



Legal study on

Norway's obligations under the EU Citizenship Directive 2004/38/EC

Advokatfirmaet Simonsen Vogt Wiig AS

4 January 2016

(With minor revisions as of 9 February 2016)

Foreword

Advokatfirmaet Simonsen Vogt Wiig AS has been given the task of producing a legal study on Norway's obligations under the EU Citizenship Directive 2004/38/EC.

Anders Thue (partner at SVW) has acted as project manager and administrative leader for the project.

Karin Fløistad (partner at SVW (on leave) and PhD researcher at the European University Institute, Florence, Italy) has been responsible for the academic delivery of the project and in particular the analysis concerning the Directive as part of the EEA Agreement.

Christine Bakker (research fellow at the European University Institute, Florence, Italy) has been responsible for the comparative dimension of the studies, including the individual country studies and the comparative analysis.

Marie Grønvik (former research assistant at UIO) has been largely responsible for the analysis of Directive 2004/38/EC.

Sofia Lazaridis (associate at SVW) has acted as research assistant and has largely been responsible for the section concerning Norwegian immigration law.

Finn Arnesen (professor at UIO) has contributed with quality assurance, in particular concerning the analysis of the Directive and the EEA analysis.

Note on minor revisions subsequent to delivery

The final study was completed on 4 January 2016 and delivered to UDI in electronic form on 5 January 2016. In the present version, dated 9 February 2016, some minor revisions have been made. These minor revisions are mainly corrections of typographical errors and do not affect the substantive contents of the report.

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Abstract

This is a legal study commissioned by the UDI of the Citizenship Directive 2004/38/EC in the EU and in the EEA legal orders. In addition to providing a general analysis of the provisions of the directive the study includes the particular EEA dimension. When the Citizenship Directive was incorporated into the EEA Agreement, the contracting parties reserved themselves specifically against Union citizenship and immigration policy not being part of the EEA Agreement.

The study discusses case law from the EEA Courts with a view to explore the possibility of ‘more room for manoeuvre’ for Norway as an EFTA state in the context of the Citizenship Directive as incorporated in the EEA Agreement. The question initially asked by the UDI concerned possible consequences of the EEA Agreement lacking the Union citizenship provisions as enshrined in Articles 20–25 TFEU. The starting point for the analysis is decision No 158/2007 by the EEA Committee regarding the incorporation of the Citizens Directive in the EEA Agreement and in particular the Joint Declaration stating essentially that Union citizenship and immigration law are not part of the EEA Agreement.

In essence, it has not been possible to identify in existing case law grounds for more ‘room for manoeuvre’ regarding the interpretation and application of the Citizenship Directive as incorporated in the EEA Agreement. On the contrary, there is support for an interpretation of the directive that ensures the same right of freedom of movement for EU member state and EFTA state nationals under the EEA Agreement as for Union citizens in the territory of the EU. This observation is limited to free movement rights and is based on an analysis of existing legal sources in particular the case law from the EEA Courts. The study also includes a discussion of possible future diverging interpretation of the directive not maintaining substantive parity in the EU and the EEA legal orders.

The study examines the state’s specific obligations under the Citizenship Directive. Norwegian immigration law relating to nationals of EEA/EFTA states is presented separately. Further, the study analyses how the directive is implemented in five selected EU member states: Belgium, Denmark, Sweden, the Netherlands, the United Kingdom, and in one EFTA State, Iceland. In addition to separate country studies a comparative chapter is included.

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Part I: Introduction

1 Background and assignment

Advokatfirmaet Simonsen Vogt Wiig AS (SVW) has been given the task of producing a legal study on Norway's obligations under the EU Citizenship Directive 2004/38/EC (hereinafter also 'Citizens Directive' or 'the directive') as incorporated in the Agreement on the European Economic Area (hereafter 'EEA Agreement'). The directive was included in the EEA Agreement by EEA Joint Committee Decision 158/2007. The directive entered into force in the European Economic Area on 1 March 2009.

The directive entered into force in the EU on 30 April 2004, with a two-year transposition deadline. It regulates the right of Union citizens and their family members to move and reside freely within the territory of the member states. For this purpose, member states are required to ensure a minimum level of rights for persons falling within its scope.

The assignment was subject to a tender procedure conducted by the Norwegian Directorate of Immigration (hereinafter 'UDI') in November 2014. SVW's mandate is specified in the tender documents, where UDI has indicated the following objectives:

The primary objective of this study is to obtain a clear and comprehensive understanding of the EU and EEA legal framework and its impact on Norwegian legislation and practice, and provide a complete comparative picture of the legal framework and legal and administrative practice in the EFTA and EU Member States.

The studies should explore whether the existing Norwegian legislation is in conformity with the EU and EEA law and whether the CJEU and the EFTA Court case law require an amendment of Norwegian national law. The study's results will serve as a basis for further policy reflection on possible legislative initiatives in this field. We also expect the study to propose recommendations to the UDI. The studies must be analytical rather than descriptive in nature and present clear conclusions that are also visually easily accessible.

Among other things, the study should establish whether there is of significance that the Agreement on the European Economic Area does not contain any provision corresponding to Article 21 of the Treaty on the Functioning of the European Union. Directive 2004/38 was incorporated into the EEA Agreement subject to the fulfilment of constitutional requirements by all three EEA/EFTA States, cf. Article 103(1) EEA.

The conclusions, suggestions and recommendations of the study should provide a useful knowledge base for making decisions about policy implementation and policy evaluation. Additionally, the conclusions, suggestions and recommendations of the study will be used for providing assistance and support to Norwegian stakeholders when implementing the Directive 2004/38/EU.

Necessary adaptations and adjustments of the mandate have been made through SVW's tender and subsequently in the Agreement of 28 November 2014 as well as in a dialogue between the UDI and SVW during the progress of the work.

2 Execution

The assignment has been carried out in three main phases (with overlap): gathering and analysing national material, gathering and analysing material from EFTA and EU states and analysing the EEA dimension of Directive 2004/38/EC. The first two phases have largely been focused on gathering material and writing descriptive parts, although some level of analysis has also been required here. The last phase has been the most analytical phase, where the main questions in the project have been addressed based on the results of the preceding two phases.

During the first phase, the main focus was the review of national legislation, national administrative decisions and practices as well as national case law relating to Directive 2004/38/EC. The aim has been to provide a legal review of all main aspects of the directive and to set out the particular issues that may arise under national law, taking into account the areas identified by UDI in the tender documents as well as the various issues raised by the EFTA Surveillance Authority in ongoing cases. Considerable work was also carried out on the specific country studies during this phase. The countries included in this analysis were selected in consultation with UDI, based on preferences expressed by UDI at the initial stage of the project's implementation. In particular, meetings were held with academic experts and representatives of the government agencies responsible for the implementation of the directive in a first group of countries (Denmark, the Netherlands and the United Kingdom).

A meeting was held between SVW and the project reference group in March 2015, where initial results and identified issues relating to the national implementing legislation as well as the specific country studies were presented and discussed.

During the second phase, an analysis of the free movement rights under the directive as well as according to the provisions in the Treaty on the Functioning of the European Union (TFEU) was undertaken. This formed a basis for the work carried out in the third phase, dedicated to the EEA analysis. Moreover, the work on the country studies was pursued, and meetings with academic experts and representatives of the Ministries responsible for migration were held in the remaining countries included in the study (Belgium, Sweden and Iceland). Furthermore, full reports were drawn up on the information gathered during these meetings, as well as through an examination of existing publications on the implementation of the directive in the countries concerned.

Another meeting with the project reference group was held in June 2015. The first comparative overview of the country studies was presented, with particular focus on some salient issues that have led to national case law and thus have been considered to raise points of interest for the study. In addition, some particular issues relating to the Schengen Agreement and Dublin II, as well as the bilateral situation between Switzerland and the EU, were identified with a view to delimit the scope of the project.

The third phase was particularly devoted to the EEA dimension of the directive; analysing the results of the country studies in a comparative perspective, as well as tying together the country studies and the analysis of the directive in the EU legal order with the EEA dimension.

The last meeting with the project reference group was held in September of 2015, the main purpose of which was to provide an overview of preliminary findings in the EEA-specific analysis of the directive as well as the directive's provisions concerning restrictions on the right of residence and entry.

3 Structure of the study

The final study consists of the following parts:

- I. Introduction (this section)
- II. The Citizens Directive in the EU legal order
- III. The scope of the Citizens Directive as part of the EEA Agreement
- IV. Norwegian immigration law relating to nationals of EEA/EFTA states
- V. Comparative analysis of country studies on Belgium, Denmark, the Netherlands, Sweden, the United Kingdom and Iceland
- VI. Concluding section
- VII. Annexes with country studies

Part II of the study provides an in-depth analysis of the Citizens Directive, including the rights to entry and exit, the rights of residence and equal treatment as well as the enhanced protection against expulsion and procedural rights. The analysis is focused on the case law from the CJEU, but it also includes the case law from the EFTA Court to the extent that this case law has contributed to the substantial content of the directive.

Part III of the study provides an analysis of the case law from the CJEU and from the EFTA Court (the EEA Courts) regarding the free movement rights of non-economically active persons. The analysis includes case law related to the directive with a particular EEA dimension as well as case law on the coordination regime for social security, which contributes to the analysis of the right to free movement for non-economically active persons.

Part IV of the study provides a review of the Norwegian implementing legislation, including administrative practices and national case law relating to the Citizens Directive. Particular issues that may arise under national law are identified, taking into account questions that have been raised by the EFTA Surveillance Authority.

Part V of the study provides a comparative overview of how the directive is implemented in five selected EU member states (Belgium, Denmark, Sweden, the Netherlands, the United Kingdom), and in one EFTA state (Iceland), examining legislative, administrative and judicial practice.

Part VI of the study provides conclusions and recommendations on specific issues as well as more general observations and findings.

4 Method

The methodology applied for the country studies and the comparative analysis was the following.

Firstly, information per country was gathered through:

- *Review of existing literature* (both general literature on EU law on free movement and on the directive, country-specific studies, including the publication of the FIDE Conference of 2014,¹ and academic articles on recent cases of the CJEU);

¹ U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds.), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen, 2014*, Congress Publications Vol. 2

- *Review of official documents* from the Commission, the EFTA Surveillance Authority and of relevant judgments of the CJEU;
- *Interviews* with government representatives and academic experts in the different countries;
- *Review of recent national case law and legislative developments.*

Secondly, individual country reports were drawn up, following an identical structure, in order to facilitate a comparison between them on each point of interest. The same structure is followed in the comparative analysis. Considering the broad scope of issues covered by the directive, and the complexity of some of the administrative requirements included in that instrument, not all elements are covered in the analysis. The choice of the points that were ultimately included in the country studies was based on the following aims, while keeping with the requirements stipulated in the Tender Document:

- (i) To provide a *general overview* of the implementation of the directive in the selected countries;
- (ii) To *highlight some ‘salient’ issues* that came up in an individual country and which led to specific legislative, administrative and/or judicial developments which might be of interest for Norway and other countries as well, and
- (iii) To *respond to specific requests from UDI*, as communicated to the research team by UDI after oral presentations of the first results at meetings with the Reference Group held on 9 March, 16 June, and 24 September 2015, and in its written comments to the draft reports sent to UDI in June 2015.

Third, the findings of the individual country studies were compared, by considering, for each of the main elements of the directive, the main points of convergence and divergence between the practices at the legislative, administrative and judicial levels, in the selected countries.² Developments in the studied countries up to 1 November 2015 were taken into account in the country studies.

Moreover, a *case study* was carried out at the request of UDI, examining how the authorities in the studied countries would handle a specific situation (set of facts), as described by UDI. This case study concerned the rights of a third country national with an adverse immigration history, who had been expelled from the host state (state ‘X’) with a re-entry ban. The TCN citizen later married an EU citizen, and applied for a right to family reunification with his EU national spouse, who returned to her home state (the same state ‘X’) after a stay in another EEA state. The (more detailed) facts were presented to the representatives of the government agencies/Ministries responsible for migration issues, asking them to describe how such a situation would be dealt with in their respective countries. The answers provided are presented in each individual country study, and a comparison of the main elements is included in the comparative analysis (Part V).

The report aims to be up to date as of 1 November 2015.

² For further details on the methodology, and on the country visits, see the Part V, Comparative analysis (Introduction)

Part II: Directive 2004/38/EC

1 Introduction

‘Union citizenship’ is a basic concept in Directive 2004/38/EC. The concept refers to the Union citizenship introduced by the Treaty of Maastricht and now found in the TFEU. Article 20 TFEU provides that Union citizens have a right to move and reside freely in the EU. This right is, according to Article 21 TFEU, ‘subject to the limitations and conditions laid down in the treaties and by the measures adopted to give them effect’.

Prior to the introduction of Union citizenship by the Treaty of Maastricht, the treaty-based rights to move and reside were limited to economically active persons, i.e. workers (Article 45 TFEU), the self-employed (Article 49 TFEU) and service providers and recipients (Article 56 TFEU). This is the state of law mirrored in the EEA Agreement, as this agreement was concluded at a time when the negotiations over the Maastricht Treaty were still pending.

Directive 2004/38/EC codifies and reviews community instruments dealing with economically active and non-active persons separately ‘in order to simplify and strengthen the right of free movement and residence of all Union citizens’.³ Thus, Directive 2004/38/EC repeals a number of directives in force at the time of adoption. Still, case law relating to these directives is of considerable interest when interpreting Directive 2004/38/EC.

The repealed directives were all included in the EEA Agreement, and by Decision 158/2007 the EEA Joint Committee decided to include Directive 2004/38/EC in the EEA Agreement. As the concept of Union citizenship has no corollary in the EEA Agreement, the EEA Joint committee decided that the words ‘Union citizen(s)’ shall be replaced by the words ‘national(s) of EC Member States and EFTA States’.

Directive 2004/38/EC gives effect to the rights established by the treaty to move and reside freely for EU citizens and their (as defined in the directive) family members. It gives expression to the conditions and limitations on the right to freedom of movement. The directive also codifies the case law of the CJEU on the right to free movement of persons. The directive adds some new rights, but it does not limit or reduce the already-existing rights enshrined in the replaced acts. The CJEU stated in Case C-127/08 *Metock* that the directive ‘aims in particular ‘to strengthen the right of free movement and residence of all Union citizens’ so that Union citizens cannot derive less rights from that directive than from the instruments of secondary legislation which it amends or repeals’.⁴

The directive establishes the minimum level of rights that the member states are obliged to provide for persons falling within its scope (i.e. Union citizens and their family members entering or residing in their territory). Hence, the member states are not precluded from granting more favourable rights, cf. Article 37.⁵ This provision, however, does not imply that national provisions that are more

³ Directive 2004/38/EC, preamble, 3rd recital.

⁴ Case C-127/08 *Metock* [2008] ECR I-6241, para 59

⁵ See also recital 29 in the preamble

favourable must be ‘incorporated into the system introduced by the directive’.⁶ It is for each member state to decide ‘whether it will adopt such a system’ and ‘the conditions and effects of that system’.⁷

The directive also imposes on the member states an obligation to disseminate information concerning the rights and obligations subject to the directive, cf. Article 34. This could ‘in particular’ be pursued through ‘awareness-raising campaigns’ and ‘other means of communication’.

The CJEU has ruled the rights of the directive should be interpreted broadly, and limitations to them narrowly, so that the rights are not deprived of their full effectiveness.⁸ The fundamental right of freedom of movement shall be effective, and in this the treaty provisions on Union citizenship have informed the CJEU in its interpretation of the directive.

The lacking corollary in the EEA Agreement to the Union citizenship begs the question of the significance of this when Directive 2004/38/EC is to be interpreted and applied in the context of the EEA Agreement. This issue will not be addressed here, but in Part III, where the scope of the Citizens Directive as part of the EEA Agreement will be discussed.

The CJEU has also ruled that limitations and conditions laid down in the secondary legislation must be in accordance with general principles of EU law, particularly the principle of proportionality.⁹ Thus, restrictions on the right to move have to be necessary for the protection of the considerations legitimising them.

Under the directive, rights are strengthened according to the length of residence. Residence of less than three months does not confer a right to social assistance benefits, cf. Article 24(2). Residence of three months to five years provides – with some exceptions – a right to equal treatment. After five years of legal residence, a right to permanent residence is obtained, and the person concerned has a greater protection against expulsion. For persons residing in the host member state for more than ten years, the grounds of expulsion are even stricter.

The directive also distinguishes between economically active and non-economically active persons. Where a person is considered to be economically active, no further conditions are required for the right to reside. For non-economically active persons, the right to remain for more than three months depends on the Union citizen having ‘sufficient resources’ and comprehensive sickness insurance cover.

The main purpose in the following is to analyse the right to free movement and residence as it is established by Directive 2004/38/EC. Thus, the personal scope of the directive will be discussed in the next chapter followed by an analysis of the material scope of the directive. In Chapter 4, issues pertaining to restrictions on right of entry and residence will be addressed. Union citizens and their family members may, however, also claim residence rights directly on the basis of the provisions of the treaties in situations neither covered by Directive 2004/38/EC nor other secondary legislation. For the sake of completeness, these situations will be addressed in Chapters 5 and 6. Issues pertaining to abuse and fraud are discussed in Chapter 7.

⁶ Joined Cases C-424/10 and 425/10 *Zilowski and Szeja* [2011] ECR I-14035, para 49. See Section 3.3.4.2 for a further examination of this judgement

⁷ Joined Cases C-424/10 and 425/10 *Zilowski and Szeja*, para 50

⁸ Case C-127/08 *Metock*, paras 84 and 93

⁹ Case C-413/99 *Baumbast* [2002] ECR I-7091, para 91

2 Personal scope

2.1 Introduction

The directive applies to all Union citizens and their family members. ‘Beneficiaries’ of the directive are defined in Article 3(1) as being Union citizens who move to or reside in a member state other than that of which they are a national and their family members (as defined in Article 2(2)) who ‘accompany or join’ them. The requirement of a cross-border element (move to or reside in), the meaning of ‘accompany or join’ and the definition of ‘family members’ will be discussed below (respectively in Sections 2.2, 2.3.2 and 2.3.3). Lastly, the category of extended family will be presented in Section 2.3.4.

2.2 Cross-border element – ‘Move to or reside in’ – Article 3(1)

The application of the directive requires a cross-border element. The directive applies to Union citizens (the primary rights holder) who ‘move to or reside in’ a member state other than that of which they are a national, cf. Article 3(1). This implies that the directive, in general, does not apply to the state’s own nationals.¹⁰ Nor does it apply to persons who have not made use of their right to free movement.¹¹

A person who is born in and has always resided in his/her own national state does not fall within the personal scope of the directive. This has been confirmed by the CJEU in Case C-434/09 *McCarthy*. The case concerned a British national married for several years to a Jamaican national. The spouses lived in the United Kingdom, but the husband did not have a residence permit there. After married, Shirley McCarthy applied for and obtained Irish citizenship. Even though Shirley McCarthy was now (also) a citizen of a member state other than the United Kingdom, she and her husband were not considered included in the scope of the directive, since she was still a citizen of the United Kingdom. The CJEU stated that the residence to which the directive refers ‘is linked to the exercise of the freedom of movement for persons’.¹² Since McCarthy had never exercised her right to freedom of movement and had always stayed in the member state of which she was a national, she was not ‘covered by the concept of “beneficiary”’ in Article 3(1), and the directive was not applicable. This finding was not influenced by the fact that she had dual citizenship. According to the CJEU, dual citizenship (citizenship in more than one member state) does not mean that the person concerned has made use of the right to free movement.¹³

The concept of ‘move to or reside in’ does not necessarily involve actual physical movement from one member state to another. Hence, the directive is applicable to a person who is born and has always resided in a member state other than the one where he/she is a national. This was confirmed by the CJEU in the Cases C-200/02 *Chen* and C-86/12 *Alokpa*. Both cases concerned children who were born in and had always resided in the territory of a member state other than the one of which they are nationals. Case C-200/02 *Chen*¹⁴ concerns a Chinese woman who gave birth to her child in Northern Ireland. The baby was issued with an Irish passport pursuant to Irish rules. The mother and child moved to Wales shortly after. The baby, who was an Irish citizen, had never left the (British) territory in which she was born. The CJEU stated that the fact that the baby was born in the host

¹⁰ This applies with exception from the right of exit

¹¹ Case C-34/09 *Zambrano* [2011] ECR I-1177, para 39

¹² Case C-434/09 *McCarthy* [2011] ECR I-3375, para 35

¹³ Case C-434/09 *McCarthy*, para 39-41

¹⁴ The judgment is based on directive 90/364/EEC on the right of residence article 1(1) which is replaced by the directive Article 7(1) b

member state and had not made use of the right to free movement ‘cannot, for that reason alone, be assimilated to a purely internal situation’.¹⁵ The CJEU further pointed out that the right to free movement does not have a lower age limit.¹⁶

Case C-86/12 *Alokpa* concerned the right of residence in Luxembourg of two babies and their TCN mother. The babies were born in Luxembourg to a citizen of Togo. Based on French law, the children acquired French nationality when a French national recognized paternity. The children had never left Luxembourg, but, with reference to *Chen*, the CJEU stated that the directive was applicable to them and they could acquire a right to reside in Luxembourg as long as they fulfilled the material conditions laid down in the directive.¹⁷

These two cases imply that if Shirley McCarthy, cf. Case C-434/09 mentioned above, had renounced her UK citizenship, the directive would have been applicable.

Essential to the assessment of the cross-border element is the following:

- The Union citizen is residing in a member state other than the state of which he/she is a national
- No physical movement is required

2.3 Family members

2.3.1 Introduction

The right of residence for family members is not an autonomous right, but derived from and dependent upon the right of the Union citizen (the primary rights holder). If the Union citizen no longer has a right to reside in the host member state, the family member’s residence right ceases as well. In some cases, the family member may obtain an autonomous right to reside (in the event of divorce or the Union citizen’s death or departure from the host member state). See Section 3.3.5 on this issue.

For the most part, the directive does not distinguish between family members who are Union citizens themselves and ones who are TCNs with regard to derived rights of residence.

The right of residence of family members is based on considerations of efficiency. The following is stated in recital 5 of the preamble to the directive:

The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.

This aim is also repeatedly stressed by the CJEU. In *Alokpa*, the CJEU stated the following:

[t]he purpose and justification of those derived rights, in particular rights of entry and residence of family members of a Union citizen, are based on the fact that a refusal to allow them would be

¹⁵ Case C-200/02 *Chen* [2004] ECR I-9925, para 19

¹⁶ Case C-200/02 *Chen*, para 20

¹⁷ Case C-86/12 *Alokpa* ECLI:EU:C:2013:645, paras 27-30

such as to *interfere* with freedom of movement by *discouraging* that citizen from exercising his rights of entry into and residence in the host Member State.¹⁸

In *Metock*, the CJEU pointed out the following:

[e]ven before the adoption of Directive 2004/38, the Community legislature recognised the importance of ensuring the *protection of the family* life of nationals of the Member States in order to *eliminate obstacles* to the exercise of the fundamental freedoms guaranteed by the EC Treaty.¹⁹

And furthermore:

if Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed.²⁰

The directive defines ‘family member’. It further distinguishes between two groups of family members as regards the right to residence. One group is considered family members who – based on their status as ‘family members’ – automatically gain a right to reside once the Union citizen is entitled to it (defined in Article 2(2)). The other group – of more extended family – are the ones that the member states are obliged to ‘facilitate entry and residence’ for, cf. Article 3(2). Family members listed in Article 2(2) must be admitted to enter into and reside in the territory of the host member state, whilst member states have a certain degree of discretion over whether the family members defined in Article 3(2) may be admitted.

In the following, the meaning of ‘accompany or join’ will be discussed (Section 2.3.2), followed by a presentation of the two groups of family members (Section 2.3.3 and 2.3.4).

2.3.2 ‘Accompanying or joining’

The application of the directive to family members of the Union citizen requires that the family members ‘accompany or join’ the Union citizen in the host member state, cf. Article 3(1). The wording ‘accompany or join’ was repeated in the provisions on the right of residence for family members.

The directive applies provided that the family member resides in the host member state together with the Union citizen who has exercised his/her right to freedom of movement. Hence, the family member is not a beneficiary under the directive if he/she is living in the Union citizen’s home member state or another member state while the Union citizen exercises the right to freedom of movement in the host member state.²¹

The CJEU has established that it is not necessary to ‘distinguish according to whether the nationals of non-member countries entered that member state before or after the Union citizen or before or after becoming his family members’.²² This implies that the family relationship can be established after the Union citizen entered the host member state and that the family member may have resided

¹⁸ Case C-86/12 *Alopa*, para 22 (emphasis added)

¹⁹ Case C-127/08 *Metock*, para 56 (emphasis added)

²⁰ Case C-127/08 *Metock*, para 62

²¹ Case C-40/11 *Iida* ECLI:EU:C:2012:691, para 61

²² Case C-127/08 *Metock*, para 93

in the host member state before the Union citizen arrived there. The CJEU's reasoning is based on the purpose of the directive, which 'aims to facilitate' Union citizens' exercise of free movement and residence in other member states.²³ According to the CJEU, the provisions of the directive 'cannot be interpreted restrictively, and must not in any event be deprived of their effectiveness'.²⁴ In *Metock*, it was stated that refusal of the right of residence for family members in these situations could 'discourage' the Union citizen from continuing to reside in the host member state and 'encourage' him/her to leave the state 'in order to be able to lead a family life in another member state or in a non-member country'.²⁵

In *Metock*, the CJEU also established that the application of the directive does not require prior legal residence in another member state before the TCN family member enters the host member state. The case concerned four TCNs who had entered Ireland and applied for asylum. The applications were refused, but they all remained and were thus residing illegally in Ireland. All four got married to Union citizens from other member states living and working in Ireland. The TCNs applied for residence cards as family members of Union citizens who had exercised their right of free movement. On the basis of the CJEU's judgement in Case C-109/01 *Akrich*,²⁶ where it was ruled that the member states may require family members from third countries to have been lawful residents in another member state prior to arriving in the host member state in order to benefit from the derived rights of residence in Regulation 1612/68, the applications were turned down.

The CJEU openly stated in *Metock* that the conclusion in *Akrich* had to be 'reconsidered'²⁷ and found that the member states are precluded from requiring such prior legal residence.²⁸

The CJEU also stated that it would be incompatible with the objective set out in Article 3(1) c EC 'of an internal market characterised by the abolition [...] of obstacles to the free movement of persons' if the member states were allowed exclusive competence to restrict entry and residence rights on their territory for TCN family members of Union citizens using their right to free movement.²⁹ To allow such exclusive competence would have the following effect, according to the CJEU:

[T]he freedom of movement of Union citizens in a Member State whose nationality they do not possess would vary from one Member State to another, according to the provisions of national law concerning immigration, with some Member States permitting entry and residence of family members of a Union citizen and other Member States refusing them.³⁰

The CJEU stated that member states may refuse the entry or residence of family members (as defined in Article 2(2)) on the grounds of public policy, public security or public health (Article 27) and moreover that the member states 'may adopt necessary measures to refuse, terminate or withdraw' rights conferred by the directive in the case of abuse or fraud (Article 35).³¹

²³ Case C-127/08 *Metock*, para 89

²⁴ Case C-127/08 *Metock*, para 84

²⁵ Case C-127/08 *Metock*, para 89. See also para 92

²⁶ Case C-109/01 *Akrich* [2003] ECR I-9607

²⁷ Case C-127/08 *Metock*, para 58

²⁸ Case C-127/08 *Metock*, para 80

²⁹ Case C-127/08 *Metock*, para 68

³⁰ Case C-127/08 *Metock*, para 67

³¹ Case C-127/08 *Metock*, paras 74-75

A consequence of the CJEU's ruling in *Metock* is that member states may not refuse the right of residence for TCN family members based solely on the fact that the person concerned has not been a legal resident in a member state before entering into the territory of the host member state. This implies that a family member may arrive in the host member state directly from a third country and may also have been residing illegally in the host member state before the family relationship with the Union citizen was established.

The broad interpretation of the expression 'accompany or join' is based on

- The effectiveness of the fundamental freedom of movement
- The right to lead a normal family life
- The consideration of not interpreting the provisions of the directive restrictively

The ruling in *Metock* has been confirmed in Case C-551/07 *Sahin*. In *Sahin*, it was ruled that a TCN who has entered the host member state independently of the Union citizen and resides temporarily in the host member state pursuant to that state's asylum law may be regarded as having a derived right of residence pursuant to the directive even though he/she acquired the status of a family member or started to lead a family life with the Union citizen only after arriving in that state.³²

2.3.3 Family members with automatically derived rights – Article 2(2)

The 'core' family members are defined in Article 2(2) a–d and will be described in the following.

2.3.3.1 Spouse – Article 2(2) a

The EU lacks competence in substantive family law. Hence, there might be differences in national laws on marriage. Guild et al. have suggested that Article 2(2) a must be interpreted in a non-discriminatory manner, so that the concept of marriage must not be treated differently for Union citizens from other member states and their spouses than for the member state's own nationals. Same-sex marriage is an example; where a member state recognises this kind of marriage, it must acknowledge a person as a 'spouse' when the couple has contracted a same-sex marriage under the law of another member state. If the host member state does not recognise such marriages, but allows for same-sex registered partnerships (Article 2(2) b), it may be assumed that the family member should be treated as a registered partner in the host member state (see Section 2.3.3.2).³³ As regards forced marriages and polygamy, the member states are not required to recognise these as lawful marriages.

The CJEU has stated that the status of 'spouse' is not dependent on the couple living together. This was established already in relation to legislation prior to the directive, namely Regulation 1612/68 Article 10 in Case 267/83 *Diatta*. The case concerned a Senegalese national married to a French national living and working in West Berlin. After living together for approximately one year, they got separated and moved apart. Their intention was to get divorced. The CJEU interpreted the regulation with regard to its context and objectives and found that the provision on the family member's right to reside in the host state 'cannot be interpreted restrictively'.³⁴ The CJEU stated that the provision did not require that the family member must live together with the worker permanently and added:

³² Case C-551/07 *Sahin* [2008] ECR I-10453, para 33

³³ Guild, Peers and Tomkin (2014) pages 34-36

³⁴ Case 267/83 *Diatta* [1985] ECR 567, para 17

the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later date.³⁵

This finding has been repeated by the CJEU in relation to the directive. In Case C-40/11 *Iida*, the Court stated that the abovementioned interpretation was applicable to Article 2(2) a of the directive, which is similar to the provision of the regulation. The fact that the former provision of the regulation also required the family member to have ‘normal housing’ implies, according to the CJEU, that the interpretation must apply ‘*a fortiori* in connection with Article 2(2)(a), which does not impose that requirement’.³⁶ In *Iida*, the CJEU also stated that Article 2(2) a does not require ‘any conditions other than that of being a spouse’.³⁷

In Case C-244/13 *Ogieriakhi*, which concerned the question of permanent residence for a TCN family member of a Union citizen (pursuant to Article 16(2)),³⁸ the CJEU maintained its prior interpretation of the status of ‘spouse’. A Nigerian national married a French national living in Ireland. Just over two years after they were married, the couple separated and moved apart to live together with new partners. The divorce took place seven and a half years after the separation. Two years before the divorce, the husband applied for permanent residence based on his completion of five years of legal residence with a Union citizen in the host member state. The application was refused. The question raised before the CJEU was whether the term ‘resided with’ the Union citizen in Article 16(2) implies that a family member, who has lived separately and not had a ‘sharing of married life’ with the Union citizen, satisfies the conditions laid down in Article 16(2).³⁹ With reference to *Diatta* and *Iida*, the CJEU concluded that he should still be considered a ‘spouse’ at the time of application for permanent residence, since the marital relationship had not been terminated by the competent authority. The CJEU also found it ‘irrelevant’ that the spouses had lived together with other partners.⁴⁰ According to the CJEU, this interpretation was ‘consistent with the need not to construe Directive 2004/38 narrowly and not to deprive its provisions of their effectiveness’. Furthermore, a literal interpretation of the directive would be ‘contrary to the spirit’ of it, because a Union citizen’s unilateral decision of living apart could make the TCN vulnerable. It is stated in recital 15 of the preamble to the directive that family members of the Union citizen should be ‘legally safeguarded’.⁴¹

A crucial issue is thus whether the marriage has been terminated by the competent authority. According to the CJEU’s ruling in Case C-970/90 *Singh*, a marriage is still in force until it is fully dissolved by a decree absolute. Hence, a decree nisi of divorce⁴² does not terminate the status of spouse. The *Singh* case concerned the question of a Chinese citizen’s right of residence in the Union citizen’s home state upon returning to this country after living in another member state as a worker. A little over a year after the spouse returned to the home state, a decree nisi of divorce was pronounced against the Chinese citizen, but the decree absolute of divorce was not pronounced until

³⁵ Case 267/83 *Diatta*, para 20

³⁶ Case C-40/11 *Iida*, para 59

³⁷ Case C-40/11 *Iida*, para 57

³⁸ See Section 3.3.4.3

³⁹ Case C-244/13 *Ogieriakhi* ECLI:EU:C:2014:2068, para 36

⁴⁰ Case C-244/13 *Ogieriakhi*, para 37-38

⁴¹ Case C-244/13 *Ogieriakhi*, para 40

⁴² A conditional decree of divorce

one and a half years later. The CJEU ruled that the Chinese citizen was to be considered a ‘spouse’ until the pronouncement of the decree absolute.⁴³

The issuing of a residence card for residence exceeding three months is conditional upon the TCN family members falling under the scope of Article 2(2) a to present a valid passport and proof of residence in the host member state in addition to documentation attesting the existence of a family relationship, cf. Article 10(2) a, c and b. The same applies to family members who are themselves EU/EFTA nationals for the purpose of issuing a registration certificate, cf. Article 8(5) a, b and c.⁴⁴

2.3.3.2 Registered partner – Article 2(2) b

A registered partner is the ‘partner with whom the Union citizen has contracted a registered partnership’, cf. Article 2(2) b. The contract must be based on a member state’s legislation, and it is a condition that the legislation in the host member state treats registered partnerships as equivalent to marriages. Further, it is a condition that the registered partnership is in accordance with the conditions laid down in the member state’s relevant legislation.

Based on case law concerning legislation on equality in employment, Guild et al. have suggested that it is sufficient that marriage and registered partnerships are ‘comparable’ in the relevant national law, and not that they should be identical. It is further suggested that ‘the comparability should relate specifically to the issue of admission of registered partners pursuant to immigration law’.⁴⁵

Termination of the registered partnership must be defined by the legislation in each member state.⁴⁶

The issuing of a residence card for residence exceeding three months is conditional upon the family members falling under the scope of Article 2(2) b to present a valid passport and proof of residence in the host member state in addition to a document attesting to the existence of a registered partnership, cf. Article 10(2) a, c and b. The same applies to family members who are themselves EU/EFTA nationals for the purpose of issuing a registration certificate, cf. Article 8(5) a, b and c.⁴⁷

2.3.3.3 Direct descendants – Article 2(2) c

The words ‘direct descendants’ relate both to those of the Union citizen and to those of his/her spouse/registered partner. Children, grandchildren and stepchildren are typical categories. The provision distinguishes between two categories of direct descendants. One group consists of direct descendants under the age of 21. No other conditions are attached to this group of direct descendants. The other group consists of ones over the age of 21. For these direct descendants to be considered ‘family members’ according to the directive, they must be ‘dependants’. The issue of dependency will be discussed below.

2.3.3.4 Relatives in the ascending line – Article 2(2) d

The provision covers both relatives in the ascending line of the Union citizen and of his/her spouse/registered partner. This includes, inter alia, parents, grandparents and parents-in-law. The

⁴³ Case C-370/90 *Singh* [1992] ECR I-4265, para 12

⁴⁴ These formal issues have not been studied further in detail

⁴⁵ Guild, Peers and Tomkin (2014) page 41

⁴⁶ Guild, Peers and Tomkin (2014) page 42

⁴⁷ These formal issues have not been studied further in detail

same criterion of dependency as in Article 2(2) c applies. There is no distinction between the concepts in the two provisions.⁴⁸

Dependency

The CJEU has ruled that dependency within the meaning of Article 2(2) must be determined based on a ‘factual situation characterised by the fact that material support for that family member is provided by the Community national who has exercised his right of free movement or by his spouse’.⁴⁹ The host member state must take into account the family member’s ‘financial and social conditions’ and assess whether the person concerned is in a position to support him/herself. The need for material support must exist in the state where the family member resided when the application for family reunification was filed.⁵⁰ According to Guild et al., this rule ‘appears to suggest that the family member’s need for support must be judged in accordance with the standard of living in the country where he or she was resident’ before applying for family reunification.⁵¹ Furthermore, there is no need to determine the reason for the dependence or for recourse to support. The CJEU bases this interpretation on the principle of broad interpretation of the provisions on the free movement of Union citizens.⁵²

The CJEU has further established that the family member cannot be required to prove that he ‘has tried without success to find work or obtain subsistence support from the authorities of his country of origin and/or otherwise tried to support himself’.⁵³ According to the CJEU, such a requirement could make the family member’s possibility of right of residence ‘excessively difficult’ and could deprive Articles 2(2) c and 7 of the directive of their ‘proper effect’.⁵⁴ The fact that the Union citizen ‘for a significant period, pays a sum of money to that descendant, necessary in order for him to support himself in the State of origin’, is sufficient to show that a real situation of dependency exists.⁵⁵

The CJEU has also established that even if the family member is ‘deemed to be well placed’ to have the intention of obtaining employment in the host member state, this is of no relevance for the determination of dependency in relation to Article 2(2) c. The opposite solution would, according to the CJEU, prohibit the family member from taking up employment in the host member state and consequently infringe the right to take up employment or self-employment in the host member state that is entitled to family members by virtue of Article 23 of the directive once they have obtained a right of residence there.⁵⁶

The CJEU has further established that the concept of dependency is determined by whether the family member is supported by the Union citizen or his/her spouse.⁵⁷

⁴⁸ Guild, Peers and Tomkin (2014) page 44. The authors refer to a comparison of the cases C-319/85 *Lebon* [1987] ECR 2811 and Case C-1/05 *Jia* [2007] ECR I-1. The first case concerns the right of residence of relatives in the descending line over the age of 21 under Regulation 1612/86 Article 10. The latter concerns a relative in the ascending line of the Union citizen’s spouse

⁴⁹ Case C-1/05 *Jia*, para 35. See also Case C-423/12 *Reyes* ECLI:EU:C:2014:16, para 21

⁵⁰ Case C-1/05 *Jia*, para 37. See also Case C-423/12 *Reyes*, para 22

⁵¹ Guild, Peers and Tomkin (2014) page 45

⁵² Case C-423/12 *Reyes*, para 23

⁵³ Case C-423/12 *Reyes*, para 25

⁵⁴ Case C-423/12 *Reyes*, para 26

⁵⁵ Case C-423/12 *Reyes*, para 24

⁵⁶ Case C-423/12 *Reyes*, paras 29-32

⁵⁷ Cf. Case C-423/12 *Reyes*, para 21 and Case C-1/05 *Jia*, para 35

The CJEU's ruling on the concept of dependency in relation to Article 2(2) c and d can be summarised as follows:

- The need of support must be assessed at the time of applying to join the Union citizen.
- The family member's capability and intention of obtaining employment in the host member state is irrelevant.
- There is no requirement that the family member must establish that he/she has tried to be supported by other means.
- The support may be provided by both the Union citizen and his/her spouse.

