awareness activities, particularly in areas of life where discrimination appears to be repetitive.

Political participation of Union citizens needs to be enhanced

In 2016, almost 14 million of the more than 16 million mobile EU citizens were of voting age and eligible to vote, accounting for 3.25 % of European voters.[254] In January 2018, the European Commission presented its report[255] on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections. It shows that, while awareness of this right is substantially higher now than in 2007, when it was at its lowest level (37 %), in over half of the Member States, it has in fact declined since 2010. On average, only one in two (54 %) European citizens know about their right to vote and stand as a candidate in municipal elections in their Member State of residence.

The case law examined in this research should be read in light of the findings of the European Commission's report. The formalities for mobile Union citizens to register on the electoral roll vary. In Member States where registration on the electoral roll is not automatic, the data provided showed that only 18.5 % of mobile EU citizens who were residents requested to be entered on the electoral rolls. The percentage of mobile EU citizens on the electoral roll more than doubles to 51.2 % in Member States using automatic enrolment. The case law examined in this research shows that unclear, excessive or wrongly interpreted administrative formalities required to register on the electoral roll can hinder the effective enjoyment by mobile EU citizens of their political rights. Member States are therefore encouraged to improve their respective legislation to facilitate political participation of mobile Union citizens, removing any cumbersome administrative requirements. Together with EU institutions they should also intensify awareness-raising activities among citizens to promote political participation of Union citizens in European, regional and municipal elections.

253 CJEU, Joined cases C-482/01 and C-493/01, *Georgios Orfanopoulos and Others and Raffaele Oliveri v. Land Baden-Württemberg,* 29 April 2004, paras. 97-98; and C-127/08, *Metock*, para. 79.

254 European Commission (2018).
255 *Ibid.*

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HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

The founding treaties, the EU Charter of Fundamental Rights and secondary EU law all provide for EU citizens' freedom to move and reside freely in any EU country of their choice. Growing numbers of citizens, and their family members, are making use of this freedom and related rights, such as the right not to be discriminated against based on nationality and the right to vote in certain elections in the host Member State. But making these rights a reality remains a challenge.

This report presents an EU-wide, comparative overview of the application of the Free Movement Directive (2004/38/EC) across the 28 Member States based on a review of select case law at national level. Providing insight into how national courts approach the provisions relating to Union citizenship and freedom of movement, it highlights the importance of their proper interpretation and their impact on vital areas of life for EU citizens and their families.

FRA - EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS
Schwarzenbergplatz 11 – 1040 Vienna – Austria
Tel. +43 1580 30-0 – Fax +43 1580 30-699
fra.europa.eu – info@fra.europa.eu
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