The issuing of a residence card for residence exceeding three months is conditional upon the family members falling under the scope of Article 2(2) c and d presenting a valid passport and proof of residence in the host member state, in addition to documentary evidence that the conditions are met, cf. Article 10(2) a, c and d. The same applies to family members who are themselves Union citizens for the purpose of issuing a registration certificate, cf. Article 8(5) a, c and d.⁵⁸

2.3.4 *Family members for whom the host member state 'shall facilitate entry and residence' – Article 3(2)*

2.3.4.1 Introduction

Unlike the family members defined in Article 2(2) who enjoy an automatic right of entry and residence once they accompany or join a Union citizen exercising his/her right to freedom of movement, family members defined in Article 3(2) are persons that the host member state shall 'facilitate entry and residence for' in accordance with its national legislation. In these cases, the member states have a certain degree of discretion. Although the member states are not obliged to accord a right of entry and residence for the 'extended' family, the CJEU ruled in Case C-83/11 *Rahman* that the provision 'imposes an obligation on the Member States to confer a certain advantage, compared with applications for entry and residence of other nationals of third States'.⁵⁹ This statement is based on the wording of the provision 'shall facilitate'.

The content and objectives of Article 3(2) are further elaborated in recital 6 of the preamble to the directive, which aims at maintaining 'the unity of the family in a broader sense'.

When examining whether the person concerned falls under the personal scope of Article 3(2), the member states shall undertake an 'extensive examination' of the 'personal circumstances' and any denial of entry or residence must be justified, cf. Article 3(2), second subparagraph. As stated in recital 6 of the preamble, the member state must take into consideration several factors, such as the relationship between the Union citizen and the family member or 'any other circumstances, such as their financial or physical dependence'.

However, the CJEU has ruled that the member states have 'wide discretion' when deciding the selection of factors that may be taken into consideration in the assessment. Within this margin of discretion, the member state must 'ensure that its legislation contains criteria which are consistent with the normal meaning of the term "facilitate" and of the words relating to dependence used in Article 3(2), and which do not deprive that provision of its effectiveness'.⁶⁰ Furthermore, the person

⁵⁸ These formal issues have not been studied further in detail

⁵⁹ Case C-83/11 *Rahman* ECLI:EU:C:2012:519, para 21 (emphasis added)

⁶⁰ Case C-83/11 *Rahman*, para 24

concerned is entitled to a judicial review of whether the member state has acted within its limits of discretion.⁶¹

The family members defined in Article 3(2) consist of two groups, namely ‘other family members’ (see Section 2.3.4.2) and partners with whom the Union citizen has a ‘durable relationship, duly attested’ (see Section 2.3.4.3).

2.3.4.2 Other family members – Article 3(2) a

First of all, the term ‘other family members’ refers to family members not falling under the definition of Article 2(2). The nationality of the family member is irrelevant. The provision lists three categories of persons falling within its personal scope: (1) Family members who are ‘dependants’, (2) family members ‘of the household of the Union citizen’ and (3) family members with ‘serious health’ problems that ‘strictly require’ personal care by the Union citizen.

(1) Dependants

With respect to the place of residence before applying for entry or residence in the host member state, it is not a requirement that the family member has resided in the same state as the Union citizen. The wording ‘in the country from which they have come’ in Article 3(2)a relates to the country in which the family member was resident when applying to accompany or join the Union citizen.⁶²

As regards the time at which the family member must be dependent on the Union citizen, the CJEU has ruled that the ‘situation of dependence must exist, in the country from which the family member concerned comes, at the time when he applies to join the Union citizen on whom he is dependent’. It is not a requirement that the person concerned must have been dependent of the Union citizen ‘shortly before’ or ‘at the time when the [Union citizen] settled in the host State’.⁶³

The member states have wide discretion when determining the relevant factors for assessing whether the dependency is genuine and stable and not brought about with ‘the sole objective’ of obtaining right to entry and residence. The member states can impose particular requirements relating to the ‘nature and duration of dependence’. As mentioned, this discretion is to be applied in compliance with the ‘normal meaning of the words relating to the dependence referred to in Article 3(2)(a)’ and must not deprive the provision of its effectiveness.⁶⁴

The CJEU has also granted the member states discretion when it comes to imposing conditions in the national legislation on the issuance of residence cards referred to in Article 10(2). The CJEU has stated that the question of whether the issuance of a residence card can be conditional on the requirement that the dependence has endured in the host state falls outside the scope of the directive. This implies that the member states may impose continued dependency in the host member state as a condition for the issuance of a residence card to ‘other (dependent) family members’ within the meaning of Article 3(2) a.⁶⁵ Assumedly, such a condition must nevertheless be exercised in compliance with the principle of proportionality and not deprive the provision of its effectiveness.

⁶¹ Case C-83/11 *Rahman*, para 25

⁶² Case C-83/11 *Rahman*, para 31

⁶³ Case C-83/11 *Rahman*, para 33

⁶⁴ Case C-83/11 *Rahman*, paras 36-39

⁶⁵ Case C-83/11 *Rahman*, para 41-45

(2) *Members of the household*

It is suggested by Advocate General Bot in his opinion on the *Rahman* case that a distinction should be drawn between dependants and members of the household of the Union citizen. He suggests that it seems ‘self-evident’ that family members ‘of the household’ must prove that they lived with the Union citizen in the same country that he/she came from. This interpretation is based on the wording of the directive, its purpose and the case law of the CJEU.⁶⁶ The Advocate General’s view is supported by Guild et al. The authors have also suggested, based on an analogy from Article 3(1), that a limited time gap must be permissible. In some instances, there may be practical reasons why the family is not moving to the host country simultaneously.⁶⁷

(3) *Serious health grounds*

The wording ‘serious’ suggests that the threshold is high. The words ‘strictly require’ personal care from the Union citizen could indicate that it is required that the Union citizen is the only person who can take care of the family member, or that the care rendered by the Union citizen will be substantially better than the care rendered by others. However, it has been suggested by Guild et al. that it would be unreasonable to apply too strict an interpretation of the provision.⁶⁸ As far as we have been able to ascertain, there is no case law from the CJEU or the EFTA Court on this issue.

The issuance of a residence card for residence exceeding three months is conditional upon the family members falling under the scope of Article 3(2) a, presenting a valid passport and proof of residence in the host member state in addition to a document issued by the relevant authority in the country of origin or country from which they arrived certifying that they are dependants or members of the household of the Union citizen. Alternatively, they must prove the existence of serious health grounds, cf. Article 10(2) a, c and e. The same applies to family members who are themselves Union citizens for the purpose of issuing a registration certificate, cf. Article 8(5) a, c and e.

2.3.4.3 Durable relationship, duly attested – Article 3(2) b

Another category of extended family members without an automatic right to entry and residence is the ‘partner with whom the Union citizen has a durable relationship, duly attested’, cf. Article 3(2) b. This provision refers to *de facto* partnership (as opposed to registered partnership).

The partner may be required to prove that he/she is a partner and that the partnership is durable. It is stated by the European Commission (hereafter referred to as ‘the Commission’) that the requirement of durability must be assessed in light of the objectives of the directive. In this regard, the Commission refers particularly to recital 6 of the preamble, which aims at maintaining the unity of the family in a broad sense. The Commission has stated that member states may refer to a minimum amount of time as a criterion in the assessment of whether the relationship is durable. However, it is also expressed that other aspects may be relevant, such as a joint mortgage to buy a home.⁶⁹

As for the question of joint household, it is assumed by Guild et al. that ‘the nature of’ the category of family members suggests that common residence is an acceptable requirement.⁷⁰

⁶⁶ Advocate General Opinion Case C-83/11 *Rahman* ECLI:EU:C:2012:174, paras 89-90

⁶⁷ Guild, Peers and Tomkin (2014) page 78

⁶⁸ Guild, Peers and Tomkin (2014) page 78

⁶⁹ COM (2009) 313 final, page 4

⁷⁰ Guild, Peers and Tomkin (2014) page 78

The issuance of a residence card for residence exceeding three months is conditional upon the family members falling under the scope of Article 3(2) b, presenting a valid passport and proof of residence in the host member state in addition to proof of the existence of a durable relationship with the Union citizen, cf. Article 10(2) a, c and f. The same applies to family members who are themselves Union citizens for the purpose of issuing a registration certificate, cf. Article 8(5) a, c and f.

3 Material scope

3.1 Introduction

The rules analysed in Chapter 2 regulate the personal scope of the directive, i.e. the persons who may benefit from the rights laid down in the directive. In the following, the provisions regulating the material scope of the directive will be examined. This includes provisions on the right of exit and entry (Section 3.2), the right of temporary and permanent residence (Sections 3.3.2, 3.3.3 and 3.3.4) and family members' right to retain residence (Section 3.3.5). Finally, family members' right to take up employment pursuant to Article 23 is examined in Section 3.3.6. As already mentioned in the introduction in Chapter 1, Union citizens and their family members residing in other member states pursuant to the directive are entitled to equal treatment. This applies especially to social benefits. Derogations from the right to equal treatment will be examined in connection with the relevant provisions.

3.2 Right of exit and entry

3.2.1 Introduction

Chapter II of the directive regulates the right of exit (Article 4) and entry (Article 5). According to Guild et al., the right of exit and entry is necessary for the exercising of the other rights conferred by the directive.⁷¹

The right of exit and entry may be restricted according to Article 27 or 35⁷² (see Chapters 4 and 7 on these issues).

3.2.2 Right of exit – Article 4

Article 4(1) states that all Union citizens holding a valid identity card or passport shall have the right to leave the territory of a member state to travel to another member state. The same applies to TCN family members holding a valid passport. No exit visa or equivalent formality may be imposed on these persons, cf. Article 4(2).

3.2.3 Right of entry – Article 5

3.2.3.1 General considerations

Article 5 concerns the right of entry. Union citizens holding a valid identity card or passport shall be granted leave to enter the territory of other member states. The same applies to TCN family members holding a valid passport. The member states are precluded from imposing visa requirements or equivalent formalities on Union citizens, cf. Article 5(1), second subparagraph. The provision implicitly applies to entry from third countries as well.⁷³ The provision applies without prejudice to

⁷¹ Guild, Peers and Tomkin (2014) page 91

⁷² Case C-202/13 *McCarthy 'II'* ECLI:EU:C:2014:2450, para 45

⁷³ Guild, Peers and Tomkin (2014) page 98

the provisions on travel documents applicable to national border controls, e.g. national rules of border control in member states that are not members of the Schengen acquis.

3.2.3.2 Visa requirement for TCN family members

Article 5(2) states that TCN family members may only be required to have an entry visa in accordance with Regulation (EC) No 539/2001.⁷⁴ The member states that do not participate in this regulation may require a visa in accordance with their national legislation. Although TCN family members' right of entry and residence is based solely on their family ties with a Union citizen exercising the right to freedom of movement, the right of entry 'may be conditional on possession of a visa'.⁷⁵ According to Article 5(2), the member states are required to grant TCN family members 'every facility' to obtain such necessary visas as soon as possible through an accelerated procedure free of charge. This wording is identical to that of the previous EU legislation and was interpreted by the CJEU in Case C-459/99 *MRAX*.⁷⁶ In *MRAX*, the CJEU emphasised the importance of ensuring the protection of family life, which has been recognised by the EU legislature, and found it to be 'disproportionate' to send back TCN family members who were able to prove their identity and conjugal ties to a Union citizen and who did not represent a threat to public order, security or health.⁷⁷ The CJEU stated that visas must be issued 'without delay and, as far as possible, at the place of entry into national territory'. Otherwise, the provisions would not be effective.⁷⁸ According to Guild et al., it is clear from the judgement in *MRAX* that the issuance of a visa is 'obligatory' where the person concerned is considered a family member of the Union citizen pursuant to Article 2(2) of the directive. The authors also find this obligation stricter than the obligation under Article 3(2) to 'facilitate entry and residence' to the extended family⁷⁹ (see Section 2.3.4). It follows from the Commission's guidelines that member states may only require 'presentation of a valid passport and evidence of the family link'. Hence, the member states may not require additional documentation, such as proof of accommodation, sufficient resources, or an invitation letter or return ticket. The Commission also states that the member states cannot require TCN family members to apply for a long-term visa.⁸⁰

3.2.3.3 Exemption from the visa requirement

If a TCN family member of a migrant Union citizen is in possession of a valid residence card (pursuant to Article 10 of the directive), the person concerned is exempted from the visa requirement, cf. Article 5(2). With reference to recital 8 of the preamble to the directive, the CJEU has stated that this exemption 'is intended to facilitate the free movement of third-country nationals who are family members of a Union citizen'.⁸¹

The CJEU has also found that there is nothing in Article 5 to indicate that TCN family members' right to entry is limited to member states other than the member state of the Union citizen.⁸² The

⁷⁴ The Regulation lists third countries whose nationals are required to possess and who are exempted from possessing short-term entry visas, and is also part of the Schengen Agreement.

⁷⁵ Case C-459/99 *MRAX* [2002] ECR I-6591, para 59

⁷⁶ The provisions at issue in *MRAX* were Article 3(2) of Directive 68/360 and Article 3(2) of Directive 73/148

⁷⁷ Case C-459/99 *MRAX*, para 61

⁷⁸ Case C-459/99 *MRAX*, para 60

⁷⁹ Guild, Peers and Tomkin (2014) page 102

⁸⁰ COM (2009) 313 final, page 6

⁸¹ Case C-202/13 *McCarthy 'II'*, para 40

⁸² Case C-202/13 *McCarthy 'II'*, para 41

statement originates from the ruling in Case C-202/13 *McCarthy 'II'* (not to be confused with Case C-434/09 *McCarthy* concerning Article 3(1)). The *McCarthy 'II'* case concerns a Columbian national married to a citizen of the United Kingdom living in Marbella in Spain. According to the United Kingdom legislation, she was obliged to apply for a certain EEA family permit valid for six months to be able to enter into the United Kingdom, where the family had a house. Such a permit (and the renewal of it) depended on the person concerned attending in person a United Kingdom diplomatic mission abroad and filling out forms containing personal questions. Thus, McCarthy had to travel from Marbella to Madrid to renew her family permit. The CJEU concluded that a TCN family member of a migrant Union citizen holding a valid residence card in accordance with Article 10 of the directive may not be required to obtain a visa or an equivalent requirement in order to enter the Union citizen's home member state.⁸³

Furthermore, the CJEU confirmed its earlier statement that residence permits issued on the basis of EU law are declaratory rather than constitutive. However, the Court stated that member states 'in principle [are] required to recognise a residence card issued under Article 10 of Directive 2004/38, for the purposes of entry into their territory without a visa'.⁸⁴ Hence, mutual trust between member states must be exercised in regard to the recognition of residence cards as far as the right of entry is concerned. This applies with the exception of concrete and individual cases where there is an abuse of rights or fraud⁸⁵ (see Chapter 7 for further elaboration on this issue).

3.2.3.4 Prohibition of placing exit or entry stamp

Article 5(3) restricts member states from placing an entry or exit stamp in TCN family members' passports, provided that they can present a residence card pursuant to Article 10 of the directive.

3.2.3.5 Persons without necessary documentation

Article 5(4) gives TCN family members lacking the necessary travel documents or visas a right to be given a reasonable opportunity to obtain/be brought to the necessary documents, or by other means to corroborate or prove their right to residence. This is in line with the CJEU judgement in *MRAX*, where the CJEU held that it would be disproportionate and not in accordance with the right to protection of family life to turn back family members who were able to prove their right to entry and residence.⁸⁶

3.2.3.6 Reporting of presence

Pursuant to Article 5(5), the host member state may require 'the person concerned' to report his/her presence within its territory within a 'reasonable' and 'non-discriminatory' period of time. Failure to comply may result in proportionate and non-discriminatory sanctions. This requirement already existed in legislation prior to the directive, namely Article 8(2) of Directive 68/360/EEC and Article 4(2) of Directive 73/148/EEC. We understand 'the person concerned' as referring to all persons (Union citizens and their family members) who enter the host member state. This is based, inter alia, on the Commission's statement in the proposal for the directive: 'The point would be merely to inform the competent authorities that exist under the domestic law of certain Member States; this is compatible with their powers as regards measures to provide public authorities with detailed

⁸³ Case C-202/13 *McCarthy 'II'*, para 42

⁸⁴ Case C-202/13 *McCarthy 'II'*, para 62

⁸⁵ Case C-202/13 *McCarthy 'II'*, para 53

⁸⁶ Guild, Peers and Tomkin (2014) pages 106-107

knowledge of population movements in their territory'.⁸⁷ Furthermore, the CJEU established in Case 118/75 *Watson and Belman* with regard to the provisions in the earlier legislation (see above) that 'Community law has not excluded the power of Member States to adopt measures enabling the national authorities to have an exact knowledge of population movements affecting their territory'.⁸⁸ The CJEU also stated that such an obligation did not in itself constitute an infringement of the freedom of movement for persons as far as the control procedures do not restrict the freedom of movement or limit the rights to enter and reside in the territory of another member state.⁸⁹

As for the requirement of a 'reasonable' period of time, it is suggested that a time limit of one or three days would not be reasonable. It is also presumed, by analogy with the case law on Article 5(1), that breach of the reporting obligation cannot result in detention of the person with a view to deportation.⁹⁰

3.3 Right of residence

3.3.1 Introduction

The directive gives expression to the Union citizens' right of free movement, which is ascribed directly to them by virtue of Articles 20(2) a and 21 TFEU. Chapter III of the directive addresses the right of temporary residence for up to five years. Chapter IV addresses the right of permanent residence. The term 'residence' is used both for short and long stays. Nevertheless, the directive distinguishes between different categories of residents depending on the length of their stay. There are different conditions attached to the various provisions, as well as different rights derived from them. The right of residence extends to the family members of the Union citizen, but the family members' residence rights are basically derived from the Union citizen's rights and are thus indirect and secondary in character.

Article 22 of the directive determines the territorial scope of the right of temporary and permanent residence. The right shall cover the whole territory of the host member state. Territorial restrictions may only be imposed where the same restrictions apply to the host member state's own nationals. The right of residence based on the directive is nevertheless limited to the territory of the member state. This implies that the effects of a residence permit issued by a member state are 'confined to the territory of that Member state'.⁹¹

The right of residence pursuant to the provisions in Chapters III and IV may be restricted according to the provisions laid down in Articles 27 to 33 (see Chapter 4).

3.3.2 Right of residence up to three months – Article 6

The only condition for a right of residence of up to three months in the host member state is that the Union citizen holds a valid identity card or passport. No other formalities can be required, cf. Article 6(1). The same applies to the Union citizen's family members holding a valid passport, cf. Article 6(2). Hence, it is neither a requirement that the Union citizen is economically active nor a person of independent means (see Article 7(1) b). Nevertheless, the provision needs to be assessed in

⁸⁷ COM (2001) 257 final, Explanatory Memorandum, Article-by-Article Commentary, Article 6, paragraph 5

⁸⁸ Case 118/75 *Watson and Belman* [1976] ECR 1185, para 17

⁸⁹ Case 118/75 *Watson and Belman*, para 18

⁹⁰ Guild, Peers and Tomkin (2014) page 107

⁹¹ Case C-291/05 *Eind* [2007] ECR I-1719, para 25. The case concerned Regulation 1612/68 Article 10 which is now replaced by the Citizens Directive

conjunction with Article 14(1), which states that retention of the right of residence of up to three months is dependent upon the person concerned not becoming ‘an unreasonable burden on the social assistance system of the host Member State’. Furthermore, Article 24(2) allows for member states to limit the entitlement to social assistance during the first three months. Article 24(2) is thus a derogation from the principle of equal treatment pursuant to Article 24(1). These provisions seen as a whole give expression to the requirement for Union citizens and their family members to be self-supported. According to Advocate General Wathelet, the derogation in Article 24(2) is consistent with the objective of ‘maintaining the financial equilibrium of the social security system of the Member States’. He further states:

Since the Member States cannot require Union citizens to have sufficient means of subsistence and personal medical cover for a three-month stay, it is legitimate not to require Member States to be responsible for them during that period.

Otherwise, granting entitlement to social assistance to Union citizens who are not required to have sufficient means of subsistence could result in relocation en masse liable to create an unreasonable burden on national social security systems.⁹²

The provision in Article 14(1) that Union citizens and family members for the first three months may not become an ‘unreasonable burden’ on the host state’s social assistance system contrasts at first sight with the provision in Article 7 that the Union citizen and family members have sufficient means for themselves ‘not to become a burden’ on the social assistance system of the host member state. However, the preamble to the directive quite clearly suggests that ‘a burden’ in Article 7 shall be read as meaning an *unreasonable* burden. The meaning of ‘unreasonable burden’ will therefore be examined in Section 3.3.3.7 in connection with Article 7(1) b.

The directive does not include rules on registration within the first three months of residence. Article 8 allows the host member state to require registration by the migrant Union citizen with the relevant authorities for periods longer than three months, cf. Article 8(1). The host member state shall issue a residence card for the family member where the planned period of residence exceeds three months, cf. Article 9(1). The deadline for submitting the application for such a card and for registration pursuant to Article 8 may not be less than three months from the date of arrival, cf. Articles 9(2) and 8(2). Hence, there is no requirement for registration (Union citizens) or a residence card (family members) for residence of less than three months. Nevertheless, migrant Union citizens and their family members may, according to the CJEU, be required to prove their identity and nationality.⁹³ Any such requirements and possible sanctions must apply equally to nationals of the member state.⁹⁴

The CJEU has further stated that the host member state may not refuse to recognise the person’s right of residence based on the grounds that the person concerned is not able to present an identity card or passport as long as he/she can provide ‘unequivocal proof’ of their nationality.⁹⁵

⁹² Advocate General Opinion Case C-299/14 *García-Nieto and others* ECLI:EU:C:2015:366, paras 70-71. The case is pending as per 9 November 2015.

⁹³ Case C-215/03 *Oulane* [2005] ECR I-1215, para 21. The case concerned a Union citizen, but according to Guild et al., the ruling applies equally to TCN family members, Guild, Peers and Tomkin (2014) page 122

⁹⁴ Case C-215/03 *Oulane*, paras 32-35 and 38

⁹⁵ Case C-215/03 *Oulane*, para 25

3.3.3 *Right of residence for more than three months – Article 7*

3.3.3.1 Introduction

The conditions for right of residence of between three months and five years laid down in Article 7 apply to the Union citizen. Family members who accompany or join him/her have a right to residence as long as the Union citizen (the primary rights holder) meets the conditions, cf. Articles 7(1) d and 7(2).

The right of residence pursuant to Article 7 depends on the status of the Union citizen. The article distinguishes between three categories: (1) Economically active, (2) economically inactive but self-supporting and (3) students. The scope of family members with a derived right to residence varies according to the Union citizen's status (see article 7(4) on the family members of students).

3.3.3.2 Worker – Article 7(1) a

The freedom of movement for workers is enshrined in Article 45 TFEU. Article 7(1) a gives effect to this treaty provision. Once the Union citizen has status as a worker, no other conditions for the right of residence exceeding three months are required. 'Worker' is to be defined within the EU law meaning of the concept. There is no definition of 'worker' in the treaties, but this has been developed in the case law of the CJEU. The CJEU has stated that the concept must be interpreted broadly.⁹⁶ A Union citizen is defined as a worker when the person concerned is in a relationship of subordination (under the control of their employer). According to the CJEU, the essential feature of such a relationship is that 'for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.⁹⁷ The person concerned must perform 'effective and genuine activities', meaning that the economic activity may not be on 'such a small scale as to be purely marginal and ancillary'.⁹⁸ The CJEU has found that part-time workers may be considered 'workers' and included in the scope of EU legislation on workers. In Case 53/81 *Levin*, the CJEU found that a part-time worker earning less than a subsistence wage was considered a worker.⁹⁹ The same has been considered to apply for a part-time worker who supplemented his income with social assistance from the member state in which he resided.¹⁰⁰

Workers (and former workers) and their family members – irrespective of nationality – also benefit from the rights conferred to them by Regulation no. 492/2011 (formally Regulation 1612/68). The regulation includes the extensive right to equal treatment, which is especially relevant for the Union citizen's children (see Section 3.3.5.3).

3.3.3.3 Self-employed – Article 7(1) a

As for workers, no other conditions need to be met for self-employed Union citizens to have a right to reside in the host member state for a period exceeding three months. The right to freedom of movement for self-employed persons is enshrined in Article 49 TFEU on the freedom of establishment. The treaty does not define 'self-employed', but the CJEU has stated that the concept of establishment within the meaning of the treaty is to be interpreted broadly. The Court has also stated that EU nationals are allowed to participate on a 'stable and continuous basis' in the host

⁹⁶ Case 66/85 *Lawrie-Blum* [1986] ECR 2121, para 16

⁹⁷ Case 66/85 *Lawrie-Blum*, para 17

⁹⁸ Case C-357/89 *Raulin* [1992] ECR I-1027, para 10

⁹⁹ Case 53/81 *Levin* [1982] ECR 1035, paras 17-18

¹⁰⁰ Case 139/85 *Kempf* [1986] ECR 1741, para 14

member state's economic life and to profit therefrom.¹⁰¹ In contrast, the provision on services is aimed at activities on a temporary basis.¹⁰² The CJEU has also stated in Case C-268/99 *Jany* that 'any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity'.¹⁰³ Essential to the determination of self-employment is whether the person chooses the activity, working conditions and conditions for remuneration, bears the risk and responsibility for him/herself and is paid directly and in full.¹⁰⁴ *Jany* concerned Czech and Polish women working as prostitutes in the Netherlands. According to Barnard, *Jany* suggests that a wide range of economic activities may fall under the scope of Article 49 TFEU and defines the person concerned as 'self-employed'.¹⁰⁵

3.3.3.4 Former workers and the former self-employed – Article 7(3)

Workers and self-employed persons who cease their occupational activity will maintain the status of worker or self-employed under several circumstances. Thus, the person concerned will continue to benefit from the rights conferred upon economically active Union citizens.

Retention of the status of worker or self-employed is regulated in the directive Article 7(3) a–d. The person concerned maintains his/her status if he/she becomes temporarily unable to work because of an illness or accident (letter a), or if he/she becomes involuntarily unemployed after one year and registers as a jobseeker (letter b). If a person who has worked for less than a year becomes involuntarily unemployed and registers as a jobseeker, he/she may maintain their status for no less than six months (letter c). Their status may also be retained if the person concerned embarks on vocational training (if the unemployment is not involuntary, the training must be related to previous employment) (letter d).

According to the CJEU, Article 7(3) does not list exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may continue to benefit from that status. The concept of workers must be interpreted broadly. The directive cannot, according to the CJEU, 'limit the scope of the concept of worker within the meaning of the FEU Treaty'.¹⁰⁶ This was stated in Case C-507/12 *Saint Prix*. The case concerned a French national who had resided in the United Kingdom as a worker for approximately one year before she entered an education course. She became pregnant during the course and withdrew from it four months before the expected date of confinement. She started working again. Due to the physical constraints of the late stages of pregnancy, she gave up that work 11 weeks before her due date. After looking for a more suitable job without success, she applied for income support. The application was rejected. Ms Saint Prix started working again three months after giving birth to her child. The CJEU stated that a 'Union citizen would be deterred from exercising her right to freedom of movement if, in the event that she was pregnant in the host State and gave up work as a result, if only for a short period, she risked losing her status as a worker in that State'.¹⁰⁷ The CJEU stressed that Ms Saint Prix did not cease to belong to the employment market of the host member state during her period of absence from it. This is, according to the CJEU, 'provided she returns to work or finds another job within a *reasonable* period after confinement'.¹⁰⁸

¹⁰¹ Case 55/94 *Gebhard* [1995] ECR I-4165, para 25

¹⁰² Case 55/94 *Gebhard*, para 26

¹⁰³ Case C-268/99 *Jany* [2001] ECR I-8615, para 34

¹⁰⁴ Case C-268/99 *Jany*, para 37

¹⁰⁵ Barnard (2013) page 305

¹⁰⁶ Case C-507/12 *Saint Prix*, ECLI:EU:C:2014:2007, para 32

¹⁰⁷ Case C-507/12 *Saint Prix*, para 44

¹⁰⁸ Case C-507/12 *Saint Prix*, para 41 (emphasis added)

When determining what constitutes a ‘reasonable period’, the member state must take into account ‘all the specific circumstances of the case’ and the ‘applicable national rules on the duration of maternity leave’.¹⁰⁹ In the ruling, the CJEU also placed emphasis on the provisions of the directive regulating the rules on legal absences from the host member state with regard to the continuous period of five years of residence for the purpose of a right to permanent residence (see Section 3.3.4.4 concerning the right of permanent residence). Pursuant to Article 16(3), an absence of a maximum of 12 consecutive months because of pregnancy and childbirth does not affect the continuity of five years. Hence, according to the CJEU, giving up work temporarily because of the physical constraints of the late stage of pregnancy ‘cannot, a fortiori, result in that woman losing her status as a worker’.¹¹⁰

Both workers and the self-employed (and the persons who retain this status according to Article 7(3)) enjoy greater protection against expulsion measures, cf. Article 14(4) a. Without prejudice to Chapter VI of the directive (Articles 27–33), persons holding the status of worker or self-employed may not be expelled on the grounds listed in Article 14(1) and (2); hence, the provisions regulate retention of the right of residence (see Section 3.3.3.12).

3.3.3.5 Service providers

In addition to the rights enshrined in Article 21(1) TFEU, service providers are granted a right to freedom of movement pursuant to Article 56 TFEU. Services are defined in Article 57 TFEU. The provisions also state that ‘services’ are to be considered within the meaning of the Treaty. Hence, as with workers and the self-employed, ‘services’ have an independent meaning within EU law. Article 57 TFEU states that services are ‘normally provided for remuneration’. This implies that services without a direct economic link are excluded from the scope of the Treaty.¹¹¹ However, the CJEU has stated that there is no need ‘for the person providing the service to be seeking to make profit’.¹¹² Services within the meaning of EU law are, opposite to establishment, of a more temporary character. However, there is a ‘fine line’ between the two concepts.¹¹³

Service providers’ right of residence for more than three months is not explicitly covered by Directive 2004/38/EC. Service providers’ right of entry and residence were originally regulated in Directive 73/148/EEC.¹¹⁴ This directive was repealed by Directive 2004/38/EC. It is therefore somewhat unclear which of the rights of the directive may be enjoyed by service providers. According to Barnard, this is not significant for most purposes, because the CJEU has always ‘placed much reliance on the Treaty provisions – and not secondary legislation – to give rights to service providers’.¹¹⁵

¹⁰⁹ Case C-507/12 *Saint Prix*, para 42

¹¹⁰ Case C-507/12 *Saint Prix*, para 46

¹¹¹ Barnard (2013) page 371

¹¹² Case C-281/06 *Jundt* [2007] ECR I-12231, para 33

¹¹³ Barnard (2013) page 366

¹¹⁴ Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services

¹¹⁵ Barnard (2013) page 378. She points especially to the Cases C-355/98 *Commission v. Belgium* (private security firms) [2000] ECR I-1221 and C-215/03 *Oulane*

Originally, it was suggested to include recipients of services in Article 7(1) a.¹¹⁶ The proposition was not retained in the common position. The Council did not consider that recipients of services could be ‘likened to employed or self-employed workers’.¹¹⁷

The preparatory work of the directive is silent about service providers. Therefore, it is still unclear whether service providers are to be defined within the scope of Article 7(1) a (economically active) or Article 7(1) b (economically inactive). If the latter provision applies, the service provider may be obliged to prove that he/she has sufficient resources and comprehensive sickness insurance cover (see Section 3.3.3.7).

3.3.3.6 Jobseekers

First-time jobseekers enjoy enforced protection by virtue of Article 14(4) b. The Union citizen and his/her family members may not be expelled provided that the Union citizen can prove that he/she is continuing to seek employment and has a genuine chance of being engaged. Jobseekers are, however, not entitled to social assistance in the host member state, cf. Article 24(2). Hence, jobseekers are excluded from the principle of equal treatment in this regard.

Case C-67/14 *Alimanovic* concerned a Swedish national and her three children living in Germany. The mother and the eldest child had been working for approximately 11 months before they became unemployed. Pursuant to Article 7(3) c of the directive, they kept their status as ‘workers’ for six months (see Section 3.3.3.4); after that, their right of residence was based on Article 14(4) b, and the question raised was whether they could be excluded from entitlement to social assistance benefits on the basis of Article 24(2) of the directive, although such benefits are granted to the nationals of the member state concerned. The CJEU answered this in the affirmative based on the express wording of the derogation in Article 24(2).¹¹⁸

3.3.3.7 Economically inactive – Article 7(1) b

If the Union citizen is non-economically active, the right of residence exceeding three months is conditional upon the Union citizen having ‘sufficient resources’ for him/herself and the family members not to ‘become a burden’ on the host member state’s social assistance system. In addition to sufficient resources, the host member state may require the Union citizen to have comprehensive sickness insurance cover in the host member state.

It is evident from the provision in Article 7(1) b that all Union citizens have a basic right to reside in other member states even if they are not pursuing an economic activity. The provision therefore gives effect to Article 21(1) TFEU. However, the requirement of sufficient resources not to become a burden on the social assistance system also takes into account the welfare system of the host member state and limits the right of residence to persons who will not become a burden on this system. This intention is also expressed in recital 10 in the preamble to the directive, which aims at preventing such persons becoming an ‘unreasonable burden’ on the social assistance system of the host member state. The CJEU has stated that the condition is ‘based on the idea that the exercise of the right of

¹¹⁶ COM (2003) 199 final, page 5

¹¹⁷ SEC (2003) 1293 final (Communication from the Commission to the European Parliament pursuant to the second subparagraph of Article 251 (2) of the EC Treaty concerning the common position of the Council on the adoption of a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.), Section 3.2.2.2 ‘Articles’

¹¹⁸ Case C-67/14 *Alimanovic* ECLI:EU:C:2015:597. See also the opinion of the Advocate General in Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2015:666 on the UK residence test, commented upon in the section on the UK. For an analysis of the so-called reversed trend of the CJEU in cases regarding national limitations on the entitlement to social assistance, see CMLRev 52 2015, i.a. N.N. Shuibhne, Limits Rising, duties ascending: The changing legal shape of Union citizenship, page 889-938

residence for citizens of the Union can be subordinated to the legitimate interests of the Member States [inter alia] the protection of their public finances'.¹¹⁹

The CJEU has established that it is not necessary for a Union citizen to prove that he/she personally has sufficient resources. The CJEU has stated that to 'have' sufficient resources must be interpreted as meaning that such resources are 'available to the Union citizen'. There is no requirement in the provision of the origin of the resources, and they may be provided by, inter alia, a TCN carer,¹²⁰ a TCN spouse¹²¹ or another third party.¹²² The requirement of sufficient resources is to be interpreted narrowly, as it constitutes a restriction on a fundamental freedom.¹²³ The CJEU has also stressed that the member state's margin of manoeuvre must not be used in a manner that would 'compromise attainment of the objective' and the 'practical effectiveness' of the directive. Such an attainment is, inter alia, to 'facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States'.¹²⁴

Guild et al. have raised the question of whether the condition of sufficient resources can be fulfilled by the Union citizen's TCN family members' future income in the host member state. TCN family members with a right of residence are permitted to take up employment by virtue of Article 23 of the directive. This right is nevertheless dependent upon the family member's right of residence, which derives from the Union citizen's right. A strict interpretation of the directive would, according to Guild et al., lead to a negative answer to the question, since the TCN family member would only derive a right to reside and work (and hence be able to provide sufficient resources for the Union citizen) after the Union citizen has established his/her right of residence. Nevertheless, the authors submit that a teleological interpretation of the directive would lead to an answer in the affirmative. They state:

[t]he wording of the Directive reflects a concern to limit claims upon Member States' social assistance budgets, rather than a concern to limit access by third-country national family members to the labour market; and such labour market access will in fact reduce the number of claims for social assistance.¹²⁵

They also draw attention to Case C-34/09 *Zambrano*, where the CJEU confirmed that the TCN father of two minor Union citizens must be permitted to reside and work in the host member state to be able to ensure that the children could continue residing within the territory of a member state. This could, according to Guild et al., be applied by analogy to the question of sufficient resources in relation to the directive.¹²⁶ However, the question has not yet been determined by the CJEU.¹²⁷

¹¹⁹ Case C-140/12 *Brey* ECLI:EU:C:2013:565, para 55

¹²⁰ Case C-86/12 *Aloka*, para 27

¹²¹ Case C-218/14 *Singh and others* ECLI:EU: C:2015:476, paras 74-77

¹²² Case C-408/03 *Commission v Belgium* [2006] ECR I-2647, paras 38-51

¹²³ See inter alia Cases C-200/02 *Chen*, paras 30-31 and C-140/12 *Brey*, para 70

¹²⁴ Case C-140/12 *Brey*, para 71

¹²⁵ Guild, Peers and Tomkin (2014) page 131

¹²⁶ Guild, Peers and Tomkin (2014) page 131

¹²⁷ See also Advocate General Opinion in Case 86/12 *Aloka* ECLI:EU:C:2013:197 concerning the of whether potential and future income of a TCN parent could satisfy the condition of sufficient resources. According to the Advocate General, this question was debated for quite a while during the hearing in the case. The Advocate General's view was that the condition of sufficient resources could be satisfied by a definite prospect of future resources stemming, inter alia, from a job offer, cf. paras 24-28. The CJEU, however, did not explicitly address the issue, but handed over to the national court to determine whether the condition of sufficient resources was met in the concrete case. See Case 86/12 *Aloka*, para 30

Economically inactive citizens are entitled to equal treatment, including access to social benefits by virtue of Article 24(1). Nevertheless, it is clear from the CJEU's ruling in Case C-333/13 *Dano* that the equal treatment provision is not applicable and that the Union citizen does not have a right to social benefits in the host member state once the Union citizen does not comply with the conditions of the directive.¹²⁸ The case concerned a Romanian national living in Germany with her son. Ms Dano was not economically active there. After residing in Germany for a little less than a year, she applied for a grant of benefits by way of basic provision for jobseekers. The application was refused.

The CJEU stated in *Dano*:

[t]o accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run *counter to an objective of the directive*, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.¹²⁹

It was further stated that such potential unequal treatment between Union citizens from other member states and the host members state's own nationals with regard to the grant of social benefits is an 'inevitable consequence' of the directive, which is founded on the link between the requirement to have sufficient resources and the concern not to become a burden on the host member state's social assistance system.¹³⁰ The member states may 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.¹³¹

Hence, the right to equal treatment as regards social benefits is limited to economically active citizens or economically inactive citizens with sufficient resources. Therefore, it is clear that the requirement of sufficient resources may be denied as being fulfilled through social benefits from the host member state.

As regards the expression 'social assistance system', the CJEU has stated in Case C-140/12 *Brey* that this concept cannot be confined to those social assistance benefits that fall outside the scope of Regulation No. 883/2004 pursuant to Article 3(5) a of the regulation.¹³² According to the CJEU, the concept of 'social assistance system' is to be defined 'by reference to the objective pursued by' Article 7(1) b of the directive and not by reference to 'formal criteria'.¹³³

The term is to be interpreted as:

covering 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

¹²⁸ Case C-333/13 *Dano* ECLI:EU:C:2014:2358, para 69

¹²⁹ Case C-333/13 *Dano*, para 74 (emphasis added)

¹³⁰ Case C-333/13 *Dano*, para 77

¹³¹ Case C-333/13 *Dano*, para 78

¹³² Case C-140/12 *Brey*, para 58

¹³³ Case C-140/12 *Brey*, para 60

could have consequences for the overall level of assistance which may be granted by that State.¹³⁴

Brey concerned a German citizen who had moved to Austria together with his German wife. He received an invalidity pension from Germany in addition to a care allowance. The couple had no other income or assets. The spouses were not able to cover all their expenses with these resources and applied for a compensatory supplement from the Austrian ‘Pensionsversicherungsanstalt’. The application was refused based on the fact that Mr Brey did not have sufficient resources to establish his lawful residence in Austria. The compensatory supplement was considered as constituting a ‘special non-contributory benefit’ within the meaning of Article 4(2) a of Regulation No. 883/2004. The question before the CJEU was whether Mr Brey was entitled to this compensatory supplement, or whether he needed to have sufficient resources not to apply for such a supplement.

The CJEU stated that even though the compensatory supplement was considered as falling under the ‘social assistance system’ of the host member state (Austria), the competent national authorities have to carry out ‘an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned’. Hence, they cannot conclude solely from the fact that the supplement is part of the social assistance system, which aims at ensuring a minimum level of subsistence where the pension is not sufficient, that the person applying for it will become a burden on the social assistance system.¹³⁵ This is consistent with the provision in Article 8(4) of the directive, which states that member states ‘may not lay down a fixed amount which they regard as "sufficient resources"’. They must take into account the ‘personal situation’ of the person concerned and the amount may not be higher than the threshold of eligibility for social assistance, or minimum social security pension, when the former is not applicable. In *Brey*, the CJEU also made reference to recital 16 of the directive, which states that before the host member state takes measures for expulsion, they should examine whether the person’s difficulties are temporary and take into account the duration of residence, personal circumstances and the amount of aid granted in order to determine if the person concerned has become an unreasonable burden on the social assistance system. This is also stressed by the Commission in their guidelines, where the criteria for the assessment is filled out in detail.¹³⁶

It has also been underlined by the CJEU that the directive ‘recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States’, particularly if the difficulties of the person concerned are temporary.¹³⁷

In the assessment of whether the economically inactive person concerned can be considered entitled to social assistance in the host member state, the member state should take the following into account:

the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it

¹³⁴ Case C-140/12 *Brey*, para 61

¹³⁵ Case C-140/12 *Brey*, para 64

¹³⁶ COM (2009) 313 final, pages 8-9

¹³⁷ Case C-140/12 *Brey*, para 72 and Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 44

may be relevant, [...] to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State.¹³⁸

It is also clear from Article 14(3) of the directive that recourse to the social assistance system may not automatically lead to an expulsion measure.

The requirement of comprehensive sickness insurance is also to be interpreted in accordance with the general principles of EU law, particularly the principle of proportionality. This is stated in Case C-413/99 *Baumbast*. Mr Baumbast and his family had lived in the host member state (the United Kingdom) for several years. He had previously lawfully worked and been lawfully self-employed there. He was now employed in a German company and worked outside the territory of the Union. It was unchallenged that the sufficient resources condition was met, and that he and his family were not a burden on the social assistance system of the United Kingdom. The family had medical insurance in Germany, but this did not fully cover them in the United Kingdom. The CJEU found that it was a 'disproportionate interference' with the exercise of Union citizens' right of residence conferred by Article 18(1) EC (now Article 21(1) TFEU) to refuse a German national and his family living in the United Kingdom the right of residence there based on the fact that they did not have sickness insurance covering emergency treatment given in that state.¹³⁹

Service recipients

It is evident from the preparatory work of the directive that service recipients (and their family members) fall under the scope of Article 7(1) b (see Section 3.3.3.5). However, the service received is often of a temporary character not exceeding three months.

Tourists

If a tourist (and his/her family members) wants to stay in the host member state for longer than three months, it is clear that they must be able to fulfil the conditions laid down in Article 7(1) b, second indent.

Pensioners

Retired persons who move their residence to another member state have a right to reside in the host member state pursuant to Article 7(1) b. This is conditional upon the person concerned having enough resources (through their pension or other means) to fulfil the condition of sufficient resources. The right to residence for pensioners was enshrined in Article 1(1) of Directive 90/365/EEC,¹⁴⁰ which has been replaced by Article 7(1) b.¹⁴¹

Registration certificate

To be issued with a registration certificate pursuant to Article 8, the non-economically active Union citizen must present valid personal identification and provide proof that he/she satisfies the conditions laid down in Article 7(1) b, cf. Article 8(3).

¹³⁸ Case C-140/12 *Brey*, para 78

¹³⁹ Case C-413/99 *Baumbast* [2002] ECR I-7091, para 93

¹⁴⁰ Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity

¹⁴¹ Case E-26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254, para 78

3.3.3.8 Students – Article 7(1) c

Union citizens enrolled at a private or public establishment, accredited or financed by the host member state, have a right of residence in this state for more than three months, cf. Article 7(1) c.¹⁴² One condition is that the person's principal purpose is to follow a course of study, including vocational training. In addition, the right of residence is conditional upon the student having comprehensive sickness insurance cover in the host member state and being able to assure that he/she has sufficient resources for him/herself and the family not to become a burden on the social assistance system of the host member state. This can be proven by means of declaration or equivalent means as they may choose. Evidently, the requirement of proving sufficient resources is less stringent than for persons covered by Article 7(1) b. In relation to prior legislation on the right of residence for students, the CJEU found that national measures requiring specific documentation for attesting to resources of a specific amount were incompatible with Directive 93/96/EEC.¹⁴³ This is now regulated in Article 8(3), third indent, which states that member states may not require the declaration of sufficient means to refer to any specific amount of resources. The different requirements of proof in relation to Article 7(1) b (originally Directive 90/364/EEC and 90/365/EEC) and Article 7(1) c (originally Directive 93/96/EEC) are based on the consideration that a student's stay in the host member state will be temporary and limited to the duration of their studies. Therefore, the risk of a student becoming a burden on the social assistance system is less than in the cases of persons of self-sufficient means.¹⁴⁴

The host member state is not obliged to grant students without a right to permanent residence maintenance aid for studies consisting of student loans or grants, cf. Article 24(2). This derogation from the right to equal treatment does not apply to workers, self-employed persons, persons who have retained such status and members of their family. The CJEU has in Case C-46/12 *LN* confirmed that the status of worker and the status of student are not mutually exclusive. *LN* concerned a Union citizen who had moved to Denmark to study at Copenhagen Business School (CBS). He entered Denmark as an employee before the summer and was employed full time in a company during the summer. When he was enrolled in CBS, he became a full-time student. He quit his full-time job and started working part time. His application for education assistance was rejected. The Danish authority found that he could no longer be classified as a 'worker', since his primary purpose of residence was to study. Consequently, according to the Danish authorities, he fell within the scope of derogation from the right to equal treatment in Article 24(2). The CJEU stated that Article 24(2) as a derogation must be interpreted narrowly and in accordance with the treaty provisions relating to Union citizenship and the free movement of workers.¹⁴⁵ The CJEU stated that Article 24(2) cannot be interpreted as meaning that fulfilling the conditions of being a student automatically precludes the person concerned from having the status of 'worker' within the meaning of Article 45 TFEU.¹⁴⁶ A student may therefore take up genuine and effective employment and become a worker in addition to being a student and consequently be entitled to equal treatment, including the right to student maintenance aid.¹⁴⁷

¹⁴² The provision reproduces Directive 93/96/EEC on the right of residence for students

¹⁴³ Case C-424/98 *Commission v Italy* [2000] ECR I-4001, para 48

¹⁴⁴ Case C-424/98 *Commission v Italy*, paras 45 and 40

¹⁴⁵ Case C-46/12 *LN* ECLI:EU:C:2013:97, para 33

¹⁴⁶ Case C-46/12 *LN*, para 36

¹⁴⁷ Guild, Peers and Tomkin (2014) page 174 and Case C-46/12 *LN*, para 51

3.3.3.9 Registration

Union citizens residing in the host member state for more than three months pursuant to Article 7(1) may be required to register with the relevant authorities, cf. Article 8(1). The deadline for registration must not be less than three months from the date of arrival. Once the Union citizen has registered, the host member state shall issue to him/her a registration certificate immediately. It shall be issued free of charge or for a charge not exceeding the cost of similar documents issued to nationals, cf. Article 25(2). Failure to comply with the registration requirement may lead to liable and non-discriminatory sanctions cf. Article 8(2).

In addition to valid identification or a passport, the respective Union citizen may be required to provide proof of his/her status as a worker, self-employed person, person of sufficient means or student, cf. Article 8(3). The provision lists the only documents/means of proof that may be required. This implies that the list is exhaustive. For workers, this includes the presentation of a confirmation from the employer or a certificate of employment. Self-employed persons may be required to prove their working status. Self-sufficient persons may be asked to provide proof that they satisfy the conditions laid down in Article 7(1) b. For students, they may only be required to prove their enrolment at an accredited establishment and comprehensive sickness insurance cover and provide a declaration or equivalent means for proving sufficient resources.

The list of documents mentioned in Article 8(5) that may be required of family members that are themselves Union citizens for the purpose of the issuance of a registration certificate is exhaustive. In addition to a valid identity card or passport and, where appropriate, the registration certificate of the Union citizen whom they are accompanying or joining, the family members must basically prove that the conditions in Article 2(2) or 3(2) are met (for a detailed description, see Sections 2.3.3 and 2.3.4).

Possession of a registration certificate may under no circumstances be made a precondition for the exercise of a right or completion of an administrative formality, cf. Article 25(1). The registration certificate is merely a confirmation of rights conferred directly by Union law and does not create rights.¹⁴⁸

3.3.3.10 Family members' right of temporary residence

Family members who accompany or join the Union citizen in the host member state are entitled to a derived right of residence exceeding three months if the Union citizen meets the conditions in Articles 7(1) a-c or 7(3). This applies regardless of the family member's nationality. Article 7(1) d regulates the right of residence for family members who are Union citizens. TCN family member's right of residence is enshrined in Article 7(2). All family members (defined in Article 2(2)) of workers, self-employed persons and persons of self-sufficient means are entitled to a right of residence. The scope of the family members of students is more limited. According to Article 7(4), only spouses, registered partners and dependent children shall have a derived right of residence. Other family members, including dependent direct relatives (Article 2(2) d), must rely on Article 3(2). Hence, the host member state is obliged to 'facilitate entry and residence' for these categories of the family members of students.

It has also been established by the EFTA Court in Case E-4/11 *Clauder* that the family members of Union citizens with a right to permanent residence pursuant to Article 16 of the directive have a right to temporary residence in the host member state. The case is analysed extensively in the EEA

¹⁴⁸ See inter alia Case C-459/99 *MRAX*, para 74

specific section of the report. Suffice it here to refer to the case in substantive scope. According to Article 16, which will be examined in Section 3.3.4 below, a Union citizen has a right to permanent residence in the host state after a period of five continuous years of residence there. Once acquired, the right of permanent residence is not conditional (i.e. it is not required that the person concerned is a worker or self-employed, a person of sufficient means or a student). He/she is also entitled to social benefits etc. However, the provision does not explicitly provide for an unconditional right to family reunification. The question raised before the EFTA Court in *Clauder* was whether Article 16 could be interpreted as conferring a derived right of residence to a family member of a Union citizen and whether such a right is dependent on the Union citizen having sufficient resources. Mr Clauder, a German national, was a resident in Liechtenstein for several years and had a permanent residence permit as an economically inactive person there. He was a pensioner in receipt of old-age pensions from Germany and Liechtenstein. He got remarried to a German national who applied for family reunification. The application was rejected based on the ground that Mr Clauder could not prove that he had sufficient resources. The EFTA Court found it ‘apparent that although not explicitly stated in the wording of the provision’, Article 16(1) did confer a derived right of residence in the host state.¹⁴⁹ This finding was based on a number of arguments; in particular, the ‘scheme and purpose’ of the directive was highlighted. The Court stated:

[T]he right to permanent residence, which represents the *highest level of integration* under the Directive, cannot be read as not including the right to live with one’s family, or be limited such as to confer on family members a right of residence derived from a different, lower status. In that regard, it must be noted that the right to permanent residence under Article 16 *does not* confer an *autonomous right of permanent residence* on family members, but a right to reside with the beneficiary of a right of permanent residence as a member of his or her family.¹⁵⁰

Furthermore, the EFTA Court found that there is a ‘discontinuation of a general requirement’ of sufficient resources in the directive. Since Article 16 is not subject to the conditions in Chapter III of the directive (right of (temporary) residence), it must, according to the EFTA Court ‘be presumed *prima facie* that also the derived right is not subject to a condition to have sufficient resources’.¹⁵¹ The EFTA Court also emphasised that the directive must be interpreted in such a way to ensure the efficiency of the provisions and stressed the importance of a Union citizen’s right to family life. The EFTA Court stated:

If an EEA national who has a permanent and unconditional right to residence in an EEA State other than that of which he is a national were precluded from founding a family in that State, this would impair the right of EEA nationals to move and reside freely within the EEA, and thus be contrary to the purpose of the Directive and deprive it of its full effectiveness (see, in a similar vein, *Metock and Others*, cited above, paragraphs 89 and 93). This conclusion cannot be different even if the family member becomes a burden on the social assistance system of the host EEA State.¹⁵²

3.3.3.11 Residence cards for TCN family members

The host member state shall issue a residence card to family members falling under the scope of Article 7, cf. Article 9(1). The deadline for submitting the application may not be less than three

¹⁴⁹ Case E-4/11 *Clauder* [2011] EFTA Ct. Rep. 216, para 43

¹⁵⁰ Case E-4/11 *Clauder*, para 43 (emphasis added)

¹⁵¹ Case E-4/11 *Clauder*, paras 47-48

¹⁵² Case E-4/11 *Clauder*, para 46

months from the date of arrival, cf. Article 9(2). The residence card must be issued no later than six months after the date of submission of the application, cf. Article 10(1) and be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, cf. Article 11(1). Temporary absences of up to six months a year do not affect the validity of the residence card, cf. Article 11(2). Nor is the validity affected by absences of longer duration for compulsory military service. Absence of up to twelve consecutive months is also allowed if there are ‘important reasons’ for the absence, such as pregnancy or childbirth, serious illness or vocational training, or a posting in another member state or third country, cf. Article 11(2). The words ‘such as’ indicate that the list of reasons is not exhaustive. The residence card must have the official title ‘Residence card of a family member of a Union citizen’, cf. Article 10(1). It shall be issued free of charge or for a charge not exceeding the cost of similar documents issued to nationals, cf. Article 25(2).

In addition to a valid passport and a registration certificate or other proof of residence in the host member state, family members must present documentation that proves the family’s relationship with the Union citizen and any other conditions as may be required for their status as family members, cf. Article 10(2) (for a detailed description, see Sections 2.3.3 and 2.3.4). The Commission has found this list of required documentation to be exhaustive in accordance with recital 14. This implies that no other documents can be requested. However, the member states can require the documents to be translated, notarised or legalised in case of suspicion about the authenticity of the issuing authority or where the document is not understandable.¹⁵³

Failure to comply with the requirement to apply for a residence card may lead to proportionate and non-discriminatory measures, cf. Article 9(3).

The residence card does not create rights, but attests to existing rights conferred directly by Union law.¹⁵⁴ Article 25(1) of the directive states that possession of a residence card may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality.

If a person’s identity card or passport with which he/she entered the host member state and was issued a registration certificate or residence card expires, the host member state may not base an expulsion order solely on this ground, cf. Article 15(2).

3.3.3.12 Retention of the right of residence and restrictions due to non-fulfilment of the conditions

Article 7 must be read in conjunction with Article 14(2), which states that Union citizens and their family members shall retain the right of residence as long as they meet the conditions in Article 7. The host member state may verify if the conditions are fulfilled in ‘specific cases’ where there is ‘reasonable doubt’. Such verification shall not be carried out systematically, cf. Article 14(2), second subparagraph.

If the person concerned no longer fulfils the conditions for a right of residence, the host member state may expel him/her, but is precluded from placing an entry ban, cf. Article 15(3). Additionally, Article 15(1) provides for procedural safeguards on the person concerned (see Section 4.9).

Expulsion measures may not be the automatic consequence of a Union citizen’s or his/her family members’ recourse to the social assistance system, cf. Article 14(3).

¹⁵³ COM (2009) 313 final, page 7

¹⁵⁴ See inter alia Case C-459/99 MRAX, para 74, Case C-215/03 Oulane, paras 17-18 and Case C-202/13 McCarthy ‘II’, para 62

It is also important to note that, pursuant to Article 14(4), expulsion measures may not be adopted against workers and self-employed persons and their respective family members. Jobseekers are also protected against expulsion as long as they fulfil the criteria set out in Article 14(4) b, i.e., when they are continuing to seek employment and have a genuine chance of being engaged (see Section 3.3.3.6).

3.3.4 *Right of permanent residence – more than five years*

3.3.4.1 Introduction

Union citizens are entitled to a right of permanent residence after a period of five continuous years of legal residence in the host member state, cf. Article 16(1). This right extends to the Union citizen's TCN family members who have 'legally resided with' the Union citizen for five years in the host member state, cf. Article 16(2). Once a person has the right to permanent residence, such residence shall not be subject to the conditions provided for in Chapter III of the directive. This implies that the Union citizen may no longer be obliged to fulfil the criteria of, inter alia, continued economic activity or economic self-sufficiency. This objective is also enshrined in recital 18 of the preamble to the directive. The right of permanent residence can only be lost through absence from the host member state for a period exceeding two consecutive years, cf. Article 16(4). According to Guild et al., it is clear from the wording 'only' in Article 16(4) that two consecutive years of absence is the sole circumstance leading to a loss of permanent residence. Consequently, a person who is expelled by virtue of Article 28(2) (see Section 4.8.2) and returns to the host member state after a determined period (of less than two years) of expulsion will retain the right to permanent residence.¹⁵⁵

The right of permanent residence is a novelty of the directive.¹⁵⁶ The purpose is to 'strengthen the feeling of Union citizenship', cf. recital 17 of the preamble to the directive. The recital further states that permanent residence is a 'key element in promoting social cohesion, which is one of the fundamental objectives of the Union'. Permanent residence provides greater protection against expulsion to the persons holding this right (see Sections 4.8.2 and 4.8.3). It is also evident from a reading of recital 18 of the preamble to the directive that permanent residence is supposed to be a 'genuine vehicle for integration' into the host member state's society.

Some aspects of the provision in Article 16 will be looked into further in the following: The requirement of 'legal' residence (Section 3.3.4.2), the words resided 'with' a Union citizen (Section 3.3.4.3) and the temporal requirement of five continuous years (Section 3.3.4.4). Derogations from the requirement of five years' residence for certain groups of persons and their family members are presented in Sections 3.3.4.5 and 3.3.4.6. Finally, the provisions concerning the formal rules are presented in Sections 3.3.4.7 and 3.3.4.8.

3.3.4.2 Resided 'legally'

In the context of Article 16, 'legally' refers to residence in compliance with the conditions laid down in the directive.¹⁵⁷ This implies that residence pursuant to national law or other EU law that does not comply with the conditions of Article 7 of the directive cannot be considered 'legal' residence for the purpose of permanent residence under Article 16.¹⁵⁸ A person who has resided legally for more than

¹⁵⁵ Guild, Peers and Tomkin (2014) page 202

¹⁵⁶ Guild, Peers and Tomkin (2014) page 177

¹⁵⁷ Joined Cases C-424/10 and C-425/10 *Zilokowski and Szeja*, para 46

¹⁵⁸ Joined Cases C-424/10 and C-425/10 *Zilokowski and Szeja*, para 47

five years under national law may be denied a right of permanent residence pursuant to Article 16(1) of the directive if the national legislation under which he/she resided is not in compliance with the conditions for temporary residence in the directive. And, conversely, residence under national law that is in compliance with the provision of the directive may count as 'legal' residence.

Residence in accordance with earlier EU law instruments completed before the transposition of the directive (30 April 2006) must be taken into account for the period of five consecutive years.¹⁵⁹ This ruling has been clarified by the CJEU in Case C-529/11 *Tijani*. The Court stated in *Tijani* that the phrase 'earlier [than Directive 2004/38] European Union law instruments' must be understood as referring to instruments that the directive codified, revised and repealed, and not those instruments that were unaffected by the directive.¹⁶⁰ Hence, a person who has resided for five years in the host member state pursuant to earlier EU legislation may acquire a right of permanent residence pursuant to Directive 2004/38/EC Article 16. A question referred to the CJEU in Case C-325/09 *Dias* was the impact of a person's illegal residence (i.e. not in compliance with the earlier legislation) in the host member state after completing five years of legal residence, but before the transposition of the directive. The CJEU stated that the rules in Article 16(4) of the directive must be applied by analogy to such illegal periods of residence in the host member state.¹⁶¹ Hence, if the period of illegal residence before the transposition date of the directive and after five years of legal residence does not exceed two consecutive years, the person concerned may obtain a right of permanent residence pursuant to Article 16(1). This rule does not apply to periods of residence that are not in compliance with the directive after the transposition of the directive. Such an interpretation would be contrary to the purpose of the provision, which is to provide for an unconditional right of residence once permanent residence is acquired.¹⁶²

The same rule applies to TCN family members. The CJEU has ruled that family members have to meet the conditions laid down in Article 7(2) for five consecutive years. This was stated in *Tijani*. The case concerned a TCN child of an EU citizen migrant worker. The child was undertaking education in the United Kingdom after the Union citizen's divorce from the child's TCN mother. The child and the mother were granted residence rights pursuant to Regulation 1612/68 Article 12 (now Article 10 of Regulation 492/2011).¹⁶³ However, the period of residence under the regulation could not count as a period of 'legal' residence, because the relevant provision was not in compliance with the conditions laid down in Article 7(2) in the directive.

Periods of residence spent during imprisonment cannot be taken into consideration in the context of the acquisition of permanent residence. This has been established by the CJEU in Case C-378/12 *Onuekwere*. The case concerned a Nigerian national married to an Irish national living in the United Kingdom. During his residence there, he was imprisoned several times for a total period of three years and three months. The CJEU found that it was clear from both the wording and the purpose of Article 16 that periods spent in prison in the host member state could not be included.¹⁶⁴ The CJEU gave particular attention to the integrational perspective, stating that the precondition of integration is also based on qualitative elements (not just territorial and temporal factors). The CJEU stated that:

¹⁵⁹ Case C-162/09 *Lassal* [2010] ECR I-9217, para 40

¹⁶⁰ Case C-529/11 *Tijani* ECLI:EU:C:2013:290, para 47. Confirmed in Case C-244/13 *Ogieriakhi*, para 30

¹⁶¹ Case C-325/09 *Dias* [2011] ECR I-6387, para 65

¹⁶² Guild, Peers and Tomkin (2014) page 202

¹⁶³ See Section 3.3.5.3 on this provision

¹⁶⁴ Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13, para 22

The imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition by family members of a Union citizen who are not nationals of a Member State of the right of permanent residence for the purposes of Article 16(2) of Directive 2004/38 would clearly be contrary to the aim pursued by that directive in establishing that right of residence.¹⁶⁵

3.3.4.3 Resided ‘with’ the Union citizen

In *Tijani*, the CJEU also interpreted the requirement laid down in Article 16(2) of residing ‘with’ the Union citizen. The CJEU stated that family members accompany or joining the Union citizen have a right of residence under Article 7(2), and this was the only requirement for the right to permanent residence after five years.¹⁶⁶ As has already been cleared by the *Diatta* case (see Section 2.3.3.1), it is not a requirement that the TCN family member is living under the same roof as the Union citizen for the right of residence pursuant to Article 7(2). Hence, the wording ‘resided with’ in Article 16(2) does not imply that the TCN family member must have lived under the same roof as the Union citizen. This has been confirmed by the CJEU in the *Ogieriakhi* case.¹⁶⁷ In *Ogieriakhi*, the Court stressed that interpreting Article 16(2) as meaning that the TCN family member is obliged to live together with and not break away from all sharing of married life is not consistent with the objective of the directive. Nor would it be consistent with Articles 13 and 18 concerning ex-spouses’ right to retain their residency rights after divorce¹⁶⁸ (see Sections 3.3.5.4 and 3.3.5.5 on these provisions).

Resided ‘with’ the Union citizen for the five year-period has also been interpreted as meaning that the TCN family member must ‘accompany or join that *same* citizen’.¹⁶⁹

3.3.4.4 Five continuous years

The requirement of five continuous years of residence in the host member state must be read in conjunction with Article 16(3). The wording of Article 16(3) is identical to the wording of Article 11(2) concerning the validity of residence cards (see Section 3.3.3.11). Pursuant to Article 16(3), continuity of residence shall not be affected by temporary absences not exceeding a total of six months a year. According to Guild et al., the use of the plural (‘absences’) implies that multiple absences must be cumulated. Hence, the person concerned may have several absences, which will be added together.¹⁷⁰ According to Guild et al., it does not seem to be a possibility to ‘carry forward’ the time of absence from one year to the next, or average the total yearly absence over multiple years. They presume that the first year starts on the date of arrival, and that subsequent years start on the same date.¹⁷¹

Longer durations of absences may be justified by reasons of compulsory military service. One absence of up to one year must also be accepted when there are important reasons for the absence, such as pregnancy, childbirth, serious illness, study or vocational training, or posting in another

¹⁶⁵ Case C-378/12 *Onuekwere*, para 26

¹⁶⁶ C-529/11 *Tijani*, para 36

¹⁶⁷ Case C-244/13 *Ogieriakhi*. See Section 2.3.3.1 for a more detailed description of the case and the ruling

¹⁶⁸ Case C-244/13 *Ogieriakhi*, paras 36-47

¹⁶⁹ Case C-378/12 *Onuekwere*, para 23 (emphasis added)

¹⁷⁰ Guild, Peers and Tomkin (2014) page 197

¹⁷¹ Guild, Peers and Tomkin (2014) page 198

member state or third country. Guild et al. interpret this exemption from continuity as meaning that the person concerned may have one single absence for important reasons and that it would be possible to cumulate one or two periods of temporary (six months) absence with the one-year absence.¹⁷² The wording ‘such as’ implies that the list of important reasons is not exhaustive. Guild et al. apply the *eiusdem generis* rule and suggest other reasons that could justify a longer period of absence: ‘adoption of a child, the serious illness of a relative, a fixed-term career-furthering job opportunity, or humanitarian or volunteer work’.¹⁷³

Continuity of residence is broken down by any expulsion decision duly enforced against the person concerned, cf. Article 21 of the directive. The CJEU has ruled that continuity of residence is also interrupted by periods of imprisonment in the host member state.¹⁷⁴

One may ask what the implications of the authorised absences pursuant to Article 16(3) are. Does ‘not be affected’ mean that the periods of absence under Article 16(3) count in the total of five years, or does the ‘clock stop’ during the absence and restart when the person concerned returns to the host member state? In the absence of any wording, and because stopping the clock would ‘affect’ the continuity of residence, Guild et al. suggest that the former interpretation is correct.¹⁷⁵

The impact of absences that are not in compliance with Article 16(3) is also unclear. Does the clock stop and restart upon their return, or does the person have to start counting time from scratch when he/she returns to the host member state? This issue has not been dealt with by the CJEU. Guild et al. suggest that the former interpretation is correct on the ground that Article 21 states that continuity is broken down by ‘any expulsion decision’. According to the authors, this implies that expulsion is the only reason for resetting the clock, since the exemptions to the rules on permanent residence should be interpreted narrowly.¹⁷⁶

Since the CJEU has stated that residence cards have a declaratory nature – not a constitutive one – it must follow that legal residence spent in the territory of the host member state without holding such a card counts towards the acquisition of permanent residence. Continuity of residence may be attested to by any means of proof in use in the host member state, cf. Article 21.

3.3.4.5 Right of permanent residence prior to five years of residence – Article 17

Article 17 regulates exemptions from Article 16 for specific categories of persons who have a right of permanent residence before the completion of the five-year period. In essence, the derogation refers to workers/self-employed persons and their family members. The objective of giving certain advantages to specific Union citizens who are workers or self-employed persons and their families is provided for in recital 19 in the preamble to the directive. According to Guild et al., the concept of residence is the same in Article 17 as in Article 16. The only derogation is the condition on the length of the stay. This implies that Article 16(3) on the continuity of residence and Article 16(4) on the loss of permanent residence apply equally in cases pursuant to Article 17.

Different circumstances that lead to termination of employment may justify the right of permanent residence before completing the time limit of five years. This involves:

¹⁷² Guild, Peers and Tomkin (2014) page 198

¹⁷³ Guild, Peers and Tomkin (2014) page 199

¹⁷⁴ Case C-378/12 *Onuekwere*, paras 28-32

¹⁷⁵ Guild, Peers and Tomkin (2014) page 199

¹⁷⁶ Guild, Peers and Tomkin (2014) page 199

- Workers or self-employed persons who reach the age for entitlement to old age pension laid down in the law of the host member state (if no such law is applicable to self-employed persons, the condition shall be met at the age of 60) or who take early retirement. In addition, there are two conditions for the right of permanent residence: The person must have worked in the host member state for at least the preceding twelve months (i.e. immediately before the retirement date) and must have been residing in the host member state continuously for three years, cf. Article 17(1) a. Periods of employment spent in the member state in which the person concerned is working shall be regarded as having been spent in the host member state.
- Workers or self-employed persons who become permanently incapacitated after residing continuously in the host member state for more than two years, cf. Article 17(1) b. Periods of employment spent in the member state in which the person concerned is working shall be regarded as having been spent in the host member state.
- Workers or self-employed persons who become permanently incapacitated because of an accident at work or occupational disease entitling the person to a benefit payable in full or in part by an institution in the host member state. This is not conditional upon the duration of the stay, cf. Article 17(1) b, second subparagraph.
- Workers or self-employed persons who work in an employed or self-employed capacity in another member state, while retaining their place of residence in the host member state, and return there each day or at least once a week (frontier workers). The right to permanent residence in such a situation is conditional on the person concerned having been a continuous resident and working in the host member state for three years, cf. Article 17(1) c.

Article 17(1), second subparagraph further states that the following periods shall be regarded as periods of employment:

- Periods of involuntary unemployment duly recorded
- Periods not worked for reasons not of the person's own making
- Absence from work due to illness or an accident

Article 17(2) provides for derogation from the condition on the length of residence and employment in point a and the length of residence in point b of paragraph 1. If the person concerned is the spouse or partner of a national of the host member state, the condition as to the length of residence/employment does not apply. The same applies to former workers/self-employed persons who are the spouse or partner of a person who has lost the nationality of the host member state by marriage to that worker or self-employed person.

3.3.4.6 Family members' right of permanent residence prior to five years of residence – Article 17(3) and (4)

The right of permanent residence on less strict terms extends to family members of the retired, permanently incapacitated and frontier workers. The right applies irrespective of the family member's nationality. The condition of 'residing with' is to be interpreted in the same manner as Article 16(2) (see Section 3.3.4.3).¹⁷⁷ Article 17(3) does not require a certain period of residence for

¹⁷⁷ Guild, Peers and Tomkin (2014) page 210

the family member's right of permanent residence. The condition for acquiring such permanent residence status is that the principal (the Union citizen) has acquired the right of permanent residence pursuant to Article 17(1). This implies that the family member may have resided in the host member state for a shorter period of time than the time required in Article 17(1). This interpretation is supported by Guild et al.¹⁷⁸

Article 17(4) provides permanent residence rights to family members of a Union citizen who dies before acquiring permanent residence in the host member state. It is a condition that the Union citizen dies while 'still working'. Hence, he/she must still be exercising economic activity at the time when he/she dies. The family member must be 'residing with' the Union citizen in the host member state. This must be interpreted equally to the similar condition in Article 16(2), i.e. it may not be required that the family member lives under the same roof as the Union citizen as long as they reside in the same member state.

The right of permanent residence under Article 17(4) must be granted in three different situations (each independent of the other):

- a) When the worker or self-employed person had, at the time of death, resided continuously in the host member state for two years
- b) When the death resulted from an accident at work or an occupational disease
- c) When the surviving spouse lost his/her nationality of the host member state following marriage to the worker/self-employed person.

3.3.4.7 Document certifying permanent residence for Union citizens

Union citizens who are entitled to permanent residence may apply for a document certifying this. However, the person concerned is not obliged to apply for or hold such a certifying document. Like residence cards, a document certifying the right of permanent residence has 'only declaratory and probative force but does not give rise to any right'.¹⁷⁹

The document shall be issued as soon as possible, cf. Article 19(1) and (2). The host member state may verify the duration of the stay. According to Guild et al., the member state may also be entitled to verify the legality of the residence. The CJEU repeated in *Dias* that residence cards only have a declaratory nature and do not confer rights, and further stated:

Consequently, just as such a declaratory character means that a citizen's residence may not be regarded as illegal, within the meaning of European Union law, solely on the ground that he does not hold a residence permit, it precludes a Union citizen's residence from being regarded as legal, within the meaning of European Union law, solely on the ground that such a permit was validly issued to him.¹⁸⁰

Hence, the member state is not obliged to base its verification of the legality and length of the residence solely on a residence permit. It must also be allowed to assure whether the person's residence has been in compliance with Article 7 of the directive or earlier EU legislation that the directive amends or repeals.

¹⁷⁸ Guild, Peers and Tomkin (2014) page 210

¹⁷⁹ Case C-123/08 *Wolzenburg* [2009] ECR I-9621, paras 50-51

¹⁸⁰ Case C-325/09 *Dias*, para 54

The document shall be issued free of charge or for a charge not exceeding the cost of similar documents issued to nationals, cf. Article 25(2).

3.3.4.8 Permanent residence card for TCN family members

TCN family members with a right of permanent residence shall be issued with a permanent residence card within six months of the submission of the application, cf. Article 20(1). The card shall be renewable every ten years. The TCN must submit the application for the card before the residence card expires. Failure to comply with this may render him/her liable to ‘proportionate and non-discriminatory sanctions’, cf. Article 20(2). The permanent residence card shall be issued free of charge or for a charge not exceeding the cost of similar documents issued to nationals, cf. Article 25(2).

3.3.5 *Autonomous right of residence for family members*

The main scheme of the directive is that the right of residence for family members is a derived right that is conferred on them on the basis of their family relationship with a Union citizen who is exercising his/her fundamental right to freedom of movement. Basically, the right of residence is lost once the Union citizen leaves the host member state or dies, or if the marriage is broken down by divorce. However, in some circumstances, family members are entitled to retain their residence rights on a personal basis. This is based on the objectives enshrined in recital 15 of the preamble to the directive, which states the following:

Family members should be legally safeguarded in the event of the death of the Union citizen, divorce, annulment of marriage or termination of a registered partnership. With due regard for family life and human dignity, and in certain conditions to guard against abuse, measures should therefore be taken to ensure that in such circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis.

These rights are expressed in Articles 12 and 13 of the directive. Such family members may also have a right to permanent residence by virtue of Article 18 (see Section 3.3.5.5). It is obvious that the EU legislator’s purpose was to strengthen the rights of family members in certain circumstances.

Articles 12 and 13 must be read in conjunction with Article 14(2), which states that the right of residence provided for in Articles 12 and 13 shall be retained as long as the conditions set out therein are met.

3.3.5.1 Retention of the right of residence in the event of departure of the Union citizen – Article 12 (1)

If the Union citizen departs from the host member state, family members who are themselves Union citizens (not TCN family members) can retain their right of residence, cf. Article 12(1). The right of continued residence on a personal basis is conditional upon the family member meeting the conditions laid down in Article 7(1) a–d. Thus, the family member must either exercise an economic activity as a worker or as self-employed, have sufficient means and comprehensive sickness insurance cover in the host member state or be a student or a family member of a person who meets one of these conditions. If the family member has already acquired permanent residence, he/she is not required to meet the criteria laid down in Article 7(1).

3.3.5.2 Retention of the right of residence in the event of death of the Union citizen – Articles 12(1) and 12(2)

If the Union citizen dies, family members who are themselves Union citizens retain the right of residence pursuant to Article 12(1). The same conditions as for the Union citizen's departure apply.

Also, TCN family members can retain their right of residence in the host member state on a personal basis if they have lived in the host member state as family members of the Union citizen for at least one year before the Union citizen's death, cf. Article 12(2). Like Article 12(1), the right to retain residency rights is conditional upon the TCN family member showing that he/she is a worker, self-employed, person of sufficient means, student or a family member of a person fulfilling one of these criteria. If the family member has already acquired permanent residence, he/she is not required to meet the criteria laid down in Article 7(1). The right provided for in Article 12(2) also applies to informal partners if they have obtained the right to entry and residence pursuant to Article 3(2).¹⁸¹

3.3.5.3 Children and their parents with actual custody – Article 12(3)

If the family member is a child of the Union citizen or the parent who has actual custody of this child, the persons concerned will not lose their right of residence if the Union citizen departs from the host member state or dies. The condition for retention of the right of residence is that the child is enrolled at an educational establishment for the purpose of studying there. The right of residence is maintained until their studies are completed. This right applies equally to TCN family members, including informal partners of the Union citizen who have obtained a right of residence under Article 3(2).¹⁸² It is evident from the reading of Article 12 as a whole that the right of residence under Article 12(3) is not conditional upon the fulfilment of conditions equivalent to those in Article 7(1).

The provision gives effect to the CJEU's rulings in the joined Cases C-389/87 and C-390/87 *Echternach and Moritz* and Case C-413/99 *Baumbast*.¹⁸³ The cases concerned children of EU migrant workers who had integrated into the host member state's education system. They were entitled to a right of residence and to continue their studies when their worker parent ceased employment in the host member state. In the cases referred to, the CJEU interpreted Article 12 of Regulation 1612/68 (now Article 10 of Regulation 492/2011). The provision gives the children of workers or former workers residing in the host member state a right to be admitted to that member state's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of the host member state. This provision has been interpreted as entailing a right to residence and equal access to study finance even if the migrant worker has left the host member state.¹⁸⁴ It gives the children right to 'any form of education, including university courses [...] and advanced vocational training at a technical college'.¹⁸⁵ The right to residence is not subject to other conditions. The children derive their right of residence directly from Article 10 of Regulation 492/2011.¹⁸⁶ The CJEU has ruled that it is not necessary for the worker to have been working in the host member state at the time the child began his/her studies. Nevertheless, it is necessary that the

¹⁸¹ Guild, Peers and Tomkin (2014) page 158

¹⁸² Guild, Peers and Tomkin (2014) page 159 referring to Case C-45/12 *Ahmed* ECLI:EU:C:2013:390 by analogy

¹⁸³ COM (2001) 257 final, Explanatory Memorandum, Article-by-Article Commentary, Article 12, paragraph 3

¹⁸⁴ Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, para 23

¹⁸⁵ Joined Cases 389/87 and 390/87 *Echternach and Moritz*, para 30

¹⁸⁶ Case C-310/08 *Ibrahim* [2010] ECR I-1065, para 40

child has lived with the Union citizen in the host member state at some point when the Union citizen worked there.¹⁸⁷

The right of residence under Article 10 of Regulation 492/2011 extends to the child's parent who is his/her carer, including parents who are TCN nationals and divorced from the Union citizen.¹⁸⁸ The CJEU has ruled that if the parents were not entitled to a right of residence, this would deprive the children of 'a right which is granted to them by the Community legislature'.¹⁸⁹ The duration of the parent's residence right under Article 10 is determined by the child's dependence on the parent and the need of his/her presence in order to be able to pursue and complete their education.¹⁹⁰ Hence, the duration of the right of residence is not determined by the age of the child (i.e. the age of majority). The question of whether the parent's presence and care is needed is a question of fact. In the assessment, the national courts or authorities may take into account the 'particular circumstances and features [...] which might indicate that the need was genuine'. This could include the child's age, whether the child is residing in the family's home and the child's need of financial or emotional support from the parent in order to pursue or complete the education.¹⁹¹ The parent's right of residence under Article 10 of Regulation 492/2011 is not subject to the conditions laid down in the directive.¹⁹² As stated in Section 3.3.4.2, this might imply that a parent who has resided in the host member state pursuant to Article 10 of the regulation may not be entitled to a right of permanent residence in accordance with Article 16(2) of the directive.

What distinguishes Article 10 of Regulation 492/2011 from Article 12(3) of the directive is that the regulation also applies to children and their parents following divorce or the termination of the worker's employment, whereas Article 12(3) only applies in the event of the Union citizen's death or departure from the host member state. In addition, Regulation 492/2011 only applies to workers or former workers and their family members (not self-employed persons, students and persons with sufficient resources).

Because of the close relationship between Article 12(3) of the directive and Regulation 1612/68 (now 492/2011), it should, according to Guild et al., follow by analogy from the rulings on the latter measure that it may not be required that the child started its education at precisely the same time the Union citizen was exercising free movement rights in the host member state. It should be sufficient that the child has been residing there with him/her at some point.¹⁹³

3.3.5.4 Retention of the right of residence in the event of divorce, annulment of marriage or termination of registered partnership – Article 13

The right of retention of residence after divorce and the like is based on the purpose of protecting the family member. The general idea of the EU legislature was that TCN family members should not have to fear losing their residence rights in the event of a divorce.¹⁹⁴ Once a family member has a right to remain in the host member state, the right of residence is retained exclusively on a personal

¹⁸⁷ Case C-480/08 *Teixeira* [2010] ECR I-1107, paras 71-75

¹⁸⁸ Case C-413/99 *Baumbast*, para 75

¹⁸⁹ Case C-413/99 *Baumbast*, para 71

¹⁹⁰ Case C-480/08 *Teixeira*, para 86

¹⁹¹ Case C-529/11 *Tijani*, para 30

¹⁹² Case C-310/08 *Ibrahim*, para 50

¹⁹³ Guild, Peers and Tomkin (2014) page 165

¹⁹⁴ General Advocate Opinion Case C-218/14 *Singh and others* ECLI:EU:C:2015:306, para 29. KOM (1998) 394 pages 14 and 21. Reference is made to the Danish language version, as the English is not available on the internet.

basis. As opposed to a derived right, the right is now autonomous, cf. Article 13(2), third subparagraph.

If the family member is him/herself a Union citizen, a divorce or annulment of the Union citizen's marriage or termination of his/her registered partnership shall not affect the family member's right of residence in the host member state, cf. Article 13(1). This is, like for Article 12, conditional upon the person concerned fulfilling the conditions laid down in Article 7(1) a–d if he/she has not already acquired permanent residence.

Article 13(2) regulates TCN family members' right to retain their residency rights under the same circumstances. The provisions do not apply to other family members, such as partners in a durable relationship. This is clear both from the provisions' wording, which refers to Article 2(2) b, and is also confirmed by the CJEU in Case C-45/12 *Ahmed*, concerning a TCN former informal partner of a Union citizen.¹⁹⁵ Nevertheless, if the former partner is him/herself a Union citizen, he/she may in any event be entitled to a right of residence pursuant to Article 7(1) if the conditions laid down in this provision are fulfilled.

TCN family members' right to retain residence in the host member state is also conditional upon the person concerned satisfying conditions equivalent to those applicable in Article 7(1) (unless the person concerned already has a right of permanent residence). There are also additional conditions that need to be met, cf. Article 13(2). These conditions give effect to recital 15 of the preamble to the directive, which points at the importance of guarding against abuse. Hence, there is a requirement of a certain degree of integration or other circumstances binding the TCN to the society of the host member state. If the person concerned fulfils the abovementioned criteria (Article 7(1)), the right of continued residence is applicable in four alternative situations:

(a) Duration of the marriage/registered partnership

If the marriage/registered partnership lasted at least three years, including one year in the host member state prior to initiation of the divorce or annulment proceedings, the TCN family member may retain the right of residence. According to Guild et al., interruptions of the one-year period must be assessed by analogy with Article 16(3) (see Section 3.3.4.4). The authors also point to the fact that the directive does not expressly require that the one year in the host member state had to occur immediately before the start of the proceedings.¹⁹⁶ It is nevertheless a relevant question whether the spouses/partners both had to be resident in the host member state at the time when the proceedings started. This question was raised before the CJEU in Case C-218/14 *Singh and others* (not to be confused with Case C-370/90 *Singh*). The case concerned three TCNs who all married migrant Union citizens living in Ireland. The spouses were given a right to reside in Ireland, and they lived together there for at least four years. In all the cases, the Union citizens moved back to their country of origin, while the TCNs remained in Ireland. The divorce proceedings were initiated after the Union citizens had left Ireland. The requirement of three years of marriage, including one year in the host member state, were fulfilled. The question was whether the TCNs could retain a right of residence in Ireland when the divorce proceedings were not initiated in this member state while the spouses still resided there. This is a question of the interrelationship between Articles 12 and 13 of the directive. Like the Advocate General, the CJEU based its conclusion strictly on the wording of the directive. Basically, the TCN's right of residence in the host member state lapses once the Union citizen 'leaves' the host member state 'for the purpose of settling in another Member State or a third

¹⁹⁵ Case C-45/12 *Ahmed*, paras 35-37

¹⁹⁶ Guild, Peers and Tomkin (2014) page 169

country'.¹⁹⁷ The CJEU further states that '[t]he later petition for divorce cannot have the effect of *reviving* that right, since Article 13 of Directive 2004/38 mentions only the 'retention' of an existing right of residence'.¹⁹⁸ The TCN's right of retention of the right of residence in the host member state can only be claimed if the Union citizen spouse has resided in the host member state in accordance with Article 7(1) of the directive 'up to the date of commencement of the divorce proceedings'.¹⁹⁹ The CJEU does not elaborate upon what is required to determine that the Union citizen has left the host state. It may seem that the intention of the Union citizen is crucial, cf. the words 'purpose of settling in another' state. Hence, a holiday or another short stay in another state, without the intention of settling there, is assumedly not sufficient to fulfil the criteria of 'leaving' the host member state.

(b) Custody of the Union citizen's children

The TCN family member has custody of the Union citizen's children by agreement between spouses/partners or by court order. If the Union citizen is/was a worker and the child attends school/education, the more favourable rules of Article 10 of Regulation 492/2011 will apply.

(c) Particularly difficult circumstances

In particularly difficult circumstances, such as having been a victim of domestic violence while the marriage or registered partnership was subsisting, the list is not exhaustive, cf. 'such as', which implies that other situations may represent a 'particularly difficult circumstance'. However, the words 'particularly difficult' might indicate that the threshold is high.

(d) Access to minor children in the host member state

The TCN family member has the right of access to a minor child, provided that the court has ruled that such access must be in the host member state and for as long as is required.

3.3.5.5 TCN family members' right of permanent residence on a personal basis – Article 18

When a TCN family member has an autonomous right of residence pursuant to Article 12(2) (after the death of the Union citizen) or 13(2) (after divorce etc.), he/she will have a right of permanent residence after residing legally for five consecutive years in the host member state, cf. Article 18. The provision is without prejudice to Article 17 (see Section 3.3.4.6), which provides for more favourable rights for the TCNs falling under the personal scope of that provision.

The requirement of 'legal' residence must presumably be interpreted in the same manner as the equivalent requirement in Article 16. The same must be presumed to apply for the requirement of the length of residence and the condition of continuity (see Sections 3.3.4.2 and 3.3.4.4). Thus, a TCN may be able to add together the years spent in the host member state as a family member of a Union citizen pursuant to Article 7(2) and the years of residence solely on a personal basis by virtue of Article 12(2) or 13(2).

TCN family members with a right to residence based on Article 12(3) (children of the Union citizen enrolled at an educational establishment and their primary carer in the event of the Union citizen's death or departure from the host member state) are not expressly mentioned as beneficiaries of Article 18. The question may be raised of whether these persons have a right to permanent residence

¹⁹⁷ Case C-218/14 *Singh and others*, para 62

¹⁹⁸ Case C-218/14 *Singh and others*, para 67 (emphasis added)

¹⁹⁹ Case C-218/14 *Singh and others*, para 66

pursuant to Article 18. A literal reading of the provision suggests an answer in the negative. This is also the viewpoint of Advocate General Bot in Case C-529/11. He points out that Article 12(3) covers the right of residence ‘until the completion of [the children’s] studies’.²⁰⁰ The CJEU did not address the particular question of the interrelationship between Article 12(3) and Article 18, because the question referred to the Court concerned the relationship between Article 12 of Regulation 1612/68 (now replaced by Regulation 492/2011, Article 10) and the right to permanent residence under the directive. Guild et al. suggest that since residence pursuant to Article 12(3) is residence ‘pursuant to the Directive’ and not pursuant to national law or other EU law, the provisions on the right to permanent residence should apply according to recital 17 of the preamble to the directive. This view may be criticized; Article 16(2) (family members’ derived right of permanent residence) refers to TCN nationals who have resided ‘with’ a Union citizen who fulfils the conditions for a right to residence. This is not the case under Article 12(3), where the Union citizen is dead or has departed. Furthermore, Article 18 (family members’ autonomous right of permanent residence) refers specifically to TCN family members who satisfy the conditions laid down in Articles 12(2) and 13(2) – not Article 12(3). Recital 17, which Guild et al. refer to, may be interpreted as aiming primarily at Union citizens. The purpose is to strengthen their feeling of Union citizenship and promote social cohesion. The means to achieve this purpose is the introduction of permanent residence for Union citizens and their family members. It may, therefore, be questionable to base a personal right of residence for TCNs on recital 17 of the preamble, especially when the wordings of the provisions in the directive indicate the opposite solution.

3.3.6 *Family members’ right to employment or self-employment – Article 23*

The family members of a Union citizen with a right of temporary or permanent residence in the host member state are entitled to take up employment or self-employment there, cf. Article 23. The right to engage in economic activity refers to all family members, irrespective of nationality. The provision refers primarily to TCN family members, since family members who are themselves Union citizens have a right to engage in economic activity in other member states by virtue of Articles 45 and 49 TFEU. According to Guild et al., the right only applies to the member state in which the Union citizen and his/her family members are residing.²⁰¹ Guild et al. argue that the provision applies to both family members defined in Article 2(2) and family members falling within the scope of Article 3(2).²⁰²

It follows from the wording of Article 23 that the right to take up employment or self-employment is limited to the territory of the host member state in which the Union citizen and the family members are resident. This has also been confirmed by the CJEU in relation to Article 11 of Regulation 1612/68 in Case C-10/05 *Mattern and Cikotic*.²⁰³ The CJEU stated that a TCN family member may only take up employment in the member state where the Community national ‘pursues an activity as an employed or self-employed person’.²⁰⁴ Since the Luxembourg spouse of the TCN was working in Belgium (the country of which the spouses were resident), the TCN could not take up employment in Luxembourg. The CJEU did not consider whether – provided that the Luxembourg spouse was working in another member state than Belgium – the TCN family member could have taken up employment in that same member state.

²⁰⁰ Advocate General Opinion Case C-529/11 *Tijani* ECLI:EU:C:2013:9, paras 85-89

²⁰¹ The authors make a reference to Case C-10/05 *Mattern and Cikotic* [2006] ECR I-3145. In that judgment the CJEU underlines that the right to take up employment is not a direct right to free movement, but a provision that benefits the migrant Union citizen

²⁰² Guild, Peers and Tomkin (2014) 233

²⁰³ Case C-10/05 *Mattern and Cikotic*, paras 24-27

²⁰⁴ Case C-10/05 *Mattern and Cikotic*, para 24

4 Restrictions on rights of entry and residence – Chapter VI of the directive

4.1 Introduction

Article 21(1) TFEU specifies that the right to freedom of movement is ‘subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’. As seen from Chapters 2 and 3, the right of free movement and residence is conditional upon the conditions laid down in the directive. Furthermore, the directive regulates that limitations on this right can be made on the grounds of public policy, public security or public health. These exceptions are further elaborated in Article 27(1) of the directive, which has the same wording as Articles 45(3) TFEU. Articles 27–33 replace Directive 64/221/EEC²⁰⁵ and the case law of the CJEU based on this former directive. The earlier jurisprudence of the CJEU related to Directive 64/221 is relevant for the interpretation of the provisions of Directive 2004/38/EC. One of the purposes of the provisions of the directive on the restriction of the right of freedom of movement is to ‘ensure a tighter definition of the circumstances and procedural safeguards’, cf. recital 22 of the preamble to the directive.

The scheme of the directive is such that the protection against restrictive measures increases according to the length of residence in the host member state.

The conditions for restrictive measures in Articles 27–28 are closely linked and must be read as a whole. However, for the purpose of structuring the presentation, they will be dealt with separately. Following an explanation of the restrictive measures in Section 4.2, the justifiable grounds – public policy, public security and public health – will be dealt with in Section 4.3. In Section 4.4, the requirement of personal conduct is presented. The requirement of a genuine, present and sufficiently serious threat is addressed in Section 4.5. Note that the different requirements often overlap. Section 4.7 concerns the principle of proportionality, and Section 4.8 presents the rules on enhanced protection. The procedural rights are presented in Section 4.9.²⁰⁶

4.2 Restrictive measures

The limitations laid down in Article 27(1) apply to restrictions on entry, exit and residence.²⁰⁷ However, the directive does not define the measures that can be taken against migrants on the grounds of public policy, public security or public health. The directive refers to ‘restrictions’ on the freedom of movement and residence. Because of the different application of some of the provisions governing this area, some conceptual distinctions are necessary.

For instance, Article 28 refers to ‘expulsion’. This involves the removal of a person who has already entered the host member state.²⁰⁸ Expulsion decisions are subject to an individual proportionality assessment, which poses stricter obligations on the member state according to the length of residence in the host member state of the person concerned. As mentioned in Section 3.3.3.12, expulsion orders may be placed on a person who does not fulfil the conditions for a right of residence. Note, however, that Article 14(3) states that such an expulsion measure shall not be an automatic consequence of a person’s recourse to the social assistance system.

²⁰⁵ Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health.

²⁰⁶ See Kristine Møse, – men ikke s anne som deg, Marlus 444 (Oslo 2014) for an in depth analysis of restrictions on right of entry and residence.

²⁰⁷ Guild, Peers and Tomkin (2014) page 250

²⁰⁸ Bamard (2013) page 502

Another expression referred to in the directive is ‘exclusion’ (see Article 32), which implies the refusal to allow a person to enter the country (entry ban).²⁰⁹ Entry bans can be placed on a person who wants to enter the host member state for the first time or may follow an expulsion decision. Exclusion orders can only be decided on the grounds of public policy, public security or public health, cf. Article 15(3). Hence, failure to satisfy the conditions for a right of residence (e.g. when a person lacks sufficient resources and becomes an unreasonable burden on the host member state) may cause expulsion, but not exclusion, from the host member state unless the decision can be based on the grounds of public policy, security or health.

4.3 Public policy, public security, public health

4.3.1 Introduction

The concepts of public order and public security do not have a uniform definition in EU law. The member states have a margin of manoeuvre in defining which interests they want to protect and what constitutes a threat to public policy or public security. This is unlike the matter of public health, which is defined in Article 29 of the directive (see Section 4.3.4).

The CJEU has stated that the two concepts of public policy and public security can vary from one state to another and from one period of time to another.²¹⁰ Therefore, the member states ‘retain the freedom to determine the requirements of public policy and public security in accordance with their national needs’. Nevertheless, derogations from the right to freedom of movement of persons must be interpreted strictly, and ‘their scope cannot be determined unilaterally by each Member State without any control by the Community institutions’.²¹¹ The strict interpretation of the restrictions is also required ‘by virtue of a person’s status as a citizen of the Union’.²¹² Furthermore, the protected interests shall be clearly defined and public policy and public security shall be distinguished and are not interchangeable.²¹³ The distinction between public policy and public security is important also in the sense that only ‘imperative grounds’ of the latter can justify restrictions on freedom of movement for minors and persons who have resided in the host member state for at least the previous ten years, cf. Article 28(3) (see Section 4.8.3).

Furthermore, the derogations may only be based on the interests of the member state imposing the restrictions. Thus, according to the CJEU, ‘it cannot be based exclusively on reasons advanced by another Member State to justify a decision to remove a Community national from the territory of the latter State’. Such a reason may, however, be taken into account in the context of the assessment.²¹⁴

It is clear from Article 27(1), second sentence that economic ends may not justify the restrictions (e.g. because of high unemployment in the host member state).²¹⁵

²⁰⁹ Barnard (2013) page 502

²¹⁰ Case 41/74 *Van Duyn* [1974] ECR 1337, para 18, Case 30/77 *Bouchereau* [1977] ECR 1999, para 34

²¹¹ Case C-33/07 *Jipa* [2008] ECR I-5157, para 23. See also Case 41/74 *Van Duyn*, para 18, Case 30/77 *Bouchereau*, para 33 and Case C-434/10 *Aladzhev* [2011] ECR I-11659, para 34

²¹² Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, para 65

²¹³ Guild, Peers and Tomkin (2014) page 253

²¹⁴ Case C-33/07 *Jipa*, para 25

²¹⁵ Guild, Peers and Tomkin (2014) page 256

4.3.2 *Public policy*

Public policy refers to the prevention of disturbances to social order.²¹⁶ It includes criminal offences, but is not limited to this. However, the CJEU has stated that conduct contrary to public policy may not justify restrictions on freedom of movement if the host member state ‘does not adopt, with respect to the same conduct on the part of its own nationals, *repressive measures* or other *genuine and effective measures* intended to combat such conduct’.²¹⁷ This implies that EU citizens may only be expelled for conduct that the host member state punishes by law or combats with other genuine or effective measures. As stated by the EFTA Court in Case E-15/12 *Wahl*, the member state must have ‘clearly defined their standpoint’ regarding the activities in question.²¹⁸

4.3.3 *Public security*

Public security is considered ‘very sensitive matters’²¹⁹ and revolves around the security of the member state – both internal and external.²²⁰ Public security may be affected by, inter alia:

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.²²¹

It can also include organised drug-related crime. The CJEU stated in Case C-145/09 *Tsakouridis*:

Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind [...], trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it.²²²

In Case C-348/09 *P.I.*, the CJEU interpreted the concept of ‘imperative grounds of public security’, cf. Article 28(3). The case concerned an Italian national who had resided in Germany for 19 years. He was sentenced to seven years and six months of imprisonment for sexual assault, sexual coercion and rape of his former partner’s daughter, who was 8 years old when the offences commenced. The offences were committed almost on a weekly basis over a period of 11 years and involved the use of force and threats of killing the child’s mother and brother. The CJEU stated that the concept of Article 28(3) may cover the criminal offences referred to in Article 83(1) TFEU, second subparagraph²²³, which constitute ‘a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population’.²²⁴ The areas of crime covered by Article 83(1) TFEU are: Terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

²¹⁶ COM (2009) 313 final, page 10

²¹⁷ Joined Cases 115/81 and 116/81 *Adoui and Cornuaille* [1982] ECR 1665, para 8 (emphasis added)

²¹⁸ Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534 , para 101

²¹⁹ COM (1999) 372 final, page 11

²²⁰ Case C-145/09 *Tsakouridis* [2010] ECR I-11979, para 43

²²¹ Case C-145/09 *Tsakouridis*, para 44

²²² Case C-145/09 *Tsakouridis*, para 47

²²³ The provision defines ‘areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis’, and gives the EU legislature the competence to establish minimum rules concerning the definition of criminal offences and sanctions in these areas

²²⁴ Case C-348/09 *P.I.* ECLI:EU:C:2012:300, para 28

4.3.4 *Public health*

Distinct from public policy and security, the concept of public health is specified in the directive. Article 29(1) establishes that only ‘diseases with epidemic potential as defined by [...] the World Health Organisation’ and ‘other infectious diseases or contagious diseases’ are covered. Only diseases occurring before three months after the date of arrival in the host member state may constitute grounds for expulsion, cf. Article 29(2). The member state may require the person concerned to undergo a medical examination, but the examination may not be carried out as a matter of routine, cf. Article 29(3).

4.4 **Personal conduct**

It follows from Article 27(2) first subparagraph that measures taken to restrict the right to freedom of movement based on public policy or public security must be based ‘exclusively on the personal conduct of the individual concerned’. This requirement is further elaborated in Article 27(2), second subparagraph, which prescribes that: ‘[j]ustifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted’. This implies that the member states must carry out a case-by-case assessment of each individual.²²⁵ This was established by the CJEU in Case 67/74 *Bonsignore* in relation to the earlier directive. The case concerned an Italian national who was expelled from Germany after causing the death of his brother by negligence. *Bonsignore* was sentenced to a fine after handling a pistol without a license and accidentally injuring and killing his brother. He was expelled by reasons of a ‘general preventive nature’ based on the ‘deterrent effect’ a deportation would have among immigrants, since violence in large urban centres was an increasing problem.²²⁶ The CJEU found that a deportation of a national of a member state could not be justified ‘for the purpose of deterring other aliens, that is, if it is based [...] on reasons of a ‘general preventive nature’.²²⁷ The grounds for justification cannot be ‘extraneous to the individual case’.²²⁸

The CJEU has also established in Case C-408/03 *Commission v. Belgium* that automatic expulsions are not allowed pursuant to the directive. According to Belgian legislation, deportation was an automatic consequence of failure to produce the necessary documents for the grant of a residence card within a specified period. The CJEU stated that, even though such deportation may be necessary where a person is unable to produce the documents in time, the automatic nature of the deportation was disproportionate.²²⁹ It was stated that the Belgian legislation ‘does not allow account to be taken of the reasons why the person concerned did not take the necessary administrative measures or of whether he was able to establish that he fulfilled the conditions which Community law attached to his right of residence’.²³⁰

The member state’s obligation to take account of the personal conduct of the person concerned was stressed by the CJEU in Case C-348/96 *Calfa*. The case concerned an Italian national who was sentenced to three months of imprisonment and expelled from Greece for life because of the possession and use of prohibited drugs. The CJEU ruled that automatic expulsion for life as a

²²⁵ Guild, Peers and Tomkin (2014) page 258

²²⁶ Case 67/74 *Bonsignore* [1975] ECR 297, para 4

²²⁷ Case 67/74 *Bonsignore*, para 7

²²⁸ Case 67/74 *Bonsignore*, para 6

²²⁹ Case C-408/03 *Commission v Belgium*, para 68

²³⁰ Case C-408/03 *Commission v Belgium*, para 69

consequence of a criminal conviction constituted a breach of EU law, since Greece did not take account of Calfa's personal conduct.²³¹

The CJEU has also established that present membership of an organisation may be taken into account as personal conduct. This was confirmed by the Court in Case 41/74 *Van Duyn*. The case concerned a Dutch national who was offered employment as a secretary with the Church of Scientology in the United Kingdom. She had taken a course in Scientology and was a practising Scientologist. She was refused leave to enter the United Kingdom based on the Government's view that the activities of the Scientologist organisation were socially harmful. The CJEU stated that past association with an organisation cannot in general justify the refusal of a right to move freely. However:

present association, which reflects participation in the activities of the body or of the organization as well as *identification with its aims and its designs*, may be considered a *voluntary act* of the person concerned and, consequently, as part of his personal conduct.²³²

The issue of membership of an organisation was also raised before the EFTA court in Case E-15/12 *Wahl*. The Norwegian national Wahl was a member of the Hells Angels motorcycle club. He was denied entry into Iceland. Icelandic authorities found they sufficiently demonstrated that Wahl's visit to Iceland was connected to the Icelandic motorcycle club MC Iceland's inclusion into Hells Angels. It was presumed that he had a role in the final accession stage of the national MC club becoming a new charter in an international organisation associated with crime. This would subsequently increase organised crime in Iceland. One of the main questions before the EFTA Court was whether it is sufficient to base a decision of denial of entry under Article 27 'only on a danger assessment that concludes that the *organisation* to which the individual belongs is connected with organised crime' and that an increase of organised crime follows from the establishment of the organisation in the member state.²³³ The EFTA court referred to the CJEU's abovementioned statement in *Van Duyn* and found that the personal conduct of Wahl 'is not limited to mere membership in a particular organisation associated with organised crime'. The EFTA court underlined the importance of Wahl's presumed role in the process of making MC Iceland a member of the organisation and the fact that the process had been directed from his home member state (Norway). The EFTA court concluded that Wahl's conduct 'appears to constitute a genuine, present and sufficiently serious threat to one of the fundamental interests of society'.²³⁴ (The issue of a genuine, present and sufficiently serious threat is addressed in Section 4.5 below.) The EFTA court also stated that Article 27 applies even though the member state has not declared the organisation or membership therein unlawful, provided that 'recourse to such declaration is not thought appropriate in the circumstances'.²³⁵

4.5 Genuine, present and sufficiently serious threat

Article 27(2), second subparagraph states:

The personal conduct of the individual concerned must represent a *genuine, present and sufficiently serious threat* affecting one of the fundamental interests of society. (Emphasis added).

²³¹ Case C-348/96 *Calfa* [1999] ECR I-11, para 27

²³² Case 41/74 *Van Duyn*, para 17 (emphasis added)

²³³ Case E-15/12 *Wahl*, para 57 (emphasis added)

²³⁴ Case E-15/12 *Wahl*, paras 90-91

²³⁵ Case E-15/12 *Wahl*, para 100

All these criteria are cumulative.²³⁶

The threat must be ‘genuine’, which means that it may not solely be presumed.²³⁷

Further, the conduct of the individual concerned must involve more than a perturbation of the social order. It must be ‘sufficiently genuine’. In Case 30/77 *Bouchereau* concerning a French national who was found guilty of unlawful possession of drugs in the United Kingdom, the CJEU stated that breaching the law is not enough to determine the existence of a threat of public policy affecting one of the fundamental interests of society exists.²³⁸

Previous criminal offences are not in themselves enough to constitute that the person concerned represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society, cf. Article 27(2), first subparagraph. The CJEU stated in *P.I.* that the condition of a present and genuine threat ‘implies, in general, the existence in the individual concerned of a propensity to act in the same way in the future’.²³⁹ A previous criminal conviction can only be taken into account in case the ‘circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy’.²⁴⁰

Multiple convictions do not in themselves constitute a sufficiently serious threat. Even though a single instance of petty criminality would not be sufficient to cause a threat, the Commission has stated in its guidelines that ‘persistent petty criminality’ may do so. In the assessment of the existence of the threat, the national authorities may in ‘particular take into account the following factors:

- the nature of the offences;
- their frequency;
- damage or harm caused’.²⁴¹

The threat must also be ‘present’, meaning that the threat ‘must exist at the moment when the restrictive measure is adopted by the national authorities or reviewed by the courts’.²⁴² The statement of the Commission is based on the joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*. In these cases, the CJEU stated that the existence of a present threat ‘must, as a general rule, be satisfied at the time of the expulsion’.²⁴³

The importance of an individual assessment of whether the person’s conduct represents a present and sufficiently serious threat to one of the fundamental interests of society is also stressed by the CJEU in Case C-503/03 *Commission v. Spain*. Spanish authorities had refused entry and the issue of visas to two TCN spouses of Union citizens. The refusal was based on a Schengen ‘alert’ issued against them by Germany. The CJEU found that, unlike the rules laid down in Directive 64/221, such alerts

²³⁶ COM (2009) 313 final, page 11

²³⁷ COM (2009) 313 final, page 11

²³⁸ Case 30/77 *Bouchereau*, para 35

²³⁹ Case C-348/09 *P.I.*, para 30

²⁴⁰ COM 2009 (313) final, page 12

²⁴¹ COM (2009) 313 final, page 12

²⁴² COM (2009) 313 final, page 11

²⁴³ Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*, para 79

could be justified without any specific assessment of the threat represented by the person concerned. The CJEU stated that a TCN spouse of a Union citizen for whom such an alert had been issued could risk being deprived of the protection provided for by Directive 64/221.²⁴⁴ The Court stressed that a strict interpretation of the concept of public policy in cases concerning the TCN family members of Union citizens ‘serves to protect the [Union citizen’s] right to respect for his or her family life’ pursuant to Article 8 of the ECHR.²⁴⁵ The CJEU found that an inclusion in the Schengen Information System (SIS) of a TCN spouse of a Union Citizen ‘does indeed constitute evidence’ that a refusal into the Schengen area is justified. However, according to the CJEU:

such evidence must be corroborated by information enabling a Member State which consults the SIS to establish, before refusing entry into the Schengen Area, that the presence of the person concerned in that area constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.²⁴⁶

Hence, as Barnard has suggested, the rules of the treaty and the directive will take precedence over the Schengen rules in case of a conflict.²⁴⁷

4.6 Cooperation and responsibilities of other member states – Articles 27(3) and (4)

The host member state may, if it is considered essential, request the member state of the person’s origin to provide information on previous police records the person concerned may have, cf. Article 27(3). Such a request may also, ‘if need be’, be made of other member states as well. The requested member states shall give a reply within two months. However, such enquiries may only be made to ascertain whether the person concerned represents a danger and shall not be made routinely. It is also important to note that, as described in Section 4.3.1, the restriction on the freedom of movement may only be based on threats against the interests of the member state by whom the restriction order is put.

Pursuant to Article 27(4), the member state that has issued the passport or identity card is obliged to allow the holder of it to re-enter its territory if the person concerned has been expelled from another member state on the grounds of public policy, public security or public health. This applies even if the document is no longer valid or the nationality of the person concerned is in dispute. The allowance of re-entry shall not be conditional upon any formalities.

4.7 The principle of proportionality

If a personal conduct represents a genuine, present and sufficiently serious threat to public policy or public security, the member state must assess a proportionality test before the decision of denial of entry or removal from the territory can be made. The principle of proportionality is expressed in Article 27(2), first paragraph of the directive. The Commission has expressed the essence of the principle of proportionality as follows:

Proportionality requires justified grounds for a measure, justified balance between the measure and the objective, and justified balance of interests of the individual and the State concerned.²⁴⁸

²⁴⁴ Case C-503/03 *Commission v. Spain* [2006] ECR I-1097, paras 48-50

²⁴⁵ Case C-503/03 *Commission v. Spain*, para 47

²⁴⁶ Case C-503/03 *Commission v. Spain*, para 53

²⁴⁷ Barnard (2013) page 501

²⁴⁸ COM (1999) 372 final, page 8

In the 2009 Guidelines, the Commission states that the member states must identify the protected interests. In light of these interests, an analysis of the characteristics of the threat must be carried out. The Commission provides a list of factors that could be taken into account in the analysis:

- degree of social danger resulting from the presence of the person concerned on the territory of that Member State;
- nature of the offending activities, their frequency, cumulative danger and damage caused;
- time elapsed since acts committed and behaviour of the person concerned (NB: also good behaviour in prison and possible release on parole could be taken into account).²⁴⁹

The member state must assess whether the restriction on the freedom of movement is ‘*appropriate* to ensure the achievement of the objective it pursues and does not go beyond what is *necessary* to attain it’.²⁵⁰ In a case concerning an exit ban on a national of the member state because of tax debt, the CJEU ruled in Case C-434/10 *Aladzhev* that the member state is obliged to ‘determine that there were *no other measure* other than that of prohibition on leaving the territory which would have been *equally effective* to obtain that recovery [of the tax debt], but would not have encroached on freedom of movement’.²⁵¹

In Case C-249/11 *Byankov*, the CJEU ruled that a prohibition to leave a person’s own member state because of a private debt was not in accordance with the principle of proportionality. This was based on the fact that the prohibition was ‘absolute’ and not ‘coupled with any exceptions, temporal limitation or possibility of regular review’ and furthermore because of the existence of other EU law instruments that were capable of protecting the creditor’s rights without restricting the right to freedom of movement.²⁵²

Hence, the member states must consider the level of protection and whether the restrictive measure is appropriate and necessary. Furthermore, the member state must make an individual assessment of whether there is a fair balance between the interest of the individual concerned and the interest of the member state. The latter assessment is further elaborated in Article 28(1). The provision concerns expulsion. However, according to Guild et al., it would presumably also apply in cases where a person is refused to be re-admitted into the host member state where he/she is residing after a visit in another state. The provision sets out relevant criteria for assessing whether an expulsion decision is proportionate from the perspective of the individual.²⁵³ The CJEU has stated that account should be taken of the fundamental rights, in particular the right to respect for private and family life, by virtue of Article 7 of the Charter and Article 8 ECHR.²⁵⁴ Chalmers et al. express the requirement of proportionality as follows:

Public policy and public security are not trump cards, but rather factors to be weighed in the balance against the interests and circumstances of the individual in question and those close to them.²⁵⁵

²⁴⁹ COM (2009) 313 final, page 13

²⁵⁰ Case C-33/07 *Jipa*, para 29 (emphasis added)

²⁵¹ Case C-434/10 *Aladzhev*, para 47 (emphasis added)

²⁵² Case C-249/11 *Byankov* ECLI:EU:C:2012:608, paras 44-45

²⁵³ Guild, Peers, Tomkin (2014) page 264

²⁵⁴ Case C-145/09 *Tsakouridis*, para 52

²⁵⁵ Damian Chalmers, Gareth Davies and Giorgio Monti (2010), *European Union Law: Cases and Materials* (Cambridge: Cambridge University Press) page 479

The list in Article 28(1) is not exhaustive, cf. ‘such as’. The Commission has provided more detailed guidelines to the different criteria,²⁵⁶ which will be examined below. The member state may take into account:

- ‘How long’ the person concerned has resided in the host member state. The Commission points out that the situation of a tourist varies from the situation of a person with many years of residence in the host member state.
- ‘Age’. Note: Article 28(3) b provides for enhanced protection of the expulsion of minors (see Section 4.8.3). Guild et al. suggest that the provision might refer to young people who are no longer minors and elderly people.²⁵⁷
- ‘State of health’. Guild et al. surmise that the intention is that ‘seriously unwell’ persons should not be expelled.²⁵⁸
- ‘Family and economic situation’. The Commission notes that this also includes an assessment of the impact on other family members who would have the right to remain in the host member state. As Guild et al. suggest, the intention would be that a family should not be separated without assessing the potential impacts. The CJEU has made reference to the jurisprudence of the European Court of Human Rights (also referred to as the ECtHR) regarding Article 8 of the ECHR (right to family and private life) in this respect.²⁵⁹ The Commission also stresses that attention should be given to the seriousness of the difficulties that the family members risk facing in the country of origin of the person concerned.
- ‘Social and cultural integration’ into the host member state. The Commission refers to this as the ‘strength of ties’ or ‘lack of ties’ and points to the example of a person who was born/has lived from an early age in the host member state. It was also stressed by the CJEU in Case C-145/09 *Tsakouridis* that ‘very good reasons would have to be put forward to justify the expulsion measure’ of a Union citizen who has lawfully spent most or all his childhood and youth in the host member state.²⁶⁰ The case concerned a Greek national who was born in and had lived in Germany for most parts of his life. He was expelled after being convicted of illegal dealing in substantial quantities of narcotics as part of an organised group. According to Guild et al., employment is also an essential factor in the concept of integration.²⁶¹
- ‘The extent of his/her links with the country of origin’. This is also referred to by the Commission as ‘strength of ties (*relatives, visits, language skills*) – or lack of ties – with the Member State of origin’.

Guild et al. point out that there is a similarity between the jurisprudence of the ECtHR concerning Article 8 of the ECHR (the right to private and family life) in cases concerning expulsion decisions and Article 28(1) of the directive. However, according to Guild et al., it is important to note that the

²⁵⁶ COM (2009) 313 final, page 13

²⁵⁷ Guild, Peers and Tomkin (2014) page 265

²⁵⁸ Guild, Peers and Tomkin (2014) page 266

²⁵⁹ Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*, para 99

²⁶⁰ Case C-145/09 *Tsakouridis*, para 53

²⁶¹ Guild, Peers and Tomkin (2014) page 266

starting places in the cases concerning Article 8 ECHR and the cases concerning expulsion pursuant to the directive are different. In EU law, ‘the individual has a right of entry and residence and it is for the Member State to justify the interference’. This is not the starting place in cases before the ECtHR, because ECHR does not guarantee the right of an alien to enter and reside in a country of the person’s own choice. Hence, according to Guild et al., ‘it is apparent that a simple transposition of the jurisprudence of the ECtHR to apply the Article 28 test would not necessarily result in the correct outcome’.²⁶²

4.8 Enhanced protection of expulsion – Article 28(2) and (3)

4.8.1 Introduction

Article 28(2) and (3) provides a strengthened level of protection against expulsion. The provisions give effect to the objectives set out in recital 23 and 24 of the preamble to the directive. Recital 23 states that expulsion can be seriously harmful for persons who have become ‘genuinely integrated into the host member state’. In recital 24, it is stated that ‘the greater the degree of integration of the Union citizen and their family members in the host Member State, the greater the degree of protection against expulsion should be’. The right of entry, exit or residence may be restricted according to Article 27 on the grounds of public policy, public security or public health. As will be shown, pursuant to Article 28, the level of protection increases according to the length of residence.

4.8.2 Persons with permanent residence – Article 28(2)

If the Union citizen or his/her family members have obtained a right of permanent residence (see Sections 3.3.4 and 3.3.5.53.3.5), the host member state is only allowed to make an expulsion decision against them on ‘serious grounds’ of public policy or public security, cf. Article 28(2).

The term ‘serious grounds’ was examined by the CJEU in *Tsakouridis*. The Greek national Tsakouridis was convicted for illegal dealing in substantial quantities of narcotics as part of an organised group and sentenced to six and a half years of imprisonment in Germany. The case mainly concerned the interpretation of Article 28(3) because Tsakouridis had resided in Germany for almost all his life. However, the CJEU found that it was for the referring national court to ascertain whether his conduct was covered by Article 28(2) or 28(3). As for the meaning of ‘serious grounds of public policy’, the CJEU concluded that dealing in narcotics as part of an organised group was covered by this concept. The conclusion was reached on the ground that the use of drugs had been considered as constituting a danger to society (Case C-348/96 *Calfa* and joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*). Hence, dealing with drugs would a fortiori be covered by the strengthened conditions in Article 28(2).²⁶³

4.8.3 Imperative grounds of public security – Article 28(3)

For Union citizens who (a) have resided for more than ten years and (b) minors, the only justifiable reason for expulsion is ‘imperative grounds of public security’ (note: not public policy or public health), cf. Article 28(3). This concept was also interpreted by the CJEU in *Tsakouridis* (see above). The CJEU stated that the concept is ‘considerably stricter’ than the one of serious grounds in Article 28(2). Therefore, the CJEU found that the EU legislature ‘clearly intended’ to limit measures based on this provision to ‘exceptional circumstances’.²⁶⁴ According to the CJEU, the concept ‘presupposes

²⁶² Guild, Peers and Tomkin (2014) page 267

²⁶³ Case C-145/09 *Tsakouridis*, para 54

²⁶⁴ Case C-145/09 *Tsakouridis*, para 40. See also Case C-348/09 *P.I.*, para 19

not only the existence of a threat to public security, but also that such a threat is of a particularly *high degree* of seriousness'.²⁶⁵ The CJEU stated in *P.I.* (the case concerning the Italian national who had abused his partner's daughter for several years) that the criminal offences referred to in Article 83(1) TFEU (see Section 4.3.3) must have been committed in a manner that 'discloses particularly serious characteristics' for Article 28(3) a to apply.²⁶⁶

It is clear from the wording of the provision in comparison with other provisions of the directive that it only applies to Union citizens and not their TCN family members.

Residence in the host state for the previous ten years – Article 28(3) a

There is a temporal dimension to this condition, which raises several questions. Essentially, the question is how to calculate the period of ten years.

Firstly, the CJEU has ruled that the period must be calculated by counting back from the decision date of the expulsion order.²⁶⁷ This differs from the way the requisite period for acquiring permanent residence is determined, namely where the counting starts from the date of arrival (see Section 3.3.4.4).

Secondly, the CJEU has stated that the period must, in principle, be continuous.²⁶⁸ In connection to this, the question arises of whether absences from the host member state prevent the person concerned from the enhanced protection under Article 28(3) a. This question was raised in *Tsakouridis*. He was born in the host member state (Germany) in 1978 and had a right to permanent residence there. Twenty years later, he was expelled. Between 2004 and 2006 when he was arrested, he spent two periods of respectively seven and thirteen months in Greece, where he ran a pancake shop. The CJEU ruled that the question of the impact of the absences must be made by an 'overall assessment [...] of the person's situation on each occasion at the precise time when the question of expulsion arises'.²⁶⁹ The essential question is whether the absences involve 'the transfer to another State of the centre of the personal, family or occupational interests of the person concerned'. All relevant factors must be taken into account. The CJEU stressed, in particular, factors like the duration of each absence; the cumulative duration and frequency of the absences; and the reason why the person concerned left the host member state.²⁷⁰

Another question concerning interruption of the continuity of the ten-year period is whether a period of imprisonment results in such an interruption. The question was raised in Case C-400/12 *M.G.*, which concerned a Portuguese national resident in the United Kingdom. She entered the host member state in 1998. Eleven years later, she was convicted of causing injuries to one of her children and of beating a person of less than 16 years. She was sentenced to 21 months' imprisonment. She was later expelled from the United Kingdom. The CJEU referred to the system of protection against expulsion in the directive and the objective of ascribing greater protection to Union citizens and their family members who have become 'genuinely integrated' into the host member state. The CJEU then made a reference to the judgement in *Onuekwere* concerning permanent residence under Article 16 (2) of the directive (see Section 3.3.4.2). In *Onuekwere*, it was established that a 'custodial sentence

²⁶⁵ Case C-145/09 *Tsakouridis*, para 41 (emphasis added)

²⁶⁶ Case C-348/09 *P.I.*, para 28

²⁶⁷ Case C-400/12 *M.G.* ECLI:EU:C:2014:9, para 24

²⁶⁸ Case C-400/12 *M.G.*, para 28

²⁶⁹ Case C-145/09 *Tsakouridis*, para 32

²⁷⁰ Case C-145/09 *Tsakouridis*, para 33

is an indication that the person concerned has not respected the values of the society of the host Member State'.²⁷¹ The CJEU continued:

Since the degree of integration of the persons concerned is a vital consideration underpinning both the right of permanent residence and the system of protection against expulsion measures established by Directive 2004/38, the reasons making it justifiable for periods of imprisonment not to be taken into consideration for the purposes of granting a right of permanent residence or for such periods to be regarded as interrupting the continuity of the period of residence needed to acquire that right must also be borne in mind when interpreting Article 28(3)(a) of that directive.²⁷²

Hence, periods of imprisonment do in principle interrupt the continuity of the period of residence for the purpose of Article 28(3) a. According to the CJEU, such periods of imprisonment must be taken into account in the overall assessment determining whether the 'integrating links previously forged with the host Member State have been broken'.²⁷³ The CJEU finally stated that the fact that the person concerned had already resided in the host member state prior to imprisonment may be taken into account as part of the overall assessment.²⁷⁴ Thus, periods of imprisonment do not automatically entail that the person concerned is precluded from enjoying the enhanced protection of expulsion under Article 28(3) a (especially if ten years of residence have elapsed before the imprisonment). Nevertheless, the host member state may take these periods into account in the overall assessment of whether Article 28(3) a may be invoked. The essential question is whether the integrating links have been broken.

Minors – Article 28(3) b

Minors may only be expelled on 'imperative grounds of public security' unless expulsion is necessary for the best interest of the child pursuant to the UN Convention on the Rights of the Child (CRC). 'Minor' is not defined in the directive. However, the provision makes reference to the CRC where a 'child' is defined as a person under the age of eighteen – unless majority is attained earlier according to the applicable law, cf. Article 1 of the Convention. According to Guild et al., Article 28(3) b of the directive should be interpreted in line with the Convention.²⁷⁵

4.9 Procedural rights

4.9.1 Introduction

The procedural remedies in Articles 30–33 implement the general principle of EU rights for an effective remedy enshrined in Article 47 of the Charter and must be interpreted in compliance with this.²⁷⁶ The guarantees are strengthened compared with Directive 64/221.²⁷⁷ The Charter has no direct parallel in the EEA Agreement. However, Article 47 of the Charter overlaps with Article 6 ECHR, and all the parties to the EEA Agreement are also parties to the ECHR. The EFTA Court has

²⁷¹ Case C-400/12 *M.G.*, paras 30-31

²⁷² Case C-400/12 *M.G.*, para 32

²⁷³ Case C-400/12 *M.G.*, para 36

²⁷⁴ Case C-400/12 *M.G.*, para 37

²⁷⁵ Guild, Peers and Tomkin (2014) page 271

²⁷⁶ Case C-300/11 *ZZ* ECLI:EU:C:2013:363, para 50

²⁷⁷ Guild, Peers and Tomkin (2014) page 280

consistently held that the provisions of the EEA Agreement are to be interpreted in the light of fundamental rights as enshrined in the ECHR.²⁷⁸

The procedural rights laid down in Articles 30–33 provide for a right to information (Article 30), right to appeal (Article 31), limits on the duration of the exclusion order (Article 32) and give a right of reviewed decision after two years (Article 33).

The procedural rights apply to the provisions concerning restrictions on freedom of movement on the grounds of public policy, public security and public health. In addition, the procedural rights provided for in Articles 30 and 31 (right to notification and right to judicial/administrative redress) shall apply by analogy to decisions restricting the freedom of movement on other grounds, cf. Articles 15(1) and 35. This includes restrictions in circumstances where the person concerned does not fulfil the conditions for a right to residence, inter alia, when he/she lacks sufficient resources (see Section 3.3.3.12) or restrictive measures because of abuse of rights or fraud (see Chapter 7 on Article 35). Articles 30 and 31 apply with some adaption to Articles 15(1) and 35 because of the difference in substance compared with Articles 27–29.²⁷⁹

The procedural rights apply to both migrants who are lawfully and unlawfully resident in the host member state.²⁸⁰

4.9.2 Notification of decisions – Article 30

Article 30 provides for a right to be notified in writing of any decision of restriction on the grounds of public policy, public security or public health (Article 27(1)). Article 30(1) specifies that the notification must be in such a way that it makes the person concerned ‘able to comprehend its content and the implications’ for him/her. The Commission has stated in the proposal for the directive that the provision does not require that the notification has to be translated into the language of the person concerned.²⁸¹ The CJEU has ruled that ‘[i]t is sufficient [...] if the notification is made in such a way as to enable the person concerned to comprehend the content and effect thereof’.²⁸²

The article lists several requirements in regard to the character of the notification.

First of all, according to Article 30(2), the person concerned must be informed ‘precisely and in full’ of the reasons on which the decision against him/her is based. The requirement of information is based on the consideration that the person concerned shall be able to ‘make effective use’ of the redress procedures established by the member state.²⁸³ The purpose of Article 30(2) is also to ‘enable the person concerned to defend his interests’.²⁸⁴ The Commission has stated that ‘just indicating one or more of several options by ticking a box is not acceptable’.²⁸⁵

²⁷⁸ Se Case E-4/11 *Clauder*, para 49.

²⁷⁹ Guild, Peers and Tomkin (2014) page 283

²⁸⁰ Case C-459/99 *MRAX*, paras 100-104

²⁸¹ COM (2001) 257 final, Explanatory Memorandum, ‘Article-by-Article Commentary’, Article 28(1)

²⁸² Joined Cases 115/81 and 116/81 *Adoui and Cornuaille*, para 13

²⁸³ Case C-300/11 *ZZ*, para 48

²⁸⁴ Joined Cases 115/81 and 116/81 *Adoui and Cornuaille*, para 13

²⁸⁵ COM (2009) 313 final, page 14

Derogation from the requirement of written, precise and full information of the grounds of the decision can be made if such a notification is contrary to the interests of state security, cf. Article 30(2). '[T]his provision must be interpreted strictly, but without depriving it of its effectiveness'.²⁸⁶ This quote originates from the CJEU's ruling in Case C-300/11 ZZ. The case concerned a man with dual French and Algerian nationality married to a British national. He had resided in the United Kingdom for more than sixteen years when British authorities cancelled his right of residence and excluded him from the United Kingdom based on the ground that his presence was 'not conducive to the public good'.²⁸⁷ He was involved in the activities of the Armed Islamic Group network and in terrorist activities in 1995 and 1996. Some of the information regarding the decision was not disclosed to ZZ based on state security reasons. He was not present in the hearing, but represented by special advocates who made a submission on his behalf. The CJEU ruled that the provision had to be interpreted in compliance with Article 47 of the Charter and that it follows from Article 52(1) of the Charter that any limitation on the exercise of the rights enshrined by the Charter 'must in particular respect the essence of the fundamental right in question and requires, in addition, that, subject to the principle of proportionality, the limitation must be necessary and genuinely meet objectives of general interest recognised by the European Union'.²⁸⁸

Secondly, the person concerned must be informed about the right to appeal and the notification must specify the court or administrative authority with which the appeal may be lodged and the time limit for the appeal, cf. Article 30(3). According to this provision, the person must also, where applicable, be informed of the time allowed to leave the territory of the host member state. The time limit must not be less than one month from the date of the notification, except in 'duly substantiated cases of urgency'. Justifications for the application of derogation from the one-month limit must be genuine and proportionate. '[T]he impact of an immediate or urgent removal on the personal and family life of the person concerned' must be taken into account in the assessment. Expulsion orders adopted on imperative or serious grounds (Article 28) 'does not necessarily mean that there is urgency'.²⁸⁹

4.9.3 *Procedural safeguards – Article 31*

Article 31(1) provides for a right to appeal or seek the review of any decision restricting the right to entry, residence or exit taken on the grounds of public policy, security or health. Pursuant to the provision, the person concerned shall have a right to access judicial and, where appropriate, administrative redress procedures in the host member state. The redress procedure must include 'an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based', cf. Article 31(3), which implies a full legal and factual inquiry. Any changes in circumstances between the date of the decision and the date of appeal are relevant to the redressing court or authority's consideration.²⁹⁰ It must also be assessed whether the decision is proportionate and in particular whether it is in conformity with the conditions laid down in Article 28(1) (see Section 4.7).

The person concerned must not be prevented from submitting his/her defence in person, even though the member state may exclude him/her from the territory pending the redress procedure, cf. Article 31(4). Exceptions from this right can be made in two circumstances. The first exception applies if the

²⁸⁶ Case C-300/11 ZZ, para 49

²⁸⁷ Case C-300/11 ZZ, para 23

²⁸⁸ Case C-300/11 ZZ, para 51. The judgement also contains statements on the requirement of the judicial review which are not further examined in the context of this report

²⁸⁹ COM (2009) 313 final, page 14

²⁹⁰ Guild, Peers and Tomkin (2014) page 287

person's appearance may cause 'serious trouble' to public policy or public security. This exception has not yet been considered by the CJEU. According to Guild et al., it would seem that the condition of 'serious trouble' is different from 'serious' or 'imperative' grounds (Articles 28(2) and 28(3)). The authors find the exact difference unclear, but conclude that the burden of proof falls upon the host member state, since this represents an exception from the right to present a defence in person.²⁹¹ The second exception from the right to submit the defence in person is when the appeal or judicial review concerns a 'denial of entry to the territory'.

Article 31(2) provides for a right not to be removed from the territory if an application for an interim order to suspend enforcement of the decision has been raised accompanying the appeal/judicial review. The right not to be removed lasts until the decision on the interim order has been taken. Exceptions to this right can be made in three specific and finite circumstances:

- An expulsion order has already been upheld by a previous judicial decision. Note: If two years have passed since the decision and the decision has not been enforced, the host member state is obliged pursuant to Article 33(2) to check whether the conditions for expulsion are still fulfilled.
- The person concerned has had previous access to a judicial review.
- The expulsion decision is based on Article 28(3) – 'imperative grounds of public security'.

4.9.4 *Duration of exclusion orders – Article 32*

An exclusion order must be limited in time. Hence, a person covered by the directive cannot be excluded for life. This is expressed in recital 27 of the preamble to the directive, which codifies the case law of the CJEU.²⁹² This is not explicitly expressed in the provisions of the directive. However, Article 32 provides for a right to apply for a lifting of the exclusion order.

The application for a lifting of the exclusion order can be submitted after 'a reasonable period', depending on the circumstances. In any event, the application can be submitted after three years from the enforcement of the final exclusion order, cf. Article 32(1). The person concerned can put forward arguments establishing that there has been a 'material change in the circumstances' that could justify a lifting of the exclusion order.

Accordingly, the host member state is obliged to review the decision of the exclusion when such an application has been submitted. The decision must be reached within six months of the submission.

The CJEU has stated that the provision is also 'applicable to measures prohibiting citizens of the Union from leaving the territory of a Member State'.²⁹³

The provision, however, is only applicable if the exclusion order has been 'validly adopted in accordance with Community law', cf. Article 32(1). Nevertheless, the CJEU has ruled that persons in such circumstances have a right to protection pursuant to EU law.²⁹⁴

During the consideration of the application, the person concerned does not have a right to enter the territory of the host member state, cf. Article 32(2).

²⁹¹ Guild, Peers and Tomkin (2014) page 288

²⁹² Joined Cases 115/81 and 116/81 *Adoui and Cornuaille*, para 12 and Case 348/96 *Calfa*, paras 26-28

²⁹³ Case C-249/11 *Byankov*, para 67

²⁹⁴ Case C-249/11 *Byankov*, paras 68-70

4.9.5 *Expulsion as a penalty or legal consequence – Article 33*

It follows from Article 33(1) that expulsion orders may not be issued as a ‘penalty or legal consequence of a custodial penalty’ unless the conditions of Articles 27, 28 and 29 are met.

Article 33(2) only applies to cases where the expulsion order is connected to a custodial penalty. If the expulsion order is enforced more than two years after it was issued, the person concerned may not be expelled without the host member state making a reassessment of the case. Article 33(2) provides for an obligation on the host member state to check that the person is ‘currently and genuinely a threat to public policy or public security’. This includes an assessment of whether there has been any ‘material change in the circumstances’.

As referred to in Section 4.5 concerning Article 27(2): It is required that the personal conduct causing the threat to one of the fundamental interests of society must be ‘present’. The CJEU has stated in *Orfanopoulos and Oliveri* that this requirement, as a general rule, must be satisfied ‘at the time of the expulsion’.²⁹⁵ The obligation of making the reassessment after more than two years helps to prevent persons who no longer represent a threat from being expelled.

5 Outside the directive – Rights against the home state

5.1 Introduction

It is clear from the wording in Article 3(1) of the directive that it only applies to Union citizens (and their family members) who move to or reside in a member state other than the Union citizen’s home state. The directive does not regulate the Union citizen’s and his/her family members’ right of residence in the Union citizen’s own member state. This has been confirmed by the CJEU in relation to the directive and to the prior legislation that the directive amends or repeals.²⁹⁶ A Union citizen’s right to reside in their own member state is ascribed to them by the principles of international law. A state cannot refuse its own nationals to enter and reside in their territory.²⁹⁷ The purpose of the directive is to strengthen the right to freedom of movement in other member states. Hence, family members may only invoke the directive for the purpose of a right to entry and residence in other member states than the Union citizen’s home state.

Nevertheless, the CJEU has found that a derived right of residence for TCN family members of Union citizens may be based on provisions in the Treaties under certain circumstances. Such derived rights are based on the consideration that a refusal to allow the right of residence for the TCN family members could interfere with the Union citizen’s right to freedom of movement.

Three different circumstances outside the scope of the directive to which the CJEU has ruled that residence rights can be invoked against the home member state will be examined in the following. This concerns returnees’ rights against the home state (Section 5.2), commuters’ rights against the home state (Section 5.3) and parents’ right of residence in the children’s home state where there is no cross-border element (Section 5.4).

²⁹⁵ Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*, para 79

²⁹⁶ See inter alia Cases C-60/00 *Carpenter* [2002] ECR I-6279, paras 35-36, C-457/12 *S and G* ECLI:EU:C:2014:136, paras 34-35 and C-456/12 *O and B* ECLI:EU:C:2014:135, paras 37-43

²⁹⁷ European Convention on Human Rights Protocol No. 4 Article 3

5.2 Returnees' rights against the home state

If a Union citizen has made use of the right to freedom of movement in another member state together with his/her family members and they eventually return to the Union citizen's home member state, the directive is not directly applicable for the purpose of the Union citizen's family members' right of residence in this state. Nevertheless, the CJEU has ruled that, under certain circumstances, the directive 'should be applied by analogy'.²⁹⁸ According to the CJEU, a granting of a derived right of residence for the TCN family members upon their return to the Union citizen's home member state:

seeks to remove the [...] obstacle on leaving the Member State of origin [...], by guaranteeing that that citizen will be able, in his Member State of origin, to continue the family life which he created or strengthened in the host Member State.²⁹⁹

The CJEU has ruled that the conditions for granting such a right of residence 'should not, in principle, be more strict than those provided for by Directive 2004/38'.³⁰⁰

This analogous interpretation originates from Case C-456/12 *O and B* concerning TCN family members' right of residence in Union citizens' state of origin. O, a Nigerian national, lived in Spain. His spouse, a Netherlands national, resided with him there for two months without pursuing economic activity. She moved back to the Netherlands when she could not find a job in Spain. B, a Moroccan national, was a resident in Belgium. His partner, a Netherlands national, was a resident in the Netherlands, but she was visiting B in Belgium every weekend for a period of one and a half years. Both the TCNs applied for a right to reside in the Netherlands with their respective wife and partner. The applications were refused. The question before the CJEU was whether the TCNs were entitled to a derived right of residence in the Netherlands on the basis of Article 21(1) TFEU. The CJEU had ruled in previous cases that such a right should be granted to the TCN family members of returning Union citizens who had engaged in economic activity in the host member state.

The first case, C-370/90 *Singh*, concerned a United Kingdom national who had resided in Germany for two years as a worker together with her Chinese spouse. They returned to the United Kingdom as self-employed persons in order to open a business. The CJEU ruled in *Singh* that the rights of movement and establishment conferred upon Community nationals by virtue of Articles 48 and 52 EEC (now Articles 45 and 49 TFEU) 'cannot be *fully effective* if such a person may be *deterred* from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse'.³⁰¹

In Case C-291/05 *Eind*, the question raised was whether a TCN daughter of a Netherlands national who had resided in the United Kingdom, on the basis of Regulation 1612/68 Article 10, was entitled to a derived right of residence in the Netherlands when her father moved back there with her after one year and eight months. According to the CJEU, the right of a migrant worker to return to his home member state 'after being gainfully employed in another Member State, is conferred by Community law, to the extent necessary to ensure the *useful effect* of the right to free movement for workers under Article 39 EC [now Article 45 TFEU] and the provisions adopted to give effect to that right'. Furthermore, this interpretation is 'substantiated' by the fundamental status of Union

²⁹⁸ Case C-456/12 *O and B*, para 50

²⁹⁹ Case C-456/12 *O and B*, para 49

³⁰⁰ Case C-456/12 *O and B*, para 50

³⁰¹ Case C-370/90 *Singh*, para 23 (emphasis added)

citizenship.³⁰² The father did not pursue any economic activity after returning to the home member state, but was in receipt of social assistance. However, the CJEU stated that

[a] national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State.³⁰³

The CJEU found that a worker's right to return to his/her home member state could not be considered a purely internal situation and that '[b]arriers to family reunification are therefore liable to *undermine* the right to free movement which the nationals of the Member States have under Community law'.³⁰⁴

It is clear from the two cases that the TCN family members' right of residence in the Union citizen's home member state in these 'U-turn' situations is based on the prohibition on restrictions on free movement pursuant to the treaty provisions.

Returning to the case of *O and B*; the question was whether the case law resulting from *Singh* and *Eind* could be applied generally in situations covered by Article 21(1) TFEU (i.e. where the Union citizen has not pursued economic activity). The CJEU's answer to this was in the affirmative. However, the scope of application of Article 21(1) TFEU upon the return to the home state for the purpose of a right to residence for the TCN family members is limited to circumstances where the 'residence of the Union citizen in the host Member State [by virtue of Article 21(1) TFEU] has been *sufficiently genuine* so as to enable that citizen to *create or strengthen family life* in that Member State'.³⁰⁵

According to the CJEU, residence pursuant to Article 6 of the directive (up to three months) cannot be considered sufficiently genuine, because the Union citizen 'does not intend to settle in the host Member State in a way which would be such as to create or strengthen family life in that Member State'. A refusal of a derived right of residence of the TCN family members would therefore not 'deter' the Union citizens from exercising his/her rights to freedom of movement.³⁰⁶ This is not the case if the Union citizen and his/her family members have resided pursuant to and in conformity with the conditions set out in Articles 7(1) and (2) and 16(1) and (2) of the directive (residence between three months and five years or permanent residence).³⁰⁷ The CJEU also stated that short periods of residence pursuant to Article 6 do not have a cumulative effect for the purpose of constituting genuine residence.³⁰⁸

This ruling raises several questions. First: How should the CJEU's description of 'sufficiently genuine' residence be interpreted? Is the genuineness of the Union citizen's residence determined objectively by a period of (at least) three months, or should a subjective assessment be applied, where the decisive feature is the intention of the Union citizen's residence in the host member state?

³⁰² Case C-291/05 *Eind*, para 32 (emphasis added)

³⁰³ Case C-291/05 *Eind*, para 35

³⁰⁴ Case C-291/05 *Eind*, para 37 (emphasis added)

³⁰⁵ Case C-456/12 *O and B*, para 51 (emphasis added)

³⁰⁶ Case C-456/12 *O and B*, para 52

³⁰⁷ Case C-456/12 *O and B*, paras 53-56

³⁰⁸ Case C-456/12 *O and B*, para 59

By making reference to Article 7 of the directive, the CJEU implicitly refers to a certain time limit (of at least three months). However, the wording of the ruling may be interpreted as making reference to the Union citizen's intention of staying in the host member state, cf. 'intends to exercise his rights under Article 7(1) of Directive 2004/38'.³⁰⁹ Schoenmaekers and Hoogenboom argue that the latter interpretation is correct. They state that 'residence of three months is not a *condition* for invoking Article 7' and, furthermore, that 'it is not about (actual) time spent, but in the end more about where the centre of interests of the persons in question lie'.³¹⁰ Ponterlitscheck and Weaver's view is that a threshold of a minimum of three months of residence is a correct interpretation based on the condition of creating or strengthening family life in the host member state.³¹¹ Whether the CJEU, or the EFTA Court, will adhere to the first or to the second view remains to be seen.

Second: The CJEU ruled that Article 21(1) requires that the family life may 'continue' in the home member state upon returning from a sufficiently genuine residence in the host member state where the family life has been created or strengthened. This implies that the family member must have resided in the host member state with the Union citizen pursuant to Articles 7(2) or 16(2). The words 'create or strengthen' imply that the family may have been founded after the Union citizen moved to the host member state and that it is not required that the family member moved to the host member state together with the Union citizen in the first place.³¹² Furthermore, there is nothing in the ruling suggesting that the family member's residence in the host member state must have been sufficiently genuine as well. 'Sufficiently genuine' appears to relate to the residence of the Union citizen.³¹³ This implies that the TCN family member may join the Union citizen and create a family life shortly before the whole family returns to the home member state.³¹⁴ As long as the family ties are genuine and real and the Union citizen's residence has been sufficiently genuine, the rule will apply regardless of the length of the family member's stay in the host member state together with the Union citizen.

A relevant question in connection to this is whether the family member's derived right of residence in the home member state expires if there is a time gap between the Union citizen's return and the family member's arrival there. The question was raised before the CJEU in *O and B* (in relation to B). However, since he did not have the status as 'spouse' at the time his partner resided in the host member state, the CJEU did not find it necessary to answer the question. Advocate General Sharpston addressed the issue in her opinion. She found that the answer depends on the reason why the EU citizen and the family members did not move together. She made reference to the provisions in the directive that do not require a temporal connection between the Union citizen's movement and the family members' arrival in the host state for the purpose of the family members' derived right of residence. Furthermore, she pointed to the fact that there may be several reasons why the family do not move at the same time. She did not consider the reason for delay relevant and emphasised that '[w]hat matters is that the decision to move in order to reside with an EU citizen is taken in the exercise of the right to a family life'. She argued that the only circumstances under which the TCN

³⁰⁹ Case C-456/12 *O and B*, para 53

³¹⁰ Sarah Schoenmaekers and Alexandra Hoogenboom, *Singh and Carpenter Revisited: Some Progress but no Final Clarity* (Maastricht Journal of European and Comparative Law 21 (2014) pages 494-513) page 507

³¹¹ Sarah Ponterlitscheck and Neil Weaver, *Freizügigkeit: Abgeleitetes Aufenthaltsrecht des drittstaatsangehörigen Familienangehörigen eines EU-Bürgers in dessen Herkunftsmitgliedstaat* (Europäische Zeitschrift für Wirtschaftsrecht, hefte 10 (2014) pages 395-400) [cited from <https://beck-online.beck.de/>] page 400

³¹² This interpretation is in compliance with the ruling in case C-127/08 *Metock*

³¹³ Henrik Skovgaard-Petersen, *Gensyn med Singh og Carpenter – Sag C-456/12, O og B, og C-457/12 S og G* (EU-ret og menneskeret 21 (2014) pages 128-144) page 137

³¹⁴ See also Schoenmaekers and Hoogenboom (2014) page 509

family member would not have a derived right of residence is when the ‘family member and an EU citizen have decided that they no longer wished to live together as a couple and exercise their right to a family life’.³¹⁵ Skovgaard-Petersen has a different view. He suggests that both the wording ‘family life [...] may continue’³¹⁶ and the purpose of the doctrine imply that a requirement of a certain continuity of the family life may be imposed, such that the family member may be obliged to apply for family reunification in a natural continuation of the Union citizen’s return.³¹⁷ However, since the CJEU ruled that the directive shall be applied by analogy, it is arguable that a temporal connection between the Union citizen’s return and the family member’s arrival may not be required in the home member state of the former (see Section 2.3.2).

Third: As regards the analogical application of the directive, it may be questioned whether the Union citizen is required to fulfil the conditions of the directive upon their return in order for the family member to be granted a derived right of residence in the home member state of the former. In the *Eind* case, the CJEU found that it was not relevant whether the Union citizen pursued economic activity in the home member state after returning. It was the provision regulating the daughter’s right of residence in the host member state that was ruled to be applied by analogy, namely Article 10(1)(a) of Regulation 1612/68 (now replaced by the directive).³¹⁸ In *O and B*, the CJEU stated that the directive:

should be applied by analogy to the conditions for the residence of a Union citizen in a Member State other than that of which he is a national, given that [...] it is the Union citizen who is the sponsor for the grant of a derived right of residence to a third-country national who is a member of his family.³¹⁹

If the conditions of the Union citizen’s right of residence should be applied by analogy, it would imply, as suggested by Skovgaard-Petersen, that the Union citizen himself would have to meet the criteria of a ‘fictitious’ right of residence in his own member state in order for the family member to gain a derived right of residence.³²⁰ Under such a rule, Mr Eind’s daughter would not have had a right of residence in Mr Eind’s state of origin, since he was not a worker and presumably did not have sufficient resources. It is unclear whether the CJEU has changed the state of law with *O and B* or whether the *Eind* doctrine has been maintained. A separate reading of *O and B* implies that the Union citizen may be obliged to meet the criteria laid down in the directive upon and after returning to his/her home member state in order to secure a derived right of residence for his/her TCN family member there.³²¹ It is obviously also required that the TCN family member fulfils the criteria laid down in the directive for the status of ‘family member’ (see Section 2.3.3).

5.3 Commuter’s rights against the home state

The question of commuters’ rights against the home state concerns situations where the Union citizen is a resident in his/her member state of origin while exercising economic activity in another

³¹⁵ Advocat General Opinion Cases C-456/12 *O and B* and C-457/12 *S and G* ECLI:EU:C:2013:837, paras 139-142

³¹⁶ Case C-456/12 *O and B*, paras 54 and 55

³¹⁷ Skovgaard-Petersen (2014) page 136

³¹⁸ Case C-291/05 *Eind*, paras 38-40

³¹⁹ Case C-456/12 *O and B*, para 50

³²⁰ Skovgaard-Petersen (2014) page 137

³²¹ For further reading, see Schoenmaekers and Hoogenboom (2014) and Skovgaard Petersen (2014)

member state on a regular basis pursuant to the right to freedom of movement enshrined in the treaties.

The CJEU has ruled that for the right to freedom of movement to be effective and exercised without obstacles, the TCN family members of the Union citizen may – in certain circumstances – be granted a right of residence in the home member state of the Union citizen.

This was established by the CJEU in Case C-60/00 *Carpenter*, concerning the freedom to provide services in other member states. Carpenter, a British national resident in the United Kingdom, regularly travelled to other member states on business trips in connection with the services he provided. Hence, his activities were covered by Article 49 EC (now Article 56 TFEU). He was married to a Philippine national who was residing illegally in the United Kingdom. The wife was looking after Mr Carpenter's children (from a former relationship). The CJEU read Article 49 EC in the light of the fundamental right to respect for family life and stressed that the EU legislature has 'recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty'.³²² With reference to the *Singh* case, the CJEU further stated:

It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be *fully effective* if Mr Carpenter were to be *deterred* from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse.³²³

The CJEU considered that the deportation of Mrs Carpenter would not be proportionate, because the interest of Mr Carpenter's right to family life outweighed the United Kingdom's interest to maintain public order and public safety.³²⁴

The ruling has been confirmed and – in some ways – limited by Case C-457/12 *S and G* (delivered on the same day as Case C-456/12 *O and B*, referred to in Section 5.2). The case concerned the right of residence in the Netherlands of the TCN family members of Union citizens who were residents in the Netherlands, but working (full- and part-time) in Belgium.

S, a Ukrainian national, was the mother-in-law of a Netherlands national. Her son-in-law (a Union citizen) was employed in a Netherlands company and spent 30% of his working time in Belgium on business trips. S was looking after her grandchildren (the son-in-law's children) in the Netherlands. G, a Peruvian national, was married to a Netherlands national. They had one child in common in addition to G's child from a former relationship living with them. The husband was working in a Belgian company and travelled to Belgium on a daily basis. Hence, both Netherlands nationals were covered by Article 45 TFEU.

The question referred to by the CJEU was whether a refusal of the right of residence in the Netherlands of the two TCNs constituted a breach of the Union citizens' right to freedom of movement as workers. The CJEU found that the *Carpenter* doctrine was transposable to Article 45 TFEU and stated:

³²² Case C-60/00 *Carpenter*, para 38

³²³ Case C-60/00 *Carpenter*, para 39 (emphasis added)

³²⁴ Case C-60/00 *Carpenter*, para 42

The effectiveness of the right to freedom of movement of workers may require that a derived right of residence be granted to a third-country national who is a family member of the worker – a Union citizen – in the Member State of which the latter is a national.³²⁵

The CJEU introduced that the threshold of when a TCN family member should be granted a right of residence is when such a right is ‘*necessary* to guarantee the citizen’s *effective exercise* of the fundamental freedom guaranteed by Article 45 TFEU’.³²⁶ Furthermore, this criterion is met when refusing such a right of residence would ‘discourage’ the Union citizen from exercising his/her rights. As far as looking after the Union citizen’s children concerns, the CJEU stated that this is a relevant factor in the assessment. However, it is not sufficient in itself that it is ‘desirable’ that the mother-in-law looks after the children. The CJEU distinguishes the *Carpenter* case from the *S and G* case by the fact that in *Carpenter*, the Union citizen’s spouse was looking after the children, whilst in *S and G*, the children were looked after by the mother-in-law. This implies that the CJEU places emphasis on the closeness of the family ties between the TCN family member and the Union citizen.³²⁷ It may be argued the necessity test is influenced by the closeness of family ties, so the core family member’s right of residence may arise where there is a lesser degree of necessity than what applies for the extended family.

Hence, the *S and G* case extended the personal scope of the *Carpenter* doctrine by making it applicable also to the cases of workers under Article 45 TFEU. However, the threshold for the derived right of residence of the TCN family member has been restricted by the application of the rule so that the presence of the family member must be necessary for the Union citizen’s ability to exercise his/her right to freedom of movement.

It has still not been determined by the CJEU whether this doctrine is transferrable to self-employed persons who exercise their fundamental freedom in another country while residing in their home member state (Article 49 TFEU) or whether the doctrine is generally applicable in relation to Article 21(1) TFEU.

The main factors in the determination of TCN family members’ right of residence in the commuter’s home member state can be summarised as follows:

- The Union citizen must be exercising a fundamental right to freedom of movement as a service provider or worker pursuant to Articles 45 TFEU and 56 TFEU by travelling regularly to another/other member state/states.
- The family ties with the TCN family member must be sufficiently close.
- The family member’s right of residence must be necessary (i.e. the refusal to grant such a right must discourage the Union citizen from effectively exercising his/her fundamental freedom of movement).

5.4 Right of residence in the home state – no cross-border element

The CJEU has also ruled that, in some particular circumstances, the TCN family members of Union citizens who have not made use of their right to freedom of movement may have a right of residence in the Union citizen’s home member state. This was established in Case C-34/09 *Zambrano*. The case concerned the right of residence in Belgium for the Colombian parents of two minor Union

³²⁵ Case C-457/12 *S and G*, para 40

³²⁶ Case C-457/12 *S and G*, para 42 (emphasis added)

³²⁷ Case C-457/12 *S and G*, para 43

citizens. The parents had moved to Belgium and applied for asylum. Their applications were refused, and they were ordered to leave Belgium. However, this order included a non-refoulement clause, which stated that they could not be sent back to Colombia because of the civil war. During that time, in Belgium the wife gave birth to two children who both obtained Belgium nationality pursuant to Belgian legislation.

The children had always stayed in the country of which they were nationals (Belgium). Thus, they had never made use of their right to freedom of movement as Union citizens (they were ‘static’ EU citizens), and Article 21(1) TFEU did not apply. However, the CJEU emphasized that ‘citizenship of the Union [pursuant to Article 20 TFEU] is intended to be the fundamental status of nationals of the Member States’ and ruled that

Article 20 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.³²⁸

The CJEU further stated that if the parents were refused the right to reside and work in the children’s home member state, the children ‘would have to leave the territory of the Union in order to accompany their parents’. The CJEU concluded:

In those circumstances, those citizens of the Union would, in fact, be unable to exercise the *substance of the rights* conferred on them by virtue of their status as citizens of the Union.³²⁹

Hence, the parents’ right of residence in Belgium was based on the fact that a refusal to grant this right could cause a threat to the substance of the children’s rights as Union citizens as such.

The scope of the *Zambrano* doctrine has been limited by subsequent judgements.

In Case C-434/09 *McCarthy* (see Section 2.2), the CJEU found that the refusal to grant Mrs McCarthy’s husband the right of residence in the United Kingdom would not have the effect of ‘depriving her of the genuine enjoyment of the substance of the rights associated with her status as a Union citizen’ or ‘obliging [her] to leave the territory of the European Union’.³³⁰ What distinguishes *McCarthy* from *Zambrano* is that *McCarthy* was not dependent on her husband’s presence for the purpose of residing in her home member state or in the territory of the Union as a whole.

In Case C-256/11 *Dereci*, the CJEU stated that the criterion for basing the right of residence of TCN family members on Article 20 TFEU ‘is specific in character’.³³¹ The CJEU concluded that even though it might be ‘desirable’ for economic reasons or in order to live together as a family, this is not ‘sufficient in itself’ to constitute that the Union citizen will be forced to leave the territory of the Union if the TCN family member is not granted a right of residence in the home member state of the former.³³² This has been confirmed in the joined Cases C-356/11 and C-357/11 *O and S*.³³³

³²⁸ Case C-34/09 *Zambrano*, paras 41-42 (emphasis added)

³²⁹ Case C-34/09 *Zambrano*, para 44 (emphasis added)

³³⁰ Case C-434/09 *McCarthy*, paras 49-50

³³¹ Case C-256/11 *Dereci* [2011] ECR I-11315, para 67

³³² Case C-256/11 *Dereci*, para 68

³³³ Joined Cases C-356/11 and 357/11 *O and S* ECLI:EU:C:2012:776, para 52

In Case C-40/11 *Iida*, the CJEU confirmed that the *Zambrano* principles apply in ‘very specific situations’ where a refusal of the right of residence ‘exceptionally’ cannot be refused.³³⁴ The CJEU also recalled that ‘purely hypothetical prospects’ of exercising the right of freedom of movement or of that right being obstructed do not establish a sufficient connection with EU law.³³⁵

Consequently, TCN family members’ right of residence in the Union citizen’s home country where there is no cross-border element based on Article 20 TFEU can be summarised as follows:

- The refusal of granting the right of residence to the TCN must cause a very specific situation where the Union citizen is de facto obliged to leave the territory of the Union.
- The refusal must have the effect that the Union citizen is deprived of the genuine enjoyment of the rights conferred upon him/her as a citizen of the Union.
- It is not sufficient that the right of residence of the TCN is merely desirable.
- The prospect of obstruction of the right to freedom of movement must not be purely hypothetical.

6 Rights against the host state outside the scope of the directive

6.1 Introduction

The CJEU has ruled that TCN family members may have the right of residence in other member states by virtue of primary EU law when the situation concerned falls outside the scope of the directive. Namely, when refusing to grant such a right would constitute a breach on the member states’ obligation not to place restrictions on the freedom of movement of persons.

6.2 Commuters’ rights against the host state

If a Union citizen is resident in a member state (other than his home member state) and working in another member state, he is considered a ‘worker’ in the state of employment and a self-sufficient person in the member state where he is residing.³³⁶ Hence, his income from the employment in the other member state must (in addition to any other sources) be sufficient so as not to become a burden on the social assistance system of the state in which he is resident.

If the person concerned has been employed or self-employed in the host member state for three continuous years and then starts working (as an employee or self-employed person) in another member state while still residing in the host member state, he/she has a right of permanent residence in the host member state. This is conditional upon him/her returning to the host member state every day or at least once a week, cf. Article 17(1) c (see Section 3.3.4.5 where this provision is referred to).

The family members’ right of residence only applies in the state of residence.

6.3 Primary carers’ right of residence in the host state

Relatives in the ascending line who are dependent on the Union citizen have a right of residence in the host member state when they accompany or join the Union citizen there, cf. Article 2(2) d, cf. Article 3(1) of the directive. This implies that the reverse situation, where a Union citizen is

³³⁴ Case C-40/11 *Iida*, para 71

³³⁵ Case C-40/11 *Iida*, para 77

³³⁶ COM (2009) 313 final, page 4

dependent on the relative in the ascending line, falls outside the scope of the directive. This has been confirmed by the CJEU.³³⁷ In its proposal for the directive, the Commission suggested removing the dependency condition in Article 2(2) d.³³⁸ The proposal was turned down by the Council, and the Commission accepted the Council's common position.³³⁹

Nevertheless, the CJEU has ruled that the primary carer of a minor Union citizen may have a right to reside in the host member state where the Union citizen is resident. This was established in Case 200/02 *Chen* (see Section 2.2 for a detailed description of the facts of the case). The minor Union citizen, an Irish national, resided in the United Kingdom with her Chinese mother. The CJEU ruled that a refusal of the mother's right of residence in the United Kingdom would 'deprive the child's right of residence [pursuant to Article 18 EC and Directive 90/364/EEC] of any useful effect'.³⁴⁰ The CJEU applied Article 12 of Regulation 1612/86 (now Article 10 of Regulation 492/2011. See Section 3.3.5.3 on this provision) and the ruling in Case C-413/99 *Baumbast* by analogy and stated:

It is clear that enjoyment by a young child of a right of residence *necessarily implies* that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.³⁴¹

The ruling has been confirmed in Case C-86/12 *Alokpa* (see Section 2.2 for a detailed description of the facts of the case) in relation to the directive.³⁴² The CJEU stated in *Alokpa*:

[W]hile Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.³⁴³

The relevant features of this doctrine are that a minor Union citizen can be deprived if his/her right to freedom of movement pursuant to Article 21(1) TFEU if he/she is not able to bring with him/her the primary carer. The right to freedom of movement would in that case not be effective. The rule applies as long as the child fulfils the criteria in the directive for the right of residence in the host member state.

As regards the personal scope of the doctrine, a relevant question is whether it is limited to the child's parents. The wording presumably implies that the rule can be applied to other persons as long as they are the child's primary carer. The CJEU speaks of 'the *person* who is his or her primary carer'.³⁴⁴ As Hofstotter points out, the identity of the primary carer is based on a 'mere factual connection' and that 'primary care is not necessarily parental care'.³⁴⁵

³³⁷ Case C-200/02 *Chen*, para 44, Case C-86/12 *Alokpa*, para 25, Case C-40/11 *Iida*, para 55

³³⁸ COM (2001) 257 final, under Article 2(2) d

³³⁹ SEC (2003) 1293, point 3.3.2

³⁴⁰ Article 18 EC is now Article 21(1) TFEU. Directive 90/364/EEC is replaced by Directive 2004/38/EC

³⁴¹ Case C-200/02 *Chen*, para 45 (emphasis added)

³⁴² Case C-86/12 *Alokpa*, para 28

³⁴³ Case C-86/12 *Alokpa*, para 29

³⁴⁴ Case C-200/02 *Chen*, para 45, Case C-86/12 *Alokpa*, para 28 (emphasis added)

³⁴⁵ Hofstotter, Bernhard, *A cascade of rights, or who shall care for little Catherine? Some reflections on the Chen case* (European Law review (2005) 30(4), pages 548-558), page 555. See also Damian Chalmers, Gareth Davies and Giorgio Monti (2014), *European Union Law: Cases and Materials* (Cambridge: Cambridge University Press, 3rd edition) page 498

It may be assumed that the residency rights last until the child is no longer in need of the primary carer's presence.

7 Abuse of rights and fraud

7.1 Introduction

Article 35 of the directive establishes:

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. (Emphasis added).

This must, according to Sørensen, assumedly be a codification of the general principle of the abuse of rights in EU law. Accordingly, he assumes, the provision must be expected to be interpreted in accordance with how the principle has been interpreted previously.³⁴⁶ According to Sørensen, the application of the principle has been narrowed by the CJEU.³⁴⁷

The principle of abuse has been expressed by the CJEU as follows:

It should be added that the scope of Union law cannot be extended to cover abuses [...]. Proof of such an abuse requires, first, a combination of *objective circumstances* in which, despite formal observance of the conditions laid down by the European Union rules, the *purpose* of those rules has not been achieved, and, secondly, a *subjective element* consisting in the intention to obtain an advantage from the European Union rules by *artificially* creating the conditions laid down for obtaining it [...].³⁴⁸

A relevant question is whether taking advantage of the rights conferred by EU law for the purpose of circumventing national legislation can constitute abuse of EU law. The question was raised in *Chen* (see Sections 2.2 and 6.3). The Chinese mother moved her residence to Northern Ireland in order for her daughter to acquire Irish citizenship in accordance with Irish rules (the principle of *jure solis*). It was undisputed that Mrs Chen's purpose of residence in Northern Ireland was to subsequently obtain a right of residence in the United Kingdom with her (Union citizen) child. The United Kingdom's view was that this was an illegal circumvention of national immigration law.³⁴⁹

The CJEU did not agree. According to the CJEU, the conditions for the acquisition and loss of nationality are for each member state to determine. In this case, the legality of the acquisition of the child's Irish nationality was not questioned. Hence, the mother's purpose of staying in Northern Ireland was not relevant, and the fact that she created a situation in order to be able to rely on EU law did not constitute an abuse of EU law.³⁵⁰

³⁴⁶ Sørensen, Karsten Engsig, *Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?* (Common Market Law Review 43 (2006) pages 423-459), pages 437-438

³⁴⁷ Sørensen (2006) page 427

³⁴⁸ Case C-456/12 *O and B*, para 58 (emphasis added). The principle has also been expressed similarly in other judgements by the CJEU concerning different areas of EU law. See inter alia Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paras 50-53 concerning export and immediate re-import and the right to export-refunds. See also Case C-202/13 *McCarthy 'II'*, para 54

³⁴⁹ Case C-200/02 *Chen*, para 34

³⁵⁰ Case C-20/02 *Chen*, paras 35-38. See also Case C-212/97 *Centros* [1999] ECR I-1459 concerning the freedom of establishment where the CJEU stated that to set up a company or branches in another member state where the rules of company are less strict does not 'in itself,

Therefore, the person's intention is not in itself enough to establish that there is an abuse of EU law. Advocate General Geelhoed stated in the opinion in Case C-109/01 *Akrich* that even though the EU legislature 'did not intend to create a right that can be used in order to evade national immigration laws', the use of the right to install oneself in another member state together with a TCN family member is nevertheless 'inherent in EC law'.³⁵¹

In the *Akrich* judgment (see Section 2.3.2), the CJEU made an attempt to clarify the substance of the principle of abuse. The CJEU's statement is worth citing in full:

As regards the question of abuse mentioned at paragraph 24 of the Singh judgment, cited above, it should be mentioned that the *motives* which may have prompted a worker of a Member State to seek employment in another Member State are of *no account* as regards his right to enter and reside in the territory of the latter State provided that he there pursues or wishes to pursue an *effective and genuine activity* (Case 53/81 Levin [1982] ECR 1035, paragraph 23).

Nor are such motives relevant in assessing the legal situation of the couple at the time of their *return* to the Member State of which the worker is a national. Such conduct cannot constitute an abuse within the meaning of paragraph 24 of the Singh judgment even if the spouse did not, at the time when the couple installed itself in another Member State, have a right to remain in the Member State of which the worker is a national.

Conversely, there would be an abuse if the facilities afforded by Community law in favour of migrant workers and their spouses were invoked in the context of *marriages of convenience* entered into in order to *circumvent* the provisions relating to entry and residence of nationals of non-Member States.³⁵²

Hence, the central factor in the abuse assessment is the question of the effective and genuine use of the rights conferred by EU law. As long as this is answered in the affirmative and the family relationship of the Union citizen and the TCN is genuine as well, the purpose or motive behind the transposal of residence is irrelevant for the application of EU law.

On the other hand, if the purpose is to trigger EU law in order to avoid national legislation and the residence in another member state was not genuine and effective, the person concerned may not rely on EU law. Furthermore, although the use of EU law has been genuine and effective, the TCN family member may not rely on EU law if the relationship with the Union citizen is not genuine and is contracted solely for the purpose of enjoying rights under EU law.

Consequently, there are two separate assessments to be made in connection to the question of abuse: (1) Is EU law applicable? Hence, is the purpose of the Union citizen to make effective and genuine use of rights conferred by EU law? (2) Is the family relationship genuine? The two different assessments will be dealt with in the following.

constitute an abuse of the right of establishment', para 27. The case concerned a Danish national who registered his private limited company in England and Wales where the rules on minimum share capital were less stringent than in Denmark

³⁵¹ Advocate General Opinion Case C-109/01 *Akrich* [2003] ECR I-9607, para 180

³⁵² Case C-109/01 *Akrich*, paras 55-57 (emphasis added)

7.2 The requirement of a genuine and effective residence

In the cases of returnees (see Section 5.2), the member states may not inquire into the personal motives that triggered the person to move to another member state before returning home as long as the residence was genuine and effective.³⁵³ The Commission has given guidance on a set of factors, which the member states may take into account in the ‘genuine and effective’ assessment:

- 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*).³⁵⁴

Due attention must be given to all the circumstances in individual cases. According to the Commission, the member states ‘must assess the conduct of persons concerned in the light of the objectives pursued by Community law and act on the basis of objective evidence’.³⁵⁵ The Commission has further stated that maintaining some ties to the home member state does not lead to a conclusion that the residence in the host member state was not genuine and effective. As referred to in Section 5.2, the CJEU has subsequently given guidance on what constitutes a sufficiently genuine residence in the host member state (i.e. residence pursuant to and in accordance with Articles 7 and 16 of the directive).³⁵⁶ The Commission’s list of factors will therefore have to be applied in light of this subsequent case law.

7.3 Genuine family relationship

The Commission Guidelines from 2009 give quite extensive guidance on the concept of a marriage of convenience. ‘Marriages of convenience’ is mentioned as one example of fraud and abuse, cf. ‘such as’.³⁵⁷ A marriage of convenience is defined in recital 28 in the preamble to the directive as a relationship ‘contracted for the sole purpose of enjoying the right of free movement and residence’. The recital refers not only to marriages, but ‘any [...] form of relationships’. According to the Commission, the definition of marriages of convenience can be extended to other forms of relationships by analogy. This includes, inter alia, a (registered) partnership of convenience, fake adoption and false declarations of fatherhood.³⁵⁸ According to Guild et al., the essential assessment is whether the persons do have a genuine marital relationship, or whether, regardless of the fulfilment of the formal legal requirements for a valid marriage, their only reason for the relationship is to invoke free movements rights.³⁵⁹

³⁵³ COM (2009) 313 final, page 18

³⁵⁴ COM (2009) 313 final, page 18

³⁵⁵ COM (2009) 313 final, page 18

³⁵⁶ See Case C-456/12 *O and B*

³⁵⁷ Guild, Peers and Tomkin (2014) page 302. Guild et al. comment that it is not clear from the wording of the Directive whether such relations should be categorized under ‘fraud’ or ‘abuse’. Article 35 mentions fraud and abuse, and it is unclear whether the phrase ‘such as’ refers to one or both

³⁵⁸ COM (2009) 313 final, page 15

³⁵⁹ Guild, Peers and Tomkin (2014) pages 302-303

The Commission has stated that the member states may identify different indicative criteria suggesting on one hand that there is unlikely to be abuse, and on the other hand that there is a possible intention to abuse EU law to circumvent national immigration laws.

Indicative criteria suggesting that EU law is not being abused could be:

- the third country spouse would have no problem obtaining a right of residence in his/her own capacity or has already lawfully resided in the EU citizen's Member State beforehand;
- the couple was in a relationship for a long time;
- the couple had a common domicile/household for a long time;
- the couple have already entered a serious long-term legal/financial commitment with shared responsibilities (*mortgage to buy a home, etc*);
- the marriage has lasted for a long time.³⁶⁰

Possible triggers for investigation of abuse could, according to the Commission, be:

- the couple have never met before their marriage;
- the couple are inconsistent about their respective personal details, about the circumstances of their first meeting, or about other important personal information concerning them;
- the couple do not speak a language understood by both;
- evidence of a sum of money or gifts handed over in order for the marriage to be contracted (*with the exception of money or gifts given in the form of a dowry in cultures where this is common practice*);
- the past history of one or both of the spouses contains evidence of previous marriages of convenience or other forms of abuse and fraud to acquire a right of residence;
- development of family life only after the expulsion order was adopted;
- the couple divorces shortly after the third country national in question has acquired a right of residence.³⁶¹

The Commission stresses that Community law prohibits systematic checks and that there must be a well-founded suspicion of abuse for the member state to carry out an investigation. It also states that the abuse assessment must be carried out 'in the framework of Community law, and not with regard to national migration law'. This follows from 'the principle of supremacy of Community law'.³⁶² Furthermore, Member states must give due attention to all the circumstances of an individual case and may not rely on one sole attribute.³⁶³

Since Article 35 provides for a possibility to restrict rights under the directive, the burden of proof lies on the Member state, according to the Commission.

7.4 Fraud

Article 35 also provides for a possibility to act against fraud. The Commission defines fraud as 'deliberate deception or contrivance made to obtain the right of free movement and residence'. Fraud in the context of the directive is, according to the Commission, likely to be limited to the 'forgery of

³⁶⁰ COM (2009) 313 final, page 16

³⁶¹ COM (2009) 313 final, pages 16-17

³⁶² COM (2009) 313 final, page 16

³⁶³ COM (2009) 313 final, page 17

documents or false representation of a material fact' necessary to invoke the rights conferred by the directive. Guild et al. mention different examples of fraud (a false EU passport, a false certificate of marriage).³⁶⁴

The *McCarthy 'II'* judgement (referred to in Section 3.2.3.3) also serves an example of a type of false document, namely fake residence cards. As we recall, the United Kingdom had adopted a requirement for TCN family members holding a residence card from another member state to acquire a certain EEA family permit for the purpose of entry into its territory. This requirement was built on considerations of general prevention. The United Kingdom held that it was justified because of a 'systemic' abuse of rights; inter alia, sham marriages and fake residence cards for the purpose of gaining illegal access to the state's territory.³⁶⁵ The CJEU, however, found that the non-acceptance of residence cards from other member states had to be based on doubt 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' that could justify the conclusion that there is an abuse of rights or fraud.³⁶⁶

7.5 Summary of the material scope of Article 35

The following factors may constitute abuse or fraud:

- Where the use of rights conferred by EU law was not genuine and effective and the sole purpose was to avoid national immigration law, or;
- The family relationship is not genuine (e.g. marriage of convenience), or;
- There has been a forgery of documents or other kinds of falsifications.

A residence in another member state that was not genuine and effective does not necessarily mean that the family relationship is not genuine. In contrast, a marriage of convenience does not necessarily entail that the Union citizen's use of the right to freedom of movement was not genuine and effective. These are separate assessments.

7.6 Measures that can be adopted

Article 35 provides for a possibility to adopt 'necessary measures to refuse, terminate or withdraw' rights conferred by the directive.

As an example of the 'refusal' of rights, the Commission mentions the refusal to issue an entry visa or a residence card. 'Termination or withdrawal' of rights could, according to the Commission, be the decision to terminate the validity of a residence card and to expel the person concerned.³⁶⁷

Article 35 further prescribes that the adopted measures must be proportionate. In connection to this requirement, Guild et al. point to the necessity of an individual assessment when deciding on which restrictive measure to adopt. They suggest that 'an outright refusal of the free movement rights is appropriate in cases where the conditions for free movement rights were fraudulently manufactured'. On the other hand, it would not be proportionate to refuse the right of entry and residence of persons who are not making genuine and effective use of EU rights. In such circumstances, the host member state should examine whether the Union citizen and his/her (genuine) family members could acquire a right to entry and residence under national immigration law.³⁶⁸

³⁶⁴ Guild, Peers and Tomkin (2014) page 302

³⁶⁵ Case C-202/13 *McCarthy 'II'*, para 27

³⁶⁶ Case C-202/13 *McCarthy 'II'*, para 53 (emphasis added)

³⁶⁷ COM (2009) 313 final, page 19

³⁶⁸ Guild, Peers and Tomkin (2014) page 303

The Commission points to the fact that present EU law does not provide for any specific sanctions to combat abuse and fraud. Sanctions may be laid down by member states under civil, administrative or criminal law. As a sanction under civil law, the Commission mentions ‘cancelling the effects of a proven marriage of convenience on the right of residence’. Fines and imprisonment serve as examples of sanctions under administrative or criminal law. The Commission stresses that the sanctions must be effective, non-discriminatory and proportionate.³⁶⁹

The measures cannot be automatic in nature and based on objectives of general prevention. This was established by the CJEU in the *McCarthy ‘II’* judgement. The CJEU found that ‘considerations of general prevention’ cannot justify the adoption of such measures. This would, according to the CJEU, exclude ‘any specific assessment of the conduct of the person concerned himself’.³⁷⁰ Measures of such an automatic nature would:

disregard the very substance of the primary and individual right of Union citizens to move and reside freely within the territory of the Member States and of the derived rights enjoyed by those citizens’ family members who are not nationals of a Member State.³⁷¹

7.7 Procedural safeguards

Article 35 also prescribes that the restrictive measures adopted by the member state must be subject to the procedural safeguards provided for in Articles 30 and 31 of the directive (see Sections 4.9.2 and 4.9.3)

As mentioned in Section 4.9.1, the rules of Articles 30 and 31 apply with some modifications (i.e. the special exceptions relating to public security).

³⁶⁹ COM (2009) 313 final, page 19

³⁷⁰ Case C-202/13 *McCarthy ‘II’*, para 55

³⁷¹ Case C-202/13 *McCarthy ‘II’*, para 57

Part III: The scope of the Citizens Directive as part of the EEA Agreement

1 Introduction

1.1 The EEA legal order

The legal study on Norway's obligations under the Citizens Directive³⁷² includes an analysis of the possibility of any differences in the scope of the Citizens Directive between the EU and the EEA legal order. The presumption for all directives included in the annexes of the EEA Agreement is the equal interpretation and application of the provisions with the corresponding provisions in the EU legal order (the principle of homogeneity).³⁷³ Furthermore, there is a clear presumption of EEA law being interpreted and applied equally in the EU and in the EEA legal order. However, when the Citizens Directive was incorporated into the EEA Agreement, the contracting parties reserved themselves specifically against Union citizenship and immigration policy not being part of the EEA Agreement.³⁷⁴ The somewhat complicated history of the incorporation of the Citizens Directive into the EEA Agreement is described and analysed in the literature.³⁷⁵ In particular, the Icelandic Government's initial view that the provisions both on social policy and on immigration policy in the Citizens Directive overstepped the legal boundaries of the EEA has been well documented.³⁷⁶ The provisions of the Citizens Directive were nevertheless incorporated in the EEA Agreement without any changes or modifications as to their substantive content.³⁷⁷

The background for the reservations in the Joint Declaration³⁷⁸ is related to the lack of parallel provisions in the main part of the EEA Agreement to those of the EU treaties. First, there are no provisions in the main part of the EEA Agreement mirroring Articles 20–25 TFEU, and therefore, 'the concept of Union citizenship [...] has no equivalent in the EEA Agreement'.³⁷⁹ The lack of Union citizenship in the EEA Agreement means that there are rights based on this status in the EU legal order that are not paralleled in the EEA legal order.³⁸⁰ Furthermore, no legal base corresponding to Article 79 TFEU exists under the EEA Agreement, and therefore, 'immigration policy is not covered by the EEA Agreement'.^{381,382} Hence, a number of EU secondary legislations³⁸³

³⁷² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, page 77

³⁷³ This is a general principle of EEA law, see also Articles 6 EEA and 3(2) SCA, a recent article on the principle can be found in EFTA Court, *The EEA and the EFTA Court*, Oxford and Portland, 2014, see chapters 14, 20, 30

³⁷⁴ Joint declaration, Decision by the EEA Committee No 158/2007 (OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, page 17

³⁷⁵ Johanna Jonsdottir (2013) *Europeanization and the European Economic Area*, Routledge, page 96-112

³⁷⁶ Johanna Jonsdottir (2013) *Europeanization and the European Economic Area*, Routledge, page 97, 103

³⁷⁷ The usual adaptations such as substituting the words 'Union citizen(s)' with the words 'national(s) of EC member States and EFTA States' were naturally included in the incorporating decision, confer Decision Annex VIII 1(c)

³⁷⁸ Joint declaration, Decision by the EEA Committee No 158/2007 (OJ 2008 L 124, page 20, and EEA Supplement No 26, 8.5.2008, page 17

³⁷⁹ See formulation in the Joint Declaration, Union citizenship was introduced in the EU in the Treaty of Maastricht (1992)

³⁸⁰ This point will be explained in detail

³⁸¹ See formulation in the Joint Declaration, Article 79 TFEU was introduced in the EU in the Treaty of Amsterdam (1999)

ensuring independent rights for third-country nationals (TCN) as part of the EU's immigration policy are not incorporated into the EEA Agreement.³⁸⁴ The lack of parallel provisions in the main part of the EEA Agreement is also referred to as a structural problem of the EEA Agreement.³⁸⁵ The structural problem raises questions regarding both the presumptions outlined above and calls for a closer look at the application of the principle of homogeneity, which is the main topic of this section of the study.

In particular, in light of the lack of the concept of Union citizenship referred to in the reservation made in the Joint Declaration, the UDI has asked specifically for an assessment 'on Norway's room for manoeuvre'³⁸⁶ (as an EFTA state) in the cases falling within the scope of the directive as incorporated into EEA law. Presumably, the UDI has foreseen that any possible differences in the scope of the directive will favour less extensive harmonisation in the EEA legal order as compared to the EU legal order.³⁸⁷ This seems to be the motivation for the expression in the UDI's invitation to tender, referring to the possibility of 'a wider room for manoeuvre in EEA cases' as the guiding parameter for this analysis.³⁸⁸ The case law demonstrates, however, that possible differences in the scope of the directive between the EU and the EEA legal order arguably may also lead to an interpretation of the directive to include increased obligations under the EEA Agreement as compared to the obligations under the directive on member states as part of EU law. The case law, particularly by the EFTA Court, has in fact broadened the scope of the directive to encompass more rights holders and consequently to limit the states' legislative freedom correspondingly.

This observation must be coupled with another observation from the case law of the EFTA Court. In the first cases where the structural problem of the EEA Agreement occurred, the EFTA Court rejected the analogous application of primary law provisions in the EU not paralleled in the EEA.³⁸⁹ In *Einarsson*, the EFTA Court held that 'it would not be a proper exercise of the judicial function to seek to extend the scope of application of the EEA Agreement on that basis'.³⁹⁰ In the *Postdoc* case the following year, the Court rejected the application of now Article 157(4) TFEU, pointing out that the provision had not been made part of the EEA Agreement and that it could not therefore be applied as 'a legal basis to decide the present application either directly or by analogy'.³⁹¹ In the first case where the EFTA Court commented on the Joint Declaration³⁹² regarding a question of

³⁸² In addition there are no provisions in the EEA Agreement equivalent to the EU treaties provisions on the Area of Freedom, Security and Justice

³⁸³ Examples include the Family Reunification Directive (2003/86/EC), the Long-term residents Directive (2003/109/EC) and the Third Country national students Directive (2004/114/EC)

³⁸⁴ In the reply from the Norwegian Ministry of Labour and Social affairs 8 October 2015 to the Reasoned Opinion 8 July 2015 from the EFTA Surveillance Authority the Government refers to the wording of the Joint Declaration to support an argument which limits the application of the Directive for third country nationals' right in an EEA context. The response from the Surveillance Authority or in the future potentially the EFTA Court is not known at the completion time of this report

³⁸⁵ See this terminology used in a recent article by H. H. Fredriksen and C. N. K. Franklin, Of pragmatism and principles: The EEA Agreement 20 years on, CMLRev 52, p 629-684, 2015

³⁸⁶ Tender Documents, Exhibit 1, Annex 1

³⁸⁷ Tender Documents, Exhibit 1, Annex 1, in particular section 5.1 III

³⁸⁸ Section III focuses on the case law from the CJEU and the EFTA Court, especially from 2010 onwards. The words 'room for manoeuvre' and the examples of questions both indicate the understanding that the Directive may impose less obligations on the Contracting Parties to the EEA Agreement as part of EEA law compared to the obligations on EU member states imposed by the Directive as part of EU law

³⁸⁹ One of the structural problems with the EEA Agreement is the fact that its dynamic nature does not encompass its main part. Under Article 98 EEA, the Joint Committee may only amend the annexes and (some of) the protocols

³⁹⁰ Case E-1/01 *Einarsson* [2002] EFTA Ct. Rep. 1, paras 43 and 45

³⁹¹ Case E-1/02 *Postdoc* [2003] EFTA Ct. Rep. 1, para 55

³⁹² Case E-15/12 *Wahl* [2013] EFTA Ct. Rep. 534, paras 72-92

interpretation of the Citizens Directive as incorporated into EEA law, the Court made some preliminary remarks pointing in a different direction. Case E-15/12 *Wahl* concerned the issue of membership of an organisation (Hells Angels) and the denial of entry into Iceland based on a risk assessment. While acknowledging the lack of the concept of Union citizenship in the EEA, the Court seemed less principled in its reasoning compared to the earlier decisions and more inclined towards an analysis based on a case-by-case approach.³⁹³ The Court added in the case that the exclusions of the concept of Union citizenship and immigration policy from the EEA Agreement had no material impact on the present case. The reference to a varied assessment based on a case-by-case analysis was therefore pronounced by the Court in an obiter. Nevertheless, the statement stands in clear contrast to the general statements made in the *Einarsson* and *Postdoc* cases rejecting any application of revised EU treaty provisions either directly or by analogy. Hence, the obligations of Norway under the directive must be analysed taking both these general observations outlined above into account.

The methodology applied in this section of the report is based on the legal sources available. The case law from the EEA Courts constitutes the most important legal source for analysing the main question of the ‘room for manoeuvre in EEA cases’. The practice from the EFTA Surveillance Authority is, subject to the modification that the practice may be reviewed by the EFTA Court, in principle also relevant for the analysis. The Surveillance Authority has closed its investigation on Iceland, see the country study of Iceland for detailed information.³⁹⁴ The situation for Liechtenstein has limited relevance given the particular agreement regarding free movement of persons currently in force.³⁹⁵ The proceedings against Norway are pending. The analysis will therefore focus mainly on the case law from the EEA Courts. First, however, it is pertinent to present the Joint Declaration to the incorporation of the Citizens Directive into the EEA Agreement.

1.2 Decision No 158/2007 by the EEA Committee, Joint Declaration

Directive 2004/38 was incorporated into the EEA Agreement through an amendment of the agreement’s Annexes V and VIII, and the directive entered into force in the EEA on 1 March 2009.³⁹⁶

When the directive was included in the EEA Agreement, the contracting parties reserved themselves specifically against Union citizenship and immigration policy not being part of the EEA. The preamble to the decision in the EEA Joint Committee incorporating the directive read as follows:

THE EEA JOINT COMMITTEE,...

(8) The concept of ‘Union Citizenship’ is not included in the Agreement.

(9) Immigration policy is not part of the Agreement.

(10) The Agreement does not apply to third country nationals. Family members within the meaning of the Directive having third country nationality shall nevertheless enjoy certain derived rights such as those foreseen in Articles 12(2), 13(2) and 18 when entering or moving to the host country.

...

³⁹³ Case E-15/12 *Wahl*, para 75

³⁹⁴ Reference is made to the national Report on Iceland included in this study

³⁹⁵ The situation of Liechtenstein is different legally from the other Contracting Parties to the EEA Agreement, a point which has been discussed with the UDI and it has been agreed with the UDI that the Liechtenstein situation is less relevant for this analysis, see also the Report from the Commission <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=COM:2015:411:FIN&from=DA>

³⁹⁶ Decision by the EEA Committee No 158/2007 (‘the Decision’) (OJ 2008 L 124, p. 20, and EEA Supplement No 26, 8.5.2008, page 17

Furthermore, it is stated that the provisions of the Directive shall, for the purposes of the Agreement, be read with the following adaptations:

- (a) ...
 - (b) The Agreement applies to nationals of the Contracting Parties. However, members of their family within the meaning of the Directive possessing third country nationality shall derive certain rights according to the Directive.
 - (c) The words 'Union citizen(s)' shall be replaced by the words 'national(s) of EC Member States and EFTA States.
- ...

The reservations were reinforced by the contracting parties in the following Joint Declaration to the decision:

The concept of Union Citizenship as introduced by the Treaty of Maastricht (now Articles 17 seq. EC Treaty) has no equivalent in the EEA Agreement. The incorporation of Directive 2004/38/EC into the EEA Agreement shall be without prejudice to the evaluation of the EEA relevance of future EU legislation as well as future case law of the European Court of Justice based on the concept of Union Citizenship. The EEA Agreement does not provide a legal basis for political rights of EEA nationals.

The Contracting Parties agree that immigration policy is not covered by the EEA Agreement. Residence rights for third country nationals fall outside the scope of the Agreement with the exception of rights granted by the Directive to third country nationals who are family members of an EEA national exercising his or her right to free movement under the EEA Agreement as these rights are corollary to the right of free movement of EEA nationals. The EFTA States recognise that it is of importance to EEA nationals making use of their right of free movement of persons, that their family members within the meaning of the Directive and possessing third country nationality also enjoy certain derived rights such as foreseen in Articles 12(2), 13(2) and 18. This is without prejudice to Article 118 of the EEA Agreement and the future development of independent rights of third country nationals which do not fall within the scope of the EEA Agreement.

Directive 2004/38 is known as the citizens' rights directive with the underlying theme echoing the case law of the CJEU related to the right to move and reside freely conferred on every citizen of the Union through the fundamental status of Union citizenship.³⁹⁷ Of the 31 recitals of the directive's preamble, only eight make no explicit reference to Union citizenship. The aim is according to the preamble to simplify and strengthen the right to free movement and residence of all Union citizens. The question is how to reconcile the incorporation of the parallel wording of all the provisions providing rights under the Citizens Directive into the EEA Agreement with the statements made in this decision by the Joint Committee.

The Joint Declaration can be interpreted as a signal to the EEA Courts and the Surveillance Authority not to interfere with national immigration and welfare policies of the EEA states under the EEA Agreement in the same manner as the concept of Union citizenship has interfered with member states' immigration and national welfare policies in the EU.³⁹⁸ How the courts should apply this in

³⁹⁷ Union citizenship destined to be the fundamental status of nationals of the member states was first formulated in Case C-184/99 *Grzelczyk* [2001] ECR I-6193, para 31

³⁹⁸ See the analysis of the incorporation process of the directive into the EEA in Johanna Jonsdottir (2013) *Europenization and the European Economic Area*, Routledge, page 96-112

concrete cases is, however, not particularly clear from the wording of the decision. This ambiguity inherent in the decision prompts an exploration of the case law on welfare rights and immigration rights and the homogeneity principle in the EEA.

Before shifting the attention to the case law from the EEA Courts, some general remarks will be made on the choice of wording of the decision and in particular on the distinction between (a) the lack of a concept of Union citizenship, (b) the lack of immigration policy as being part of the EEA Agreement and (c) the non-application of the EEA Agreement to TCN save certain derived rights for family members. The distinction in the decision into three reservations may create the understanding that these are three separate categories of rights whereas in fact they are not. The aim of this first stage of the analysis is to clarify more precisely the legal question that is later analysed through the examination of the case law from the EEA Courts.

As clearly stated also in the Joint Decision, the EEA Agreement confers rights on the nationals of the contracting states.³⁹⁹ However, even before the adoption of the Citizens Directive, the importance of ensuring the protection of the family life of Union citizens in order to eliminate obstacles to the exercise of the fundamental freedoms was recognised.⁴⁰⁰ This is also made clear in the Joint Decision, which states that rights provided to the nationals of the contracting states may also confer rights for non-nationals such as family members. These derived rights are not independent rights for non-nationals but are rights provided to facilitate the right to move and reside freely for the nationals of the contracting states. This means that EEA law even before the adoption of the Citizens Directive provided rights for TCN.⁴⁰¹ The right to family life for a moving EU or EEA citizen included a derived right for family members regardless of the nationality of the family member to move to another member state to which the citizen of the Union is migrating or has migrated. For example, a TCN husband or wife of a moving worker had the right under EU/EEA law to move to and reside in the state where the moving worker was employed.⁴⁰²

Before the *Metock* decision,⁴⁰³ these derived rights for TCNs could, however, be limited by national immigration law to the TCNs who already had the legal right to stay in the territory of the Union/EEA.⁴⁰⁴ In the case of *Akrich*,⁴⁰⁵ which concerned the rights of an economically active person, the CJEU found that national limitations on the derived rights for TCN family members, such as a requirement of the TCN to be a lawful resident in another member state as a condition for derived rights under EU law, were compatible with free movement rights for Union citizens.⁴⁰⁶

Limiting TCNs' rights under EU law according to the ruling in *Akrich* (before the situation was reversed through the *Metock* decision) meant that the interference of EU/EEA law with national

³⁹⁹ In parallel with EU law the right to free movement of workers, the self-employed and some categories of non-economically active persons is limited to nationals of the EU member states and the EEA-EFTA states in the EEA Agreement

⁴⁰⁰ Case C-60/00 *Carpenter* [2002] ECR I-6279, para 38; Case C-459/99 *MRAX* [2002] ECR I-6591, para 53; Case C-157/03 *Commission v Spain* [2005] ECR I-2911, para 26; Case C-503/03 *Commission v Spain* [2006] ECR I-1097, para 41; Case C-441/02 *Commission v Germany* [2006] ECR I-3449, para 109; and Case C-291/05 *Eind* [2007] ECR I-0000, para 44).

⁴⁰¹ See the earlier Regulation 1612/68 on freedom of movement for workers

⁴⁰² Article 10 in the former Regulation 1612/68

⁴⁰³ Case C-127/08 *Metock* [2008] ECR I-6241

⁴⁰⁴ This was made clear in Case C-109/01 *Akrich*

⁴⁰⁵ Case C-109/01 *Akrich*

⁴⁰⁶ See also the analysis of the later Case C-1/05 *Jia* [2007] ECR I-1 in CMLRev 44 787-801, 2007 by M. Elsmore and P. Starup, Case C-1/05, *Yunying Jia v. Migrationsverket*, Judgment of the Court (Grand Chamber), 9. January 2007 in which the authors claim that the exercise of free movement included entitlement of being accompanied or joined by family members irrespective of nationality

immigration law was limited. The limited interference is demonstrated by the fact that not all TCN family members of moving Union citizens/EFTA state nationals (at least in some EU member states) could claim a derived right of entry and residence based on EU/EEA law. Through national immigration law, the categories of rights holders could be limited to TCNs who already had the legal right to stay in the territory of the Union/EEA. The *Metock* decision fundamentally changed the interference of EU law with national immigration law. The case clarified that national immigration law could no longer require a legal right to stay in the territory of the Union as a precondition for granting the right to family reunification for a moving Union citizen.

The political sensitivity of the issues at stake in the *Metock* case is clearly formulated by Advocate General Maduro:

The issue is a sensitive one because it involves drawing a dividing line between what is covered by the provisions on Union citizens' freedom of movement and residence and what comes under immigration control, a matter over which the Member States retain competence in so far as and to the extent that the European Community has not brought about complete harmonisation. The constitutional significance of the subject explains the liveliness of the debate, with no less than 10 Member States intervening in support of the respondent in the main proceedings to challenge the interpretation put forward by the applicants in the main proceedings and the Commission of the European Communities.⁴⁰⁷

The importance of the right to family life for a Union citizen is in *Metock* presented as necessary to not obstruct the exercise of the freedoms guaranteed by the treaty.⁴⁰⁸ The link between the right to family life and the fundamental freedoms guaranteed by the treaty is the recognition that the lack of family reunification has an impact on the rights holder's own right to move and reside freely.⁴⁰⁹ The member state's legislation at issue in the case that required the spouse to have had legal residence in another member state would discourage the right of freedom of movement laid down by the treaty.⁴¹⁰ The CJEU consequently found the national requirements to be incompatible with EU law. The importance of the decision for the fundamental right to move and reside freely for all Union citizens has been highlighted in the literature:

The importance of the *Metock* decision cannot be underestimated in terms of its constitutional re-enforcement of the centrality of free movement and the individual. Thus in *Metock*, Art.18 EC formed the epicentre of the decision and results in a most favourable determination for the litigant; matters of state interest are not at the forefront in the decision.⁴¹¹

The consequence of the decision in *Metock* was a fundamental shift away from national immigration law (potentially) alone regulating the conditions for first entry to and residence in the territory of the Union. The legal basis for the decision was an interpretation of the Citizens Directive with a reference to the fundamental status of Union citizenship. The extent to which EU law grants derived entry and residence rights for TCNs and subsequently interfered with national immigration policy therefore ultimately depends on the extent to which the Union citizen has free movement rights. Hence, the concept of Union citizenship is not separate from rights given to TCNs or the subsequent

⁴⁰⁷ Opinion from advocate general Maduro in Case C-127/08 *Metock*, para 1

⁴⁰⁸ *Metock*, para 62

⁴⁰⁹ Confer Case C-200/02 *Zhu and Chen* [2004] ECR I-9925 and Case C-127/08 *Metock*

⁴¹⁰ See *Metock*, para 82 and the reference to Union citizens' rights in the Treaty

⁴¹¹ Fahey, E. (2009) Interpretive legitimacy and the distinction between "social assistance" and "work seekers allowance": Comment on Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* 3. E.L. Rev. 2009, 34(6), 933-949, on page 948

interference with national immigration policy. In fact, it is the right of family reunification for moving Union citizens both against the host and against the home state that triggers the rights for TCNs and subsequently the interference with national immigration policy.

To sum up, regarding the apparent three different categories of reservations in the Joint Decision, there is really only one main point to assess further. The question is whether there has been a parallel development of free movement rights for the nationals of the EU member states and the EFTA states in the EEA legal order as compared to the free movement rights for Union citizens in the EU legal order, even without the concept of Union citizenship. In other words, the answer to the question of whether there is ‘room for manoeuvre’ depends on whether the free movement rights are paralleled in the EEA.

This EEA-specific section of the legal study of Norway’s obligations under the Citizens Directive relates to the more general question in EEA law regarding the lack of parallel provisions in the main part of the EEA Agreement to changes made in the EU treaties since the signing of the EEA Agreement on 2 May 1992—the structural problem. For the purpose of this study, the question is, however, limited to the possible consequences of this phenomenon within the scope of the Citizens Directive. Nevertheless, some introductory remarks on the broader phenomenon seem appropriate.

1.3 The structural problem in the EEA Agreement

The EEA Agreement extends the free movement of persons, goods, services and capital to the EFTA states: Iceland, Liechtenstein and Norway.⁴¹² The overall aim of the agreement is to include the EFTA states in the internal market of the EU to provide for equal conditions of competition and to abolish discrimination on grounds of nationality. The dynamic nature of the agreement is the mechanism to achieve this overall aim in a constantly evolving internal market.⁴¹³ A basic principle in the EEA Agreement is that it shall be dynamic in the sense that it shall develop in step with changes in EU law that lie within the scope of the EEA Agreement. The dynamic nature is meant to ensure a homogenous development between EEA law and the internal market law of the EU.⁴¹⁴ Homogenous development includes both legislative homogeneity and homogeneous interpretation of EEA law and those provisions of EU law that are substantially reproduced in the EEA Agreement.⁴¹⁵ The continued substantial reproduction of provisions is ensured by decisions of the EEA Joint Committee that incorporate new EU legislation of relevance to the EEA into the agreement.⁴¹⁶ More than 7000 new legal acts have been added through amendments of the annexes and the protocols of the agreement since the entry into force on 1 January 1994.⁴¹⁷

As far as legislative homogeneity between the EU and the EEA is concerned, the dynamic nature of the EEA Agreement does not include the main part of the agreement: the main part being the part of

⁴¹² EFTA is the European Free Trade Association countries. The EFTA states which are members of the EEA Agreement include Iceland, Liechtenstein and Norway. Switzerland is a member of the EFTA but it is not party to the EEA Agreement. In the following the term EFTA states will be used for Iceland, Liechtenstein and Norway

⁴¹³ Most literature on EEA law has praised the achievements of both the EFTA Court and the CJEU to ensure homogeneity in both of these aspects. See Fredriksen, H.H. [2010] The EFTA Court 15 years on, *International and comparative law quarterly*, volume 59, issue 03, July 2010, page 731-760 with further references

⁴¹⁴ The Agreement itself explicitly excludes part of the EU internal market from the association such as agriculture and fisheries, see Article 8(3). It is self-evident that areas excluded from the Agreement are also excluded from the dynamic mechanism

⁴¹⁵ References to the homogeneity objective can be found in recitals 4, 5 and 14 of the Preamble to the EEA Agreement and Articles 1(1), 6, 102, 105 and 106 EEA, Article 3 SCA

⁴¹⁶ Articles 93, 94, 102 EEA

⁴¹⁷ Europautvalget [2012] NOU 2012:2 ‘Utenfor og innenfor’ page 108

the agreement where (some) primary EU law is reproduced in the EEA.⁴¹⁸ Under Article 98 EEA, the EEA Joint Committee may only amend the annexes and some protocols, which means that only, in EU terms, secondary legislation⁴¹⁹ is continually updated. The substantive provisions of the main part of the EEA Agreement, negotiated as they were in 1990–92, still mirror the corresponding provisions of EU primary law as it stood at that time.⁴²⁰ Thus, the subsequent amendments to EU primary law accomplished through the Treaties of Maastricht, Amsterdam, Nice and Lisbon are not reflected in the main part of the EEA Agreement and not included in the annexes or the protocols. Thus, the dynamic nature of the agreement does not include EU primary law changes. This phenomenon in EEA law has been described as the widening gap between the EU treaties and the EEA Agreement.⁴²¹ The lack of parallel provisions has been instrumental in raising the discussion of limits to homogeneous interpretation.⁴²²

Traditionally, the discussion of homogeneous interpretation in EEA law has centred on the arrival of an equal interpretation of EEA law provisions with the corresponding provisions in EU law. The main dispute has essentially been whether the more limited objectives of the EEA Agreement would warrant a more limited interpretation of the scope of the equally formulated provisions in EEA law.⁴²³ This line of argument has consistently been rejected by the EFTA Court. The EFTA Court's view on the importance of homogeneous interpretation has been endorsed on several occasions by the CJEU.

The search for homogeneity has, however, met new borders in recent years. These frontiers are, first and foremost, due to the fact that the two legal systems have not, regardless of the aim set out in the EEA Agreement, developed with the same speed and breadth. To this end, recent developments have created new challenges to the overall objective of the EEA Agreement of a homogenous development between EEA law and the internal market law of the EU. The discussion is no longer limited to interpreting substantially equal provisions in the same manner but also includes the possibility of interpreting equally worded provisions differently to reach the overall objective.

In academic literature, this phenomenon is termed homogeneity in effect.⁴²⁴ Homogeneity in effect (or effect-related homogeneity) seems to largely disregard the existence of the in-substance equally worded provisions and to focus more on the end result of the rights and obligations under the agreement. Thus, in other words, homogeneity in effect in reality tries to parallel the end result of EU law rights and obligations limited to the scope of EEA law without being too concerned about the existence of parallel provisions. In fact, homogeneity in effect may require a different interpretation of in substance equally formulated provisions. Homogeneity in effect departs from the formulations in the EEA Agreement itself, which refers to the homogeneity objective in relation to

⁴¹⁸ There is in principle no primary and secondary law in the EEA, the structure of the Agreement means that it is all part of one international agreement

⁴¹⁹ The EEA Agreement is an international agreement where all provisions in principle are considered to be at the same level, hence there is no distinction between primary and secondary law

⁴²⁰ Illustrative of this point is the wording in the unchanged Article 6 EEA referring to homogenous interpretation between the provisions of the EEA Agreement and the corresponding rules of the *Treaty establishing the European Economic Community* and the *Treaty establishing the European Coal and Steel Community*

⁴²¹ Fredriksen, H. H. [2012] Bridging the Widening Gap between the EU Treaties and the Agreement on the European Economic Area, *European Law Journal*, vol 18, No 6, November 2012 page 868-886

⁴²² Nils Fenger, Limits to dynamic homogeneity between EC law and EEA law, *Festschrift til Claus Gulmann*, page131-155

⁴²³ See EFTA states arguments in a range of cases

⁴²⁴ Carl Baudenbacher, The EFTA Court and the ECJ – Coming in parts but winning together” in *The Court of Justice and the Construction of Europe: Analysis and perspectives on Sixty years of Case law*, in particular section 3.2 and Burke/Hannesson, *Citizenship by the back door?* Gunnarsson, *CMLRev* 52:1-24, 2015

equally formulated provisions.⁴²⁵ Nevertheless, homogeneity in effect has gained acceptance through the case law from the EFTA Court.⁴²⁶ The case law from the CJEU seems thus far more mixed.⁴²⁷

Before moving to the case law on the right to free movement under EEA law, some clarification of the EEA judicial architecture, in particular to present the relationship between the two EEA Courts, seems appropriate.

1.4 Judicial architecture of the EEA

The EEA Agreement is based on a two-pillar model, in which the EU institutions are kept separate from those of the EFTA states, including the courts. Before entering into the substance of the EEA analysis in the study, it is necessary to clarify that the institutions with the competence to decide questions of interpretation of EEA law may not always agree on what is the correct interpretation of EEA law. As a preliminary point in the analysis, it therefore seems necessary to point to the fact that any conclusions on the content of rights in EEA law drawn from one or more decisions from one institution may be only reflections of a temporary state of the law.

This is particularly striking given the authority to interpret EEA law by two independent international courts: the CJEU and the EFTA Court. This is not the place for an in-depth analysis of the role of international courts or the relationship between the two courts in the two pillars created for the functioning of the EEA Agreement. In this context, it is sufficient to point out the following:

- The EFTA Court's competences extend to the EFTA states alone. The CJEU is the supreme authority on the interpretation of EEA law in the EU pillar.⁴²⁸ Clearly, the existence of two separate courts could have undermined the overall aim of the agreement to secure uniform interpretation and application of common rules in all EEA states—the homogeneity objective.
- In the EFTA pillar, a number of safeguards are put in place to ensure the principal objective of the EEA Agreement to integrate the EEA-EFTA states into the internal market of the EU.⁴²⁹ Academic studies of the case law from the EFTA Court clearly demonstrate the loyalty of the EFTA Court towards the CJEU.⁴³⁰ In fact, the EFTA Court in Cases E-9/07 and 10/07 *L'Oréal* abandoned its former interpretation of Article 7(1) in the Trademark Directive⁴³¹ in Case E-2/97 *Maglite* in favour of the interpretation laid down by the CJEU in Case 355/96 *Silhouette*. This has been characterised by academics as a decision clarifying that the EFTA Court itself considers its own decision only to have authority for as long as the CJEU is in agreement with the solution (so-called provisional authority).⁴³²

⁴²⁵ Article 6 EEA, Article 3 SCA (The Surveillance and Court Agreement)

⁴²⁶ See in particular the later analysis of Case E-26/13 *Gunnarsson*

⁴²⁷ Case C-431/11 *United Kingdom v Council* ECLI:EU:C:2013:589 and a string of tax related cases analysed in Zimmer, F. [2010] 'ECJ Settles Dispute Over Italian Withholding Tax, Raises New Concerns About EEA Agreement', 11:5 *Worldwide Tax Daily* (2010) page 1–4

⁴²⁸ See Case T-115/94 *Opel Austria* [1997] ECR II-39, para 102 for confirmation of the EEA Agreement being part of EU law

⁴²⁹ Articles 6, 105, 106, 111 EEA, Article 3 SCA,

⁴³⁰ Fredriksen, H. H. [2009] *Er EFTA-domstolen mer katolsk enn paven?* *Tidsskrift for rettsvitenskap* 2009 page 507-576 Fredriksen, H.H. [2010] *The EFTA Court 15 years on, International and comparative law quarterly*, volume 59, issue 03, July 2010, page 731-760

⁴³¹ Directive 89/104/EEC, Cases E-9/07 and 10/07 *L'Oréal* [2008] EFTA Ct. Rep. 259 and Case E-2/97 *Maglite* [1997] EFTA Ct. Rep. 127

⁴³² Titus van Stiphout [2009] *The L'Oréal Cases – Some Thoughts on the Role of the EFTA Court in the EEA Legal Framework: Because it is worth it!*, *Jus & News* (2009) p 7-18 on page 15

As far as the CJEU is concerned, there are no statutory obligations to follow or to pay due account to the case law of the EFTA Court, not even when the Court is interpreting EEA law. As pointed out by Fredriksen, it could scarcely be otherwise, as from the perspective of the EU pillar, the EEA Agreement forms an integrated part of EU law, thus falling within the exclusive competence of the CJEU according to Article 19 TEU.⁴³³ Thus, neither when the CJEU decides cases applying EU law (meaning EU law provisions in substance parallel to the provisions in the EEA Agreement) nor when the Court decides cases on the interpretation of EEA law specifically is the Court under a statutory obligation to take EFTA Court decisions into account. The CJEU has nevertheless been both inspired and influenced by the case law of the EFTA Court, but it decides by itself if, when and the extent to which this will be the case.⁴³⁴

When assessing more closely the extent to which the CJEU may allow itself to be inspired and influenced by EFTA Court case law, it seems useful to distinguish between cases involving EU/EEA law equally applicable in both legal orders and cases regarding the interpretation of provisions with a more specific EEA law dimension.

In the first category would be cases involving questions of interpretation of law, which are equally applicable in the EU and in the EEA legal order. Most cases fit this description. The second category would include cases on the legal effect of EEA law in the EEA-EFTA states, such as the principle of direct effect and the cases on the existence of a state liability for breaches of the EEA Agreement⁴³⁵ as well as the cases on whether to include fundamental principles as part of the EEA Agreement.⁴³⁶ The case law from the EFTA Court in this second category of cases seems more legally relevant for the CJEU. The reason for this, in addition to the structure of the EEA with the two-pillar system and the role of the specialised EFTA Court as the final arbiter of EEA law in the EFTA pillar, is the objective of reciprocity. Reciprocity is best served with the CJEU respecting the decisions of the EFTA Court even if it can be argued that the EFTA Court can simply reverse its own decision whenever later case law from the CJEU demonstrates differences of opinion. The case of *Gunnarsson*, which will be explained in detail below, provides a powerful illustration of the challenges for reciprocity if the EFTA Court decision is deviated from in a later case by the CJEU. The specific EEA law dimension in the *Gunnarsson* case concerns the possible effects of EU primary law not reproduced in the EEA Agreement.

The EEA analysis of different questions of substantive law arises primarily from the fact that the directive is part of EEA law and the treaty articles on Union citizenship are not.⁴³⁷ Whenever the CJEU interprets EU law and applies the treaty articles on Union citizenship as the legal base for its decision, there is no parallel legal base in the EEA context. Without a parallel legal base, the overall aim in the EEA Agreement of developing a homogeneous legal order is challenged. The analysis will demonstrate how the EFTA Court in the relevant subject matter for this report has dealt with this challenge in a number of cases. In line with case law in other fields of law, the EFTA Court has attributed great importance to the overall goal of achieving homogeneity, including homogeneity in

⁴³³ H. H. Fredriksen [2010] One market, Two Courts: Legal Pluralism vs. Homogeneity in the European Economic Area, *Nordic Journal of International Law* 79 (2010) page 481-499 on page 486

⁴³⁴ The foodstuff case is an often cited example, Case C-192/01, *Commission v. Denmark* [2003] ECR I-9693, for an overview of cited cases, see H.H. Fredriksen, *The EFTA Court 15 years on*, page 755 onwards, See also on the judicial dialogue between the two courts, V. Skouris (2005) *The ECJ and the EFTA Court under the EEA Agreement in The EFTA Court ten years on*, C. Baudenbacher, P. Tresselt, T. Örlýgsson (eds) Oxford page 123-129

⁴³⁵ Cases E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95 and E-4/01 *Karlsson* [2002] EFTA Ct. Rep. 24 and Case 355/96 *Silhouette* [1998] ECR I-4799

⁴³⁶ See in particular Cases E-2/03 *Ásgeirsson* [2003] EFTA Ct. Rep. 185 and E-12/10 *ESA v Iceland* [2011] EFTA Ct. Rep. 117

⁴³⁷ Articles 20-25 TFEU

effect. This tendency has extended to the point where the EFTA Court has arguably even arrived to a different interpretation of the scope of the directive than the CJEU. This conclusion will be substantiated in the section in which the case is discussed. In this section on methodology, the important point is to underline the uncertainty of the decisions from the EFTA Court in terms of representing the final voice of the (future) state of EEA law.

Even if the *Gunnarsson* case is the first case where the EFTA Court was asked in a straightforward manner by the national court on the significance of the EEA Agreement not containing any provision corresponding to Article 21 TFEU, the case is not the first to deal with questions of free movement for all, regardless of economic activity. Phrased differently, the EFTA Court has dealt with the question of the EEA Agreement going beyond economic objectives and market integration in a number of cases. Essentially, the Court has never shied away from extending the scope of the agreement to ensure the overall objective of homogeneity interpreting and applying EEA law equally to its EU law counterparts. The analysis of the EFTA Court cases will begin with the *Clauder* case and continue with the *Gunnarsson* case followed by the cases regarding the position of the non-economically active in the context of the coordination regime. Before the analysis of the EFTA Court case law, it seems appropriate to provide an introduction to the topic of Union citizenship in the EU legal order. First, some points of delimitation will be presented.

1.5 Delimitation

The concept of Union citizenship has in different ways increased the number of rights provided under EU law. Furthermore, the harmonisation of immigration law under Article 79 TFEU has increased the number of rights for TCNs under EU law. In analysing the scope of the Citizens Directive as part of EEA law, a number of these rights fall outside the study. As already demonstrated, the analysis is narrowed down to the question of whether there is a parallel right to free movement for EEA nationals under the EEA Agreement as compared to the free movement rights for Union citizens. Indeed, all rights conferred on Union citizens outside the field of application of Articles 20 (2)(a) and 21(1) TFEU are outside the EEA Agreement. Clear examples concern rights laid down in the treaty articles themselves, such as the right for Union citizens to stand for and vote in elections in the member state in which they reside to the European Parliament,⁴³⁸ the right of Union citizens to diplomatic and consular protection from other member states⁴³⁹ and the right to take citizens' initiative.⁴⁴⁰ Furthermore, all rights under Article 79 TFEU and the corresponding secondary legislation are outside the EEA Agreement.

Another perhaps less obvious but still clear example of Union citizenship rights outside the application of the EEA Agreement is the case law on Union citizens 'unable to exercise the substance of the rights conferred on them by virtue of their status as EU citizens'.⁴⁴¹ The CJEU based its decision in *Zambrano* on rights flowing directly from Article 20 TFEU. The *Zambrano* case is an example of an in principle wholly internal situation with no cross-border elements.⁴⁴² This case law of rights based on Union citizenship in the EU is largely based on the status of Union citizenship and not on the right to move and reside freely for Union citizens. There is no parallel legal base in the EEA Agreement to provide rights for individuals without a cross-border element present. The analysis regarding parallel rights of individuals in the EEA Agreement therefore does not include the

⁴³⁸ Article 22 TFEU

⁴³⁹ Article 23 TFEU

⁴⁴⁰ Article 24 TFEU

⁴⁴¹ Case C-34/09 *Zambrano*, para 44

⁴⁴² The significance of the case is later played down in cases like C-434/09 *McCarthy*

case law from the CJEU regarding Union citizens who claim rights without any cross-border element being involved.⁴⁴³

Another point to address regarding delimitation is the wording in the Joint Decision, which points to the limited rights for TCNs in the Citizens Directive, specifying Articles 12(2), 13(2) and 18. One possible interpretation of this reference may be to isolate rights for TCNs under the EEA Agreement accordingly. In other words, a possible question for interpretation is whether this statement means that the rights enshrined in Articles 12(2), 13(2) and 18 of the Citizens Directive are the only rights provided for TCNs provided that none of the free movement provisions in the main part are applicable under the EEA Agreement. If the free movement provisions enshrined in Articles 28, 31 and 36 EEA apply the right to family reunification (regardless of the nationality of the family member) in order to ensure free movement rights for the economically active, is equally significant under the EEA Agreement.

Limiting the rights for TCNs in the Citizens Directive as incorporated into the EEA to the specified Articles (12(2), 13(2) and 18) would, for non-economically active moving individuals, entail that the right to family life in the EEA Agreement is limited to family members who have the nationality of the contracting parties.

In the EU legal order, it is clear that the nationality of the family member is of no significance. The right to family life for a moving citizen is based on a functional consideration of the impact on free movement of not being able to be joined by one's family member. The nationality of the family member has no bearing on this functional assessment. Based on this functional approach, there is no reason to believe that the rights of TCNs under EEA law derived from the rights of the moving citizens are different from the rights of TCNs derived from Union citizens under EU law.

The only question in terms of the rights of TCNs under EEA law relates to the question of whether the EU law right to free movement is paralleled in EEA law. For instance, if the right to move and reside freely for the non-economically active EEA citizen is not paralleled to the same right for non-economically active Union citizens in the EU, the derived rights for TCN family members of non-economically active moving EEA citizens will be limited correspondingly. This link between the right of the moving EEA national and the derived right of a family member is also made clear in the Joint Declaration to the Joint Decision referring to 'these rights are corollary to the right of free movement of EEA nationals' and the reference to the EFTA states recognising the 'importance to EEA nationals making use of their right of free movement of persons, that their family members also enjoy certain derived rights ...'. Reference is also made to the fifth recital of the directive:

The right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, *irrespective of nationality* (emphasis added).

The specification of Articles 12(2), 13(2) and 18 in the Citizenship Directive in the Joint Decision will therefore not be commented upon further. The rights of TCNs depends on the free movement rights of the moving EEA individual.

⁴⁴³ This conclusion is supported by a national case in Norway decided by the Supreme Court (the Maria-case) Rt. 2015 page 93, see further references to the case in the section on national law in Norway

2 Case law from the CJEU on Union citizenship

2.1 Introduction

The concept of Union citizenship was introduced into EU law by the Treaty of Maastricht. It became the basis of a model change in EU law going beyond a market/economic-based model of integration to include more general policy integration. Union citizenship is described as the major step forward in the evolution of the right of free movement away from a simple economic right.⁴⁴⁴ The legislative choices made in the secondary legislation to protect the boundaries of national social welfare benefits has not hindered the CJEU from rendering a series of judgments based on the provisions on Union citizenship in the treaty to challenge these legislative choices. The CJEU has used Union citizenship as an instrument to overcome the existing basic distinction between economically active and non-economically active Union citizens and create rights for all.⁴⁴⁵

Even though the contracting parties to the EEA Agreement were familiar to some extent with the concept of Union citizenship in the negotiation period, the concept of citizenship was not included in the EEA Agreement and consequently not made part of the EEA legal order.⁴⁴⁶ Union citizenship was viewed as part of the growing political dimension of European integration and therefore falling outside the scope of the more limited economic market-oriented EEA Agreement. The limitation of the scope of the EEA Agreement was a deliberate choice made by the contracting parties and not a random consequence stemming from the fact that the EEA Agreement was signed in 1992 prior to the entry into force of the Maastricht Treaty.⁴⁴⁷

When the Maastricht Treaty introduced the legal concept of citizenship of the Union based on the right to free movement and residence,⁴⁴⁸ one possible interpretation of the concept at the time was the existence of a general right of free movement, residence and equal treatment for all Union citizens regardless of their economic activity. After all, the right for people to move freely from one state to another is a distinguishing feature of an ever-closer Union. The citizenship rights are, however, according to the wording in the treaty provision, subject to the limitation whereby they can only be exercised in accordance with the conditions and limits defined by the treaties and the measures adopted thereunder.⁴⁴⁹ The understanding of this formulation has undergone a transformation through the interpretation of the concept of Union citizenship by the CJEU and through the evolution in the secondary legislation, which will be commented on below. At this stage, it should suffice to simply point out that the wording of the treaty provisions themselves creating the novel concept of Union citizenship clearly put limitations on the right of free movement and residence for Union citizens as well as the right of Union citizens to equal treatment.

⁴⁴⁴ Third report from the Commission to the Council and the European Parliament on the application of Directives 93/96, 90/364, 90/365 on the right of residence for students, economically inactive and retired Union citizens, COM(2006)156 final on page 8

⁴⁴⁵ Hailbronner, K. [2005] Union citizenship and access to social benefits, CML Rev 2005, 42, page 1245-1267

⁴⁴⁶ The different elements of the negotiations in the EU leading up to the conclusion of the Maastricht Treaty were known to the negotiators of the EEA Agreement and to some extent also served as a motivation for the EEA negotiations

⁴⁴⁷ Some elements going beyond purely economic or market provisions were included in the EEA Agreement as part of areas of cooperation between the Contracting parties, see i.a sections V and VI EEA Agreement

⁴⁴⁸ The political and electoral rights stemming from Union citizenship will be commented on later. The political rights do not create any specific challenges vis a vis the homogeneity objective in the EEA Agreement

⁴⁴⁹ Article 20 paragraph 2 TFEU 'These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. This limitation has not stopped an expansive interpretation by the CJEU as demonstrated in this chapter

For this reason, it was generally perceived for many years after the introduction of Union citizenship both in the EU and in the EFTA states that this status was more of a symbolic nature. The practical legal impact of Union citizenship remained largely supplemental and residual to the legal categories into which EU law traditionally divided the nationals of the member states, such as workers, self-employed, jobseekers, students, families etc. The capacity of citizenship to supplement and strengthen the rights of free movement, residence and equal treatment laid down in other articles of the treaty as well as in secondary legislation (paralleled in the EEA Agreement⁴⁵⁰) seemed unlikely for a long time. To this end, the absence of the concept of Union citizenship in the EEA legal order did not appear challenging to the functioning of the EEA Agreement including the fundamental objective of a dynamic and homogeneous interpretation of the provisions on free movement of persons in the EEA.⁴⁵¹

However, in the last 18 years, the concept of Union citizenship has undergone significant changes in the way in which it has been conceptualised and interpreted. From the case law, it is now possible to identify rights enjoyed by all Union citizens subject to conditions in the following areas:

- Rights of departure, entry and return
- A right of residence in the host state
- A right to equal treatment
- Specific rights for family members

It is clear that the Citizens Directive lays down significant rights for Union citizens and their families in the above areas, but its coverage is far from complete. The CJEU has used the advent of Union citizenship to rethink the case law on free movement of persons in EU law. In particular, the Court has struck down national rules that distinguish between nationals and migrants⁴⁵² and between nationals who have migrated and those who have not.⁴⁵³ The Court has also used citizenship as a justification to limit the limits to the secondary legislation on migrants' rights.⁴⁵⁴ The careful scrutiny of the proportionality of the national rules characterises the case law where Union citizenship entails that the personal circumstances of each individual must be taken into account despite the administrative burden this might entail.⁴⁵⁵

In this section, no attempt is made to provide for a comprehensive analysis on the case law on Union citizenship in EU law. The case law is under constant development, and exact limits and boundaries regarding rights based on Union citizenship are far from clear. Instead, the focus here is on the contribution to the free movement rights of the non-economically active Union citizens. This section includes rights against the host and against the home state. It will be shown that the limitations in the

⁴⁵⁰ The residence directives (see below) were included in the EEA Agreement in the annexes upon the adoption of the original Agreement

⁴⁵¹ Article 45 TFEU and Article 28 EEA on free movement of workers, Article 49 TFEU and Article 31 EEA on the right of establishment and Article 56 TFEU, Article 36 EEA on the free movement of services and Article 18 TFEU and Article 4 EEA on the right to equal treatment all give rights relevant for the free movement of persons in the EEA

⁴⁵² Case C-456/02 *Trojani* [2004] ECR I-7573

⁴⁵³ Case C-224/98 *D'Hoop* [2002] ECR I-6191

⁴⁵⁴ Case C-413/99 *Baumbast* [2002] ECR I-7091

⁴⁵⁵ Case C-499/06 *Nerkowska* [2008] ECR I-3993 regarding a Polish residence requirement for the payment of a disability pension, Joined Cases C-11/06 and C-12/06 *Morgan* [2007] ECR I-9161 on the award of education and training grants for studies in another member state. This early approach by the Court may have been somewhat modified in the most recent cases where the Court is seen to have taken a step back, see Cases C-140/12 EU:C:2013:565 *Brey*, C-333/13 EU:C:2014:2358 *Dano* and C-67/14 EU:C:2015:5 *Alimanovic*

secondary legislation both regarding the Citizens Directive and regarding the coordination regime for social security benefits have been modified and sometimes even ignored as a consequence of the rights stemming from the status of Union citizenship in the EU legal order. The aim here is to provide a platform upon which the case law under the EEA agreement may be assessed.

First, it seems necessary to present briefly the evolution of the secondary legislation culminating into the Citizens Directive. The directive is analysed extensively in Section II of the report, and the purpose here is simply to demonstrate how existing limitations have been continuously upheld in the secondary legislation despite the existence of the concept of Union citizenship in primary law. Second, it is necessary to present briefly the coordination regime for social security to provide some background for the CJEU case law on extended free movement rights based on the status of Union citizenship in the area of social security. Immediately below, some remarks on the methodology of the complex relationship between primary and secondary law in the EU will follow.

2.2 Methodology

The relationship between primary and secondary law in the EU legal order is complex.⁴⁵⁶ An analysis of the legal effect of the treaty provisions of Union citizenship must take into account the interaction of these provisions with the secondary legislation adopted to ensure the right to freedom of movement, residence and equal treatment for Union citizens. This interaction takes different forms in the case law. As demonstrated in the legal literature, there are inconsistencies in the approach by the CJEU.⁴⁵⁷

It is important to point out first that neither the Citizens Directive nor the coordination regime are secondary legislation that effectively displace primary law—so-called total harmonisation measures. In the situation of free movement, residence and equal treatment for Union citizens, it is intended that primary and secondary law will coexist.

In the situation of coexistence, the common approach for the Court where the facts of the case fall within the scope of secondary legislation is to first examine the case with regard to the provisions in this legislation interpreted in light of primary law.⁴⁵⁸ Thereafter, if appropriate, the questions referred to the Court will be examined with regard to the treaty provision itself. Regarding the applicability of different primary law provisions, the CJEU will first examine Articles 45, 49 and 56 TFEU depending on whether the case concerns a worker, the freedom of establishment or a provider/recipient of services, respectively. Only when these provisions regarding forms of economic activity are not applicable or insufficient will the Court apply Article 21(1) TFEU on Union citizenship.⁴⁵⁹ Yet, even where a case is decided on the basis of Articles 45, 49 and 56 TFEU, the CJEU may consider citizenship-type principles.⁴⁶⁰

At times, however, the CJEU seems to regard the secondary legislation in the field of free movement, residence and equal treatment as exhaustive and refrains from applying the treaty provisions as a supplementing legal basis for the claims even if this would seem more consistent

⁴⁵⁶ P. Syrpis, *The relationship between primary and secondary law in the EU*, CMLRev 52: 461-488, 2015 with further references

⁴⁵⁷ P. Syrpis, *The relationship between primary and secondary law in the EU*, CMLRev 52: 461-488, 2015, see page 462

⁴⁵⁸ Case C-46/12 *N*. ECLI:EU:C:2013:97, Case C-341/05 *Laval* [2007] ECR I-11767, para 61, see Case E-2/11 *STX* [2012] EFTA Ct. Rep. 4, para 35

⁴⁵⁹ Cases C-100/01 *Olazabal* [2002] ECR I-10981, C-392/05 *Alevizos* [2007] ECR I-3505, para 80, C-152/05 *Germany* [2008] ECR I-39, para 18

⁴⁶⁰ Cases C-60/00 *Carpenter* [2002] ECR I-6279, C-291/05 *Eind* [2007] ECR I-10719, C-228/07 *Jörn Petersen v Arbejdsmarktservice* [2008], ECR I-6989, Joined Cases C-502/01 & C-31/02 *Gaumain Cerri and Barth* [2004] ECR I-6483

with the earlier approach.⁴⁶¹ Other times, the CJEU seems to be determined to disregard specific limitations in the secondary legislation, and the Court bases all the reasoning on the existence of the treaty provisions without being concerned with the effect, leading to an apparent disregard of legislative choices.⁴⁶² In the following section, the limitations on a general right to free movement, residence and equal treatment for Union citizens will first be analysed from the point of view of the provisions in the secondary legislation, and then the case law challenging these boundaries will follow.

2.3 Limitations on a general right to free movement, residence and equal treatment

Originally, the right to move and reside anywhere in the Union extended beyond economic activity through the right provided for by the residence directives adopted before the Maastricht Treaty introduced the concept of Union citizenship.⁴⁶³ The residence directives were included in the EEA Agreement in the annexes upon the adoption of the original agreement. However, all three previous directives on the free movement of non-economically active citizens merely provided residence rights for those who could support themselves. The purpose was to exclude risks for the social systems in the member states stemming from immigration of persons who might become a burden on the social assistance systems.⁴⁶⁴ Article 1 in each of the three residence directives stated that the granting of a residence right was only required for nationals of member states provided that they themselves and the members of their families avoided ‘becoming a burden on the social assistance system of the host member states during their period of residence’.⁴⁶⁵

In principle, the Citizens Directive continued the requirement for non-economically active citizens to have sufficient resources and insurance fully covering the risk of illness for themselves and their family members not to become a burden on the social welfare system of the host state.⁴⁶⁶ Although the directive has taken up some of the principles and statements of the CJEU in the cases on Union citizenship (prior to the adoption of the directive), the basic distinction between economically and non-economically active citizens, as was included in previously applicable directives 90/364, 90/365 and 93/96, has not been given up.⁴⁶⁷ In the third report from the Commission to the Council and the European Parliament on the application of the residence directives, the then-new Directive 2004/38 is commented upon in the following manner regarding main innovations: ‘The Directive (2004/38) maintains the requirement that Union citizens need to exercise an economic activity or, in the case of economically inactive persons, to dispose of sufficient resources and a comprehensive sickness insurance in order to take up residence in another member state’.⁴⁶⁸

Thus, in the secondary legislation, the free movement of non-economically active persons is still seen as generally preventing a person not involved in economic life from relying on public funds in the host state. The main exception is the right of citizens who have resided legally for a continuous

⁴⁶¹ Confer the *Dano* case

⁴⁶² Confer Citizenship cases

⁴⁶³ Directives 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, now replaced by Directive 38/2004

⁴⁶⁴ The scope of Directive 90/364 was general, whereas Directive 90/365 concerned retired people and Directive 93/96 concerned students

⁴⁶⁵ Directive 90/365 on retired union citizens refers to social security instead of social assistance system presumably without any intentional legal difference

⁴⁶⁶ The string of directives enacted in the early 1990s; Article 1 of Directive 90/364, Directive 90/365, Directive 93/96 (now recast as Article 8(4) of Directive 2004/38)

⁴⁶⁷ See Article 14 (1) and(2) and Article 7 and Article 24

⁴⁶⁸ Third report from the Commission to the Council and the European Parliament on the application of Directives 93/96, 90/364, 90/365 on the right of residence for students, economically inactive and retired Union citizens, COM(2006)156 final on page 9

period of five years in the host member state to have the right of permanent residence there without being subject to the condition of showing sufficient resources.⁴⁶⁹ With permanent residence the citizen has access to the social welfare benefits on equal footing with nationals.⁴⁷⁰

The three residence directives imposed obligations on member states to grant residence rights to citizens of the member states provided the conditions were fulfilled. Neither Directive 90/365 nor the other residence directives was ever set out to prevent any obstacles to free movement, and they have never been interpreted in that way in the case law from the CJEU. Rather, the residence directives much like the Citizens Directive replacing the residence directives were about prescribing conditions governing the exercise of the right of residence in the host state.⁴⁷¹ It follows directly from the wording in several provisions of both the previous and the present directive, which all refer to the host state obligations regarding residence rights and the right to equal treatment.⁴⁷² This general point becomes important for the analysis of the *Gunnarsson* case, E-26/13. Before moving to the EFTA Court case law, the next section will comment on the challenge of boundaries in the secondary legislation based on the treaty provisions on Union citizenship.

2.4 Limitations on personal scope of application – Union citizens and TCNs

Free movement rights for persons under the EEA Agreement apply to nationals of the EU member states and nationals of the EEA EFTA states. Free movement rights in the EEA Agreement therefore do not in principle apply to TCN.⁴⁷³ Immigration policy is not part of the EEA Agreement. However, the Citizens Directive establishes certain limited independent rights for TCN, such as those enshrined in Articles 12(2), 13(2) and 18. These independent rights are additional to the rights of residence for TCN family members as part of the right to family life for moving citizens. The rights of residence for TCN family members are conditioned upon and derived from the rights of the Union citizen. The rights of residence depend on the length of residence of the Union citizen as enshrined in Articles 6 (up to 3 months), 7 (more than 3 months) and 16 (permanent residence). There were no independent rights for TCN equal to the rights in Articles 12(2), 13(2) and 18 in the secondary legislation included in the annexes of the EEA Agreement prior to the incorporation of the Citizens Directive. These independent rights are therefore new rights.

In the EU legal order, Article 79 TFEU lays down the Union's competence to legislate in immigration issues. This provision as well as the secondary legislation adopted pursuant to this provision⁴⁷⁴ has not been made part of the EEA Agreement. In the EU legal order, Articles 12(2), 13(2) and 18 in the Citizens Directive complement the rights of TCNs ensured by the legislation adopted pursuant to Article 79. The interaction between the different sets of legislation may be viewed in case law. For instance, in *Metock*, the CJEU argued in its reasoning that member states could not condition family reunification for a moving Union citizen with a TCN family member on previous legal residence in another member state. This interpretation by the Court of the Citizens

⁴⁶⁹ See Directive 2004/38 Article 16

⁴⁷⁰ The conditions for expelling a citizen for lack of sufficient resources will not be described here. Suffice to say that there may not always be sufficient grounds for terminating the residence of citizens where they have become temporarily or permanently dependent on social welfare, they must have become 'an unreasonable burden', see the directive Article 14

⁴⁷¹ Chapter II of the Citizens Directive regulates right of exit and entry. The directive requires the home state to ensure nationals a right to leave the territory. These obligations on home states are, however, limited to not requiring exit visas or equivalent formalities and to issue the necessary identity cards or passports, see Article 4

⁴⁷² See i.a. Chapter III on residence rights, Articles 6, 7 and 16 and generally Article 24 on equal treatment

⁴⁷³ Limited rights for TCN workers as part of the free movement rights for undertakings have been acknowledged by the Courts

⁴⁷⁴ Examples include the family reunification Directive (2003/86/EC), the Long-term residents Directive (2003/109/EC) and the Third Country national students Directive (2004/114/EC)

Directive in the area of immigration and first access to EU territory was supported by the right of family reunification for TCNs enshrined in Directive 2003/86, which was adopted based on Article 79 TFEU. In *Metock* paragraph 69, the Court states:

Furthermore, the interpretation mentioned in paragraph 66 above would lead to the paradoxical outcome that a Member State would be obliged, under Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12), to authorise the entry and residence of the spouse of a national of a non-member country lawfully resident in its territory where the spouse is not already lawfully resident in another Member State, but would be free to refuse the entry and residence of the spouse of a Union citizen in the same circumstances.⁴⁷⁵

As demonstrated by this citation, the reasoning of the Court when interpreting the Citizens Directive is based on the understanding that Union citizens cannot have less rights to family reunification with TCNs compared to non-Union citizens. Given that member states cannot require previous legal residence in another member state of a family member of a TCN rights holder under Directive 2003/86, such requirements are also incompatible with Union citizens' rights under the Citizens Directive.

Adopting this interpretation of the Citizens Directive by the CJEU in the EEA context arguably entails the adoption of elements of rights for TCNs, which have been agreed in the EU legal order through a treaty provision and in secondary legislation, neither of which has been made part of the EEA Agreement.

2.5 Limitations on the application of the coordination of social security benefits

The case law from the CJEU on the application of the coordination of social security benefits demonstrates how Union citizenship has set aside limitations in this regime. In essence, the CJEU has built on the right to free movement, including both the economically active and the non-economically active, to introduce extended obligations on the member states under this regime compared to the existing limitations on application inherent in the regulation itself. Analysing the extent to which the case law on the application of the coordination of social security benefits in the EEA in a similar manner has increased the rights of the non-economically active will illuminate the question of a parallel right to free movement in the EEA.

This is a study on the Citizens Directive in the EEA. However, in order to shed more light on the possible consequences of the lack of the provisions on Union citizenship in the EEA legal order, reference will also be made to case law from the EEA Courts in relation to the regime for coordination of social security benefits in the EEA. The reason for this inclusion is based on an understanding of the case law from the CJEU where the status of Union citizenship has served as a basis for complementing and at times extending rights in the field of the coordination regime.⁴⁷⁶ This case law from the CJEU therefore serves to illuminate how Union citizenship has contributed to free movement rights for non-economically active citizens. The question in the analysis of the EFTA Court case law in relation to the coordination regime concerns whether a parallel reasoning is applied by the EFTA Court in the EEA Agreement. In other words, the question is whether this case law

⁴⁷⁵ Case C-127/08 *Metock*, para 69

⁴⁷⁶ A recent Advocate General opinion in Case C-308/14 *Commission v United Kingdom* ECLI:EU:C:2015:666, regarding the residence test in the UK for access to child benefits seems however, more sensitive to member states arguments of the need to protect entitlements to welfare benefits. This opinion seems to be in line with three recent decisions concerning the relationship between the Regulation and the Citizens Directive, Cases C-140/12, EU:C:2013:565 *Brey*, C-333/13, EU:C:2014:2358 *Dano* and C-67/14, EU:C:2015:5 *Alimanovic*

indicates similar free movement rights for the non-economically active in the EEA to the rights ensured by the CJEU in the EU legal order. The analysis aims to shed light on the EEA Courts' understanding of the reach of the EEA Agreement into the area of free movement rights for the non-economically active.

The coordination system for social security in Regulation 1408/71⁴⁷⁷ was made part of the EEA Agreement through the inclusion in Point 1 of Annex VI at the adoption of the agreement. By Decision No 76/2011, the EEA Joint Committee made amendments to Annex VI to the EEA Agreement by substituting Regulation 1408/71 with Regulation 883/2004.⁴⁷⁸ Regulation 883/2004 entered into force in the EEA on 1 June 2012. For the sake of completeness, the inclusion in the EEA Agreement of Regulation 492/2011⁴⁷⁹ on freedom of movement of workers, replacing Regulation 1612/68, must also be mentioned. The Joint Committee made amendments to Annex V to the EEA Agreement by decision on 30 March 2012, Decision No 52/2012, to include Regulation 492/2011.

Before entering into the analysis of the case law, it should be clarified that the relationship between Regulation No 883/2004 and Directive 2004/38 is not clear in the EU legal order. The CJEU has dealt with this relationship in three recent decisions—Cases C-140/12 *Brey*, C-333/13 *Dano* and C-67/14 *Alimanovic*—and there is an advocate general opinion in Case C-308/14 *UK v Commission*. This report is not the place to aim at clarifying this relationship in EU law. Here, it will suffice to point out that even if the recent case law is directed towards limiting rights to social welfare benefits, this is only nuancing earlier case law, which has significantly expanded such rights based on the status of Union citizenship.⁴⁸⁰ The aim here is simply to analyse the direction of the case law from the EFTA Court in terms of paralleling rights for the non-economically active. The aim is not to establish the exact boundaries of EU member states'/EEA-EFTA states' freedom to legislate in the field of social welfare benefits.

Regulation 1408/71 was adopted as a social complement to the free movement of workers.⁴⁸¹ The general purpose of the regulation is to promote intra-EEA migration by ensuring that someone who moves and settles in another EEA state will not lose his or her social security entitlements. The regulation is organised through two main principles: The principle of equal treatment applies without exception and sets aside provisions in national legislation that reserve certain benefits for own nationals or long-term residents. The principle of exportability stipulates that acquired rights are exportable, but unlike the requirement of equal treatment, it is not an absolute principle. Both these principles will be revisited in the case law analysis.

The Joint Committee decision to include Regulation 883/2004 was disputed in the EU legal order in Case C-431/11 *UK v. Council*.⁴⁸² The case of *UK v. Council* seems at first glance like a technical

⁴⁷⁷ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community

⁴⁷⁸ 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, 30.4.2004, 1; corrigendum OJ L 200, 7.6.2004, 1

⁴⁷⁹ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement of workers in the Union, replacing Regulation 1612/68

⁴⁸⁰ Some authors also argue for a narrow interpretation of these decisions in order to comply with primary law, an argument in this direction regarding the *Dano* case is to be found in H. Verschuere, Preventing “benefit tourism” in the EU: A narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?, CMLRev 52 page 363-390 2015, for a critical analysis of the recent case law, see N N Schibhne, Limits rising, duties ascending: The changing legal shape of Union citizenship in CMLRev 52 page 889-938, 2015

⁴⁸¹ See also Regulation 492/2011 on freedom of movement of workers

⁴⁸² C-431/11 *UK v Council*. The position by the Court has later been reiterated in decision C-656/11, *UK v Council* ECLI:EU:C:2014:97 on the Swiss Agreement on Movement of Persons

case concerning the choice of the right legal base for a decision in the EEA Joint Committee concerning the update of the annexes to the EEA Agreement in the field of social welfare benefits. The process of updating the annexes seldom (especially on the EU side) raises delicate questions. The UK was however concerned that the updated regulation would give social rights to non-economically active TCN.⁴⁸³ An extension of social rights to non-economically active TCN was, according to the UK, within the content of the reservation the UK had made in the EU policy on immigration. For this reservation right to be invoked also in an EEA context, however, there was a need to change the legal base from Article 48 TFEU to Article 79 TFEU. In other words, the attempt by the UK was to limit the solidarity in terms of rights to national welfare benefits to Union citizens leaving non-economic TCN outside, including nationals from the EEA EFTA state.

Starting from an external relation viewpoint, the UK Government's observation was rooted in a long-term practice of the division of competences. Whenever Article 48 is invoked as a legal base in external relations, this is only through the doctrine of implied powers. The doctrine of implied powers need not (and should not) be invoked whenever there is an explicit power available. According to the UK, the appropriate legal base, which dealt with the rights of TCN, was Article 79.

However, the Court did not accept this line of reasoning by the UK Government. In order to reach the result that Article 48 is the appropriate legal basis, the Court had to 'internalise' the EEA Agreement. This internalisation means that the Court employed language whereby the EFTA states through the EEA Agreement are almost considered 'one of us', as part of the EU, and therefore not considered part of EU external relations. Only by departing from the ordinary view through characterising the EEA Agreement as internal can the Court achieve both the interpretative result desired and not question the long-standing doctrine of implied powers in external relations.

Had the Court accepted the view of the UK Government, this would have been a serious defeat for the homogeneity principle of the EEA Agreement. The Court relies strongly on the element of reciprocity when it reaches its conclusion. It refers repeatedly to the rights of EU citizens in the EFTA countries. Underlying the reasoning and the conclusion is arguably also a sense of solidarity albeit clearly based on reciprocity. The non-economic EEA individuals are included as members of the EU also in terms of their right to national social welfare benefits outside the economic justification of such rights, provided this same right is extended to EU nationals in the EFTA states. All are in a sense members of the same community, a point of view that powerfully reinforces the strength of the homogeneity principle in the EEA.

2.6 Challenging boundaries in the secondary legislation

2.6.1 Introduction

The legislative choices made in the secondary legislation to protect the boundaries of national social welfare benefits did not prevent the CJEU from rendering a series of judgments based on the provisions on Union citizenship in the treaty challenging these legislative choices. The CJEU has used the Union citizenship as an instrument to overcome the existing basic distinction between economically active and non-economically active Union citizens and create rights for all.⁴⁸⁴ To this end, the CJEU introduced a concept of transnational solidarity based on Citizenship of the Union. In recent case law, the CJEU has taken a step back and has limited its own earlier broad interpretation

⁴⁸³ The term 'third country nationals' are in an EU context often discussed as a category comprising all but the Citizens of the Union. EEA nationals are a special category of third country nationals given that the EEA Agreement is the most far-reaching association agreement the EU has ever concluded with a third country or a group of third countries

⁴⁸⁴ Hailbronner, K. [2005] Union citizenship and access to social benefits, CML Rev 2005, 42, page 1245-1267

of Union citizenship rights. At present, the Court seems to be more sensitive to member states' concerns regarding possible burdens on national social assistance systems. Both the *Dano*⁴⁸⁵ and *Alimanovic* cases⁴⁸⁶ and the recent opinion by the Advocate General in *UK v Commission*⁴⁸⁷ have led commentators to question the extent of the solidarity principle in the EU legal order.⁴⁸⁸

Regardless of these recent adjustments in case law regarding the right to social assistance-type benefits for non-nationals, the CJEU has undoubtedly widened the personal and substantive scope of Article 21 TFEU through its case law and insisted that, in its application, there be no discrimination on the basis of nationality. The CJEU has thus interpreted Union citizenship as a new individual freedom to be protected by the European constitutional order.⁴⁸⁹ Even though Union citizenship is still secondary to national citizenship and the redistributive role of the national welfare state remains in principle unchallenged, Union citizenship has gradually grown in importance as a conductor for social entitlements and residence rights. The change is incremental and gradual, but through a series of cases, the emerging consequences of Union citizenship destined to be 'the fundamental status of nationals of the member states'⁴⁹⁰ can be, if not fully so, at least partially observed.⁴⁹¹

The weight given to the concept of citizenship became particularly visible in the CJEU's case law on the rights of EU citizens to family life under the Citizens Directive. The next sections will review this case law, distinguishing between the case law concerning rights against the host state and rights against the home state, respectively.

2.6.2 *Union citizens' rights against their host state*

The *Martinez Sala* case⁴⁹² was the first instance in which the Court used the provisions on Union citizenship in order to circumvent the specific limitations in secondary law on access to social benefits. In *Sala*, a Spanish national—who after residing and working in Germany for a long time had lost her job and become permanently dependent upon social assistance—claimed childcare allowance. Until this case, certain conditions for the application of then-Regulation 1408/71⁴⁹³ had been applied in order to determine whether an individual in relying upon the equal treatment clause could be considered a worker/employee. If this was not the case, a citizen could not rely upon the

⁴⁸⁵ Case C-333/13 *Dano*

⁴⁸⁶ Case C-67/14 *Alimanovic*

⁴⁸⁷ Case C-308/14 *UK v Commission*

⁴⁸⁸ Recent analysis can be found in CMLRev 52 2015, see N.N Suibhne, Limits Rising, Duties Ascending: The Changing Legal Shape of Union Citizenship, page 889-938 and H. Verschueren, Preventing 'Benefit Tourism' in the EU: A Narrow or Broad Interpretation of the Possibilities offered by the ECJ in *Dano*?, page 363-390 and D. Thym, The Elusive Limits of Solidarity: Residence Rights of and Social benefits for Economically inactive Union Citizens, page 17-50

⁴⁸⁹ An analysis of the impact of the case law on Union citizenship and access to social welfare benefits recommending legislative initiatives can be found in S. Giubboni, (2010) A certain Degree of Solidarity in M. Ross and Y. Borgmann-Prebil, (2010), Promoting Solidarity in the European Union, Oxford University Press page 166-197

⁴⁹⁰ The CJEU famously stated this in the leading citizenship case of *Grzelczyk*, Case C-184/99 [2001] ECR I-6193, para 31 and has repeated the formula constantly in its citizenship jurisprudence. A recent decision where this formula was relied upon in terms of access to welfare benefits was Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* [2011] ECR I-6497

⁴⁹¹ Spaventa is critical to the possible constitutional impact of Union citizenship. She argues that since the rights, still require a transborder element, the impact of Union citizenship is '[T]he fact that Union citizenship is, or is destined to be the fundamental status of Union citizens appears to be, at present, more a piece of limited rhetoric than a statement of fact'. Spaventa, E. (2010) The Constitutional impact of Union citizenship in Neergaard, U. Nielsen, R and Roseberry, L. (eds) The Role of Courts in developing a European social model – Theoretical and Methodological Perspectives

⁴⁹² Case C-85/96 *Martinez Sala* [1998] ECR I-2691

⁴⁹³ Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. This regulation has been replaced by Regulation (EC) No 883/2004

general principle of non-discrimination to grant unlimited equal treatment with regard to social benefits. The Court, departing from its previous jurisprudence, decided that a Union citizen could rely upon the equal treatment clause with respect to all social benefits falling within the scope of application of the treaty. Therefore, the mere fact of establishing a lawful residence entitled, in the Court's view, Mrs Sala to claim equal access to a childcare allowance.

A new building block was laid by the ruling in *Baumbast*.⁴⁹⁴ In this case, the Court affirmed that the right to reside within the territory of a member state was conferred directly on every citizen of the Union disregarding that Mr Baumbast did not comply with the national requirement to have full medical insurance, a requirement that was fully compliant with the secondary legislation.⁴⁹⁵ In a sequence of judgments, the Court has considerably expanded its case law. In *Grzelczyk*⁴⁹⁶ and in *Bidar*,⁴⁹⁷ the Court awarded assistance for students in the form of a minimum income under Belgian law and of subsidised loans. In *Trojani*,⁴⁹⁸ the Court decided that a French national residing in Belgium for some time at a campsite and subsequently in a hostel was entitled to the Belgium *minimex*, a kind of social welfare payment. In *Collins*,⁴⁹⁹ the Court decided that an Irish-American dual national was in principle, as a citizen of the Union, entitled to claim a jobseeker's allowance, subject, however, to making it conditional on a residence requirement.

Regarding the right to family reunification with a TCN family member, the *Metock* case⁵⁰⁰ provides an example of residence rights for family members not to be conditioned on previous legal stay in another member state. The Court held that the possibility of family members joining an EU citizen had to be interpreted broadly. There could be no requirement for a citizen to already have founded a family when moving to a host member state. Even after the exercise of the right to freedom of movement, family members (typically TCN) could join the citizen and derive a right of residence from the Union citizen's right.⁵⁰¹

Furthermore, the CJEU has ruled that the primary carer of a minor child Union citizen may have a right to reside in the host member state where the Union citizen is resident. This was established in Case 200/02 *Chen*.⁵⁰² The minor child Union citizen, an Irish national, resided in the United Kingdom with her Chinese mother. The CJEU ruled that a refusal of the mother's right of residence in the United Kingdom would 'deprive the child's right of residence of any useful effect'.⁵⁰³ The CJEU applied Article 12 of Regulation 1612/86 (now Article 10 of Regulation 492/2011) and the ruling in Case C-413/99 *Baumbast* by analogy and stated:

It is clear that enjoyment by a young child of a right of residence *necessarily implies* that the child is entitled to be accompanied by the person who is his or her primary carer and accordingly

⁴⁹⁴ Case C-413/99 *Baumbast* [2002] ECR I-7091

⁴⁹⁵ See for an analysis of *Baumbast* in Dougan, M. and Spaventa, E. [2003] *Educating Rudy and the (non-)English patient: A double-bill on residency rights under Article 18 EC*

⁴⁹⁶ Case C-184/99 *Grzelczyk* [2001] ECR I-6193

⁴⁹⁷ Case C-209/03 *Bidar v London Borough of Ealing* [2005] ECR I-2119

⁴⁹⁸ Case C-456/02 *Trojani* [2004] ECR I-7573

⁴⁹⁹ Case C-138/02 *Collins v. Secretary of State for Work and Pensions* [2004] ECR I-2703

⁵⁰⁰ Case C-127/08 *Metock*

⁵⁰¹ Case C-127/08 *Metock*, para 87-88

⁵⁰² See Part II for a more detailed analysis of the case

⁵⁰³ Article 18 EC is now Article 21(1) TFEU. Directive 90/364/EEC is replaced by Directive 2004/38/EC

that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.⁵⁰⁴

The ruling has been confirmed in Case C-86/12 *Alokpa*.⁵⁰⁵ The CJEU stated in *Alokpa*:

while Article 21 TFEU and Directive 2004/38 grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that directive, the same provisions allow a parent who is that minor's primary carer to reside with the child in the host Member State.⁵⁰⁶

The relevant features of this doctrine are that a minor child Union citizen can be deprived of his/her right to freedom of movement pursuant to Article 21(1) TFEU if he/she is not able to bring with him/her the primary carer. The right to freedom of movement would in that case not be effective. The rule applies as long as the child fulfils the criteria in the directive for a right of residence in the host member state.

2.6.3 *Union citizens' rights against their home state*

The case law on social rights and residence rights based on citizenship of the Union does not only include rights against the host state. In *De Cuyper*,⁵⁰⁷ the Court subjected the national residence requirement in the home state to a proportionality test even though the requirement was in compliance with the right to refuse export in then-Regulation 1408/71.⁵⁰⁸ Requirements on the home state were further developed in cases like *Petersen*⁵⁰⁹ concerning also the export of an unemployment benefit apparently refused in line with Regulation 1408/71 but not considered proportional under the citizenship review. Other examples of cases concerning rights against the home state are *Tas Hagen*⁵¹⁰ and *Pusa*⁵¹¹ concerning residence requirements and access to veteran benefits and tax advantages, respectively. Further steps have also been taken by the Court in terms of students' rights against their home state in cases like *d'Hoop*⁵¹² and *Morgan and Bucher*.⁵¹³ A more recent example is the right to export a youth invalidity benefit without any prior or likely future economic activity on the part of the beneficiary, as decided by the Court in *Stewart*.⁵¹⁴

According to Regulation 1408/71, the right to export a benefit was conditional on having the status of a worker. However, with the treaty provisions on citizenship, this condition was set aside by the Court on the grounds that it was sufficient to have the status of citizenship.

For instance, the *Gaumain-Cerri and Barth* case⁵¹⁵ concerned the compatibility with EU law of rules that made the receipt of some benefits conditional upon residence within the territory of the member

⁵⁰⁴ Case C-200/02 *Chen*, para 45 (emphasis added)

⁵⁰⁵ See later section for a more detailed analysis of the case

⁵⁰⁶ Case C-86/12 *Alokpa*, para 29

⁵⁰⁷ Case C-406/04 *Gérald De Cuyper v Office national de l'emploi* [2006] ECR I-6947

⁵⁰⁸ Regulation 1408/71 Article 10 (replaced by Regulation (EC) No 883/2004)

⁵⁰⁹ Case C-228/07 *Jørn Petersen v Arbejdsmarktservice* [2008] ECR I-6989

⁵¹⁰ Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451

⁵¹¹ Case C-224/02 *Pusa v Osuuspankkien* [2004] ECR I-5763

⁵¹² Case C-224/98 *d'Hoop* [2002] ECR I-06191

⁵¹³ Joined Cases C-11/06 and 12/06 *Morgan and Bucher* [2007] ECR I-9161

⁵¹⁴ Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* [2011] ECR I-6497

⁵¹⁵ Joined Cases C-502/01 & C-31/02 *Gaumain Cerri and Barth* [2004] ECR I-6483

state. Having found that the benefits in question were covered by Regulation 1408/71, thereby falling within the material scope of EU law, the CJEU decided that it was not necessary to investigate whether one of the claimants qualified as a worker falling within the personal scope of either the regulation or Article 39 EC (now Article 45 TFEU). Instead, the Court found that, according to Article 17 EC (now Article 20 TFEU), the claimants were Union citizens and that this status enabled those ‘who find themselves in the same situation to enjoy within the scope of the treaty the same treatment in law, subject to such exceptions as are expressly provided for’. Accordingly, the residence criterion was found to be incompatible with EU law.

Regarding the right to family reunification with a TCN family member, reference is made to Case C-456/12 *O and B*. The question in the case was whether the TCNs were entitled to a derived right of residence in the Netherlands (the home state of the Union citizen) on the basis of Article 21(1) TFEU. The CJEU had ruled in previous cases that such a right should be granted to TCN family members of returning Union citizens who had engaged in economic activity in the host member state. The CJEU’s answer to this was in the affirmative. However, the scope of application of Article 21(1) TFEU upon return to the home state for the purpose of a right to residence to the TCN family members is limited to circumstances where the ‘residence of the Union citizen in the host Member State [by virtue of Article 21(1) TFEU] has been *sufficiently genuine* so as to enable that citizen to *create or strengthen family life* in that Member State’.⁵¹⁶

2.7 Concluding remarks

Michael Dougan has demonstrated how the CJEU’s case law has fundamentally changed the conceptual framework for assessing territorial restrictions.⁵¹⁷ The starting point was indeed that the national welfare systems are territorially bound and naturally entitled to restrict the payment of benefits to those resident within the member state. Regulation 1408/71 (replaced by Regulation (EC) No 883/2004) merely created certain exceptions to that territoriality principle for the benefit of certain classes of migrant individuals.⁵¹⁸ All three previous directives⁵¹⁹ on the free movement of non-economically active citizens took great care to provide residence rights merely for those who could support themselves in order to exclude risks for the social systems in the member states stemming from the immigration of persons who might become a burden on the social assistance systems. The Citizens Directive continued in principle the requirement for non-economically active citizens to have sufficient resources and insurance fully covering the risk of illness for themselves and their family members not to become a burden on the social welfare system of the host state. Although the Citizens Directive as already demonstrated has taken up some of the principles and statements of the CJEU in the cases on Union citizenship, the basic distinction between economically and non-economically active citizens has not been given up.⁵²⁰

Thus, clearly, the treaty provisions on Union citizenship have influenced the right to social and residence rights for EU nationals and their family members both from the host state when they have moved to and resided in another member state as well as from their home state. The right as a Union

⁵¹⁶ Case C-456/12 *O and B*, para 51 (emphasis added)

⁵¹⁷ Dougan, M. [2009] *The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon*

⁵¹⁸ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. The Regulation has been replaced by Regulation 883/2004 which has also been made part of the EEA Agreement. The case law concern mainly Regulation 1408/71.

⁵¹⁹ The string of directives enacted in the early 1990s; Article 1 of Directive 90/364, Directive 90/365, Directive 93/96 (now recast as Article 8(4) of Directive 2004/38)

⁵²⁰ See Article 14(1) and (2) and Article 7 and Article 24

citizen has prompted the CJEU over the years to increase both the scope *ratione personae* and *ratione materiae* of the right to free movement and equal treatment beyond the limits posed by the secondary legislation and in other articles in the treaties.⁵²¹ In doing so, the CJEU has to some extent abandoned the distinction between economically active and non-economically active citizens.⁵²² Rather than confining free movement rights to specific categories of persons, workers are now treated ‘...as a species of the genus citizen of the Union’.⁵²³

Of interest in an EEA context is the fact that the CJEU is interpreting secondary legislation and treaty provisions in a particular way given the existence of the Union citizenship provisions in the treaty and in some cases disregarding the legislative provisions or interpreting the provisions against their wording. Express limitations in the secondary legislation are occasionally disregarded given that the claimant can rely on primary law directly. To this end, political compromises reached in secondary legislation are set aside based on primary law. This can be seen in relation to both the coordination regime of social security and the Citizens Directive.

The conceptual basis for claims against both the host and the home state is the same. Rules containing a territorial element, such as a residence requirement, affect the right to move of Union citizens as well as the right to choose their place of residence. For this reason, these rules are compatible with the treaty only insofar as they pursue a legitimate aim in a proportionate way. Thus, it can be argued that, in all those cases, what mattered was discrimination against movers: Those who had moved, or who had returned after having exercised their right to move, were at a disadvantage compared to those who had not moved.

The next section sets out to explore the case law from the EFTA Court to see if the Court is equally determined to abandon the distinction between economically active and non-economically active citizens in the EEA.

3 Case law from the EEA Courts on the right to free movement, residence and equal treatment

The EFTA Court has thus far not decided a case involving residence rights of a TCN under EEA law. The case law from the EFTA Court regarding the Citizens Directive concerns the right of family reunification with an EU national,⁵²⁴ the right to limit the entry of an EFTA state national based on reasons of public security⁵²⁵ and the right to equal treatment to avoid obstacles to free movement from the home state of an EFTA state national.⁵²⁶ All the cases thus far are preliminary references, and none of the cases originates in Norway. The Court will, however, most likely have the opportunity to interpret the Citizens Directive as part of the EEA Agreement in the case of residence rights for a TCN in an upcoming case from Oslo tingrett.⁵²⁷ This is also a preliminary reference case

⁵²¹ Such as Article 45 TFEU

⁵²² Hailbronner, K., ‘Free Movement of EU Nationals and Union Citizenship’, in International Migration Law. Developing Paradigms and Key Challenges, R. Cholewinski, R. Perruchoud and E. MacDonald (ed), (The Hague: T.M.C. Asser Press 2007) at page 317-320. An opposing view can be found in O’Brien, C. [2008] Real links, abstract rights and false alarms: the relationship between the ECJ’s “real link” case law and national solidarity, 33 ELR (2008), page 653

⁵²³ Condinanzi, M., Land, A., and Nascimbene, B., Citizenship of the Union and Free Movement of Persons (The Hague: Martinus Nijhoff Publishers, 2008) at page 67

⁵²⁴ The *Clauder* case

⁵²⁵ The *Wahl* case

⁵²⁶ The *Clauder* case

⁵²⁷ This information is provided by the UDI

and the first reference regarding the Citizens Directive from Norway. Furthermore, the EFTA Court may in the future decide in an infringement case given that the EFTA Surveillance Authority has initiated formal proceedings against Norway for the failure to correctly implement the Citizens Directive.⁵²⁸ If the cases continue, they will be decided after the finalisation of this research report. The CJEU has yet to decide in a case regarding the Citizens Directive and the EEA Agreement.

The case law from the EFTA Court regarding the coordination regime for social security is more extensive than the case law regarding the Citizens Directive. The EFTA Court has in a number of cases been asked to interpret ‘residence-like’ requirements and the refusal to export social benefits. The cases reviewed for this study all concern refusals from EFTA states in situations of minor or no economic activity on the part of the beneficiary. The cases concern the situation of claims being made by the moving individual against both the host state and the home state, and they include both preliminary references and infringement proceedings. All three EFTA states have been involved in cases regarding the coordination regime for social security. Furthermore, the CJEU has decided in one case regarding the coordination regime for social security and the EEA Agreement in a situation involving non-economically active moving nationals.

The analysis in this report is limited to the existing legal material. Our general conclusion is therefore based on the analysis of the case law already decided upon by the EEA Courts. Our question in the following case law analysis addresses the question asked in the introduction, namely whether there is ‘a greater room for manoeuvre’ for Norway as an EFTA state under the Citizens Directive than the limitations imposed on the EU member states as interpreted by the CJEU. The answer depends on whether the EEA Agreement confers the same free movement rights for moving individuals in the EEA legal order as compared to the EU legal order. All the cases point in the same direction, namely to the free movement rights being parallel regardless of economic activity and regardless of whether claims are made against the home or against the host state.

The analysis will distinguish between rights against the host state, Case E-4/11 *Clauder* (Section 4), and rights against the home state, Case E-26/13 *Gunnarsson* (Section 5). Case E-15/12 *Wahl* does not add to the analysis of the EEA-specific dimension of the directive and is therefore analysed in the chapter on the directive in EU law. The case law from the EFTA Court on the Citizenship directive is followed by the case law on the coordination regime for social security rights (Section 6).

4 Rights against the host state – Case E-4/11 Arnulf Clauder

4.1 Introduction

The *Clauder* case was the first instance in which the EFTA Court was confronted with the right to free movement for non-economically active citizens and the corollary right to a family life. The question in the case concerned the right to family reunification with the spouse of an EU member state citizen. Mr Clauder was a pensioner with a permanent residence permit in Liechtenstein. Mr Clauder did not fulfil the requirement of having sufficient resources to claim a derived right of residence for his wife under Article 7(1) d of the Citizens Directive. A feature of the case is the EFTA Court insisting to give full effectiveness to the right of EEA nationals regardless of economic activity to move and reside freely within the territory of the EEA states.

⁵²⁸ See Reasoned opinion 8 July 2015, case No: 73930

4.2 The right to protection of family life for Union citizens in EU law

Since the introduction of Union citizenship in primary law, the CJEU has in various decisions had the opportunity to clarify the effect of this concept on the legal position of Union citizens as well as their family members.⁵²⁹ The *Metock* judgment remains a fundamental ruling for the development of rights for TCNs as family members of Union citizens under Union law.⁵³⁰ The Court insists on the right to family life as part of eliminating obstacles to the exercise of the fundamental freedoms guaranteed by the treaty.⁵³¹ The primary law foundation for a universal right to free movement for all Union citizens is an important precondition for the CJEU to intervene in issues of national migration law regardless of the lack of, or limited, EU general competences in these matters.

As already commented upon briefly, in the *Metock* case, the CJEU came to the conclusion that it had ‘to reconsider’ its previous finding in the *Akrich* case.⁵³² The *Akrich* case concerned an economically active Union citizen’s right to family reunification. The Court held that in order to benefit from the rights provided for in Article 10 of Regulation 1612/68, national migration law could require a TCN who is the spouse of a Union citizen to be lawfully resident in a member state before he/she moves to another member state to which the citizen of the Union is migrating.⁵³³ The reasoning was based on the view that the secondary legislation is silent regarding access to the territory of the Union.⁵³⁴ The *Akrich* case concerned the division of powers between the EU and the member states in the area of controlling immigration at the external borders of the EU. In *Akrich*, the CJEU accepted national legislation limiting the right of Union citizens to be joined by their spouses of a third-country nationality.

Similarly, the *Metock* case concerned a rejection of an application of residence for a TCN spouse of a Union citizen based on national requirements in Ireland of prior lawful residence in another member state. The balancing act for the CJEU was again a matter of on the one hand protecting free movement rights, including Union citizens’ right to family life, and on the other hand respecting national autonomy in the field of immigration. The governments of the member states strongly argued for the need to prevent illegal immigration resulting from, for instance, marriages of convenience. In this context, the CJEU relied heavily on the provisions of Union citizenship in the treaty, especially the interference of the national legislation with the right to freedom of movement of the Union citizens as a consequence of the citizen not having the right to be accompanied by his or her family.⁵³⁵

In the *Metock* case, the Court refers both to the treaty and to the directive regarding the Union citizens’ right to move and reside freely. The directive aims to facilitate the exercise of this right, but the granting of the right is ‘conferred directly on Union citizens by the treaty’ according to the Court’s own words.⁵³⁶ The CJEU rebuts the intervening governments’ submission regarding the lack of EU competence in matters of immigration by, for example, referring to the right to family life as part of eliminating obstacles to the exercise of the fundamental freedoms guaranteed by the treaty.

⁵²⁹ See section above

⁵³⁰ Case C-127/08 *Metock* [2008] ECR I-6241

⁵³¹ Case C-127/08 *Metock*

⁵³² Case C-109/01 *Akrich* [2003] ECR I-9607

⁵³³ Para 50-51

⁵³⁴ Para 49

⁵³⁵ See in particular paras 60-67

⁵³⁶ *Metock* paras 56, 62 and 82

Based on this reasoning by the Court, it seems that the primary law foundation for a universal right to free movement for all Union citizens is an important precondition for the CJEU to intervene in national immigration law. The directive facilitates the right, but the primary law foundation is the legal basis for the Court's reasoning.

4.3 The decision of the EFTA Court in Clauder

4.3.1 The facts of the case

Arnulf Clauder, a German national, had been continuously residing in Liechtenstein since 1992. His first wife, also of German nationality, had taken up residence in Liechtenstein, and Mr Clauder was first granted a right of residence as a family member of a worker. In 2002, Mr Clauder received a permanent residence permit. In 2009, Mr Clauder and his first wife divorced, and in 2010, Mr Clauder remarried a German national residing in Germany. On 1 February 2010, Mr Clauder applied to the Liechtenstein Immigration Office for a family reunification permit for his second wife.

Mr Clauder was a pensioner in receipt of old-age pensions from both Germany and Liechtenstein. As the old-age pensions, even in combination, were relatively modest, he received supplementary benefits in Liechtenstein pursuant to national legislation on supplementary benefits to old-age, survivors' and invalidity insurance.

On 12 February 2010, the application for family reunification was rejected on the grounds that Mr Clauder, who was granted a permit of permanent residence as an economically inactive person, could not prove that he had sufficient financial resources for himself and his wife. It was an undisputed fact in the case that if Mrs Clauder were allowed to reside with her husband in Liechtenstein, the amount of the supplementary benefits received by Mr Clauder would increase. Hence, the national condition of having sufficient resources to not become a burden on the social assistance system of the host EEA state was not satisfied either by Mrs Clauder as a family member or by Mr Clauder as a national of an EEA state whom Mrs Clauder wished to join in the host EEA state.

The case concerned only the derivative right of residence of a family member of an EEA citizen. The family member's possible independent right to reside in Liechtenstein as a German citizen was according to the reference not an option in the particular case. Even if this case concerned family reunification with a Union citizen, there is no reason to believe that the reasoning of the Court does not apply equally to a TCN. This also seems to be the interpretation of the EFTA Court decision by several administrative authorities dealing with immigration law in various member states.⁵³⁷

4.3.2 The legal question

The Administrative Court in Liechtenstein asked three questions in the case distinguishing between the rights of the economically active and the non-economically active. Only the latter situation raised the difficult question of interpretation in the case, but the formulation of the questions by the Administrative Court serve to indicate how the EFTA Court could have solved the question in the EEA context. The challenge in the EEA of combining the more extended rights based on the status of being a Union citizen with the more limited rights inherent in the directive only arises for the non-economically active citizen. Thus, one alternative for the EFTA Court in accordance with the formulations of the questions in the preliminary reference would have been to uphold the distinction between the economically active and the non-economically active in EEA law. For the latter group, a

⁵³⁷ See reference in Danish practices and the practice of Dutch administrative agencies in the country studies

possible outcome could have been a literal reading of rights clearly spelt out in the directive. This was, however, not the path chosen by the EFTA Court.

Pursuant to Article 16 of the Citizens Directive, EEA nationals who had been residing legally for a continuous period of five years in the host EEA state shall be granted a right of permanent residence in this state. This right of permanent residence also applies to family members who have been legally residing for a continuous period of five years in the host state. Article 16 states that, once acquired, the right of permanent residence is not subject to the conditions laid down in Chapter III of the directive, namely the conditions of economic self-sufficiency or worker/self-employed status found in Article 7(1) a-c. In contrast, for residence between three months and five years, the citizen must fulfil one of these criteria, and if he/she does, his or her family members may join and reside with him/her.⁵³⁸

It was not disputed in the case that Mr Clauder had permanent residence in Liechtenstein and fulfilled the criteria in Article 16 of the directive. Thus, he was no longer dependent on having sufficient resources for himself in order to continue to reside in Liechtenstein. Furthermore, it was clear that Mrs Clauder did not fulfil the conditions of having resided with Mr Clauder in the host state the previous five years.

The question in the case concerned the conditions subject to which a family member can derive a residence right in order to stay in a host state with a national from an EU member state or an EFTA state holding a right of permanent residence. In particular, the question was whether a host state requirement of sufficient resources for the right to family reunification violated EEA law.

The parties referred to Article 8 ECHR on the right to family life in their interventions. The EFTA Court, however, while referring to this article when citing relevant legal provisions in the introductory part of the decision, did not rely particularly on this provision when deciding the case.⁵³⁹ Whether the circumstances in this specific case were such that a right of residence may have been derived from Article 8 ECHR required a balanced assessment of the competing interests of the individuals concerned, and the interests of the community as a whole, in which the Human Rights Court in Strasbourg has given the state the right to exercise a certain degree of discretion.⁵⁴⁰ The right to family life in human rights law puts emphasis on the protection of the unity of the family wherever this unity may be achieved. In the *Clauder* case, the unity of the family could have also been obtained in Germany. In free movement law, it is the right to move and reside freely that is the starting point for the analysis of the right to family life. Hence, in EU/EEA law, it is the right to move to and reside in Liechtenstein that is protected. It thus seems safe to assume that the right to family life enshrined in Article 8 ECHR to be enjoyed in Liechtenstein was not violated in the case. In any event, the balance assessment under human rights law was not made by the EFTA Court in the case.⁵⁴¹

⁵³⁸ See Directive 2004/38 Article 7(1) d

⁵³⁹ In para 49 of the decision there is a reference to the fact that the EEA States are parties to the ECHR and to the protection of family life enshrined in Article 8(1) of the Convention. It is, however, unclear why the EFTA Court makes this reference given that they do not discuss the relevance of this Article for the facts of the case

⁵⁴⁰ See for an analysis of how citizenship rights in combination with fundamental rights may give rights of residence (including a right to welfare benefits) for non-economically active and non-financially independent family members of citizens in Dougan, M. and Spaventa, E. [2003] *Educating Rudy and the (non-)English patient: A double-bill on residency rights under Article 18 EC*, page 711

⁵⁴¹ The Commission makes a reference to the couple's right to family life enshrined in the Directive and in general principles of EEA law according to the Commission, see Report from the Hearing para 72

4.3.3 *Alternative interpretations of the directive in the EEA*

4.3.3.1 Introduction

In this section, two alternative readings of the directive in the EEA will be presented. First, a more literal reading of the provisions will be presented as well as more general arguments supporting the rejection of the application of family reunification rights for Mr Clauder. Second, a different reading of the directive will be presented introducing the reasoning of the EFTA Court in its decision in the case where the national requirement was deemed incompatible with the directive.

4.3.3.2 A literal interpretation of the directive

According to the wording of the directive, it is possible to separate the three types of residence status available for family members with a derivative right of entry and residence in the host state. It follows from Article 6 of the directive that a family member may have a derivative right of residence for up to three months.⁵⁴² This may also be termed an informal residence status.⁵⁴³ The conditions of a residence status for more than three months are regulated in Article 7(1), see letter d with further references, in particular the requirement of being a family member of a worker or a self-employed person, see letter a, or a person with sufficient means for himself and his family members not to become a burden on the social assistance system of the host state, see letter b. This second status may be termed a temporary residence status.⁵⁴⁴ Finally, the conditions for having a permanent residence status are enshrined in Article 16(2).

Hence, a family member may be entitled to acquire any of the three residence statuses (informal, temporary or permanent) if he or she fulfils all the relevant conditions attached to the respective status.

In contrast to Articles 6 and 7 of the directive, Article 16 does not explicitly regulate the right to family reunification. Regarding family members, the wording of the provision only provides the conditions for a permanent residence permit. A literal reading of the provision would support the argument that the legislator did not intend to grant further rights to family reunification to nationals of the EU member states and nationals of the EFTA states holding a permanent residence status in the host state than those mentioned in Article 6 and 7 of the directive. From the wording of the directive, it seems as if not only nationals of the EU member states and the EFTA states but also every single family member must go through the integration process individually in order to acquire rights under Article 16(1) and (2).

Family members who do not fulfil the requirements for permanent residence pursuant to Article 16(2) of the directive (which Mrs Clauder did not) because they have not been residing in the host state for five years may thus according to the wording only be granted a right of residence pursuant to Article 7(1) letter d in conjunction with Article 7(1) letter b.

It follows from the directive:

Article 7

(1) All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the

⁵⁴² For job-seekers the time period is extended to 6 months

⁵⁴³ See written observations from the Government of Liechtenstein para 8 and paras 24 and 25

⁵⁴⁴ See written observations from the Government of Liechtenstein para 8 and paras 24 and 25

host Member State; or (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or ... (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) ...

It follows from Article 7(1) b that the acquisition of a temporary residence status for more than three months depends on the fulfilment of the condition that the family member must not become a burden on the social assistance system of the host EEA state during their period of residence and must have comprehensive sickness insurance cover in the host EEA state. Mr Clauder did not comply with the conditions in Article 7(1) d, since he depended on social welfare benefits himself.

As mentioned above, it was undisputed in the case that if Mrs Clauder joined her husband, their claims for social assistance would increase and that they would in that sense become a burden on the welfare system in Liechtenstein. The submissions of the governments (Liechtenstein, the Netherlands and Denmark) all concluded that the directive did not give a derived right of residence for Mrs Clauder in the current situation.⁵⁴⁵ It was undisputed that should she take up work or self-employed activity, she would fall within Article 7(1) a and acquire a freestanding right of residence.

The wording of the directive clearly allowed the EEA states to set the requirement of sufficient resources before granting residence permits to family members. To this end, the national regulation was in full compliance with the directive. Seemingly, no right to family reunification for Mrs Clauder could therefore be based on the directive.

Furthermore, this interpretation of the right to family reunification in the directive would entitle member states and EFTA states to treat moving EEA nationals in parallel with own citizens who in many instances according to domestic regulation would also be obliged to have sufficient resources before family reunification could be granted. In other words, this reading supports upholding domestic legislation where family reunification was always conditioned on sufficient resources. Hence, the choice of wording in the provisions of the directive may well be explained by the political sensitivity in immigration law of allowing for family reunification without conditions of financial means.

It follows from Article 24(1) of the directive, which provides for equal treatment, that in order to require sufficient means for family reunification for moving nationals from EU member states and EFTA states for citizens with a permanent residence permit according to Article 16 of the directive, the same requirement must apply to nationals of the host state. Equal treatment means that the position of a national from an EU member state or EFTA state holding a right of permanent residence who wishes a family member to join him/her may not be less favourable than the position of a national of the host state who wishes a family member to join him/her. By extension, this means that only if domestic legislation requires own nationals to prove they have the necessary financial means to maintain the family members who wish to join them may such a requirement be imposed on moving citizens with a permanent residence permit.⁵⁴⁶

National immigration law often requires a form of self-sufficiency test before family reunification will be granted.⁵⁴⁷ An interpretation of the directive according to the wording as described above

⁵⁴⁵ Report from the hearing para 31-51

⁵⁴⁶ For further elaboration of this argument, see written observations from the Dutch Government 2 May 2011, para 38 and 39

⁵⁴⁷ See the country studies included as annexes to this Report, i.a. on Denmark and on the UK

would ensure member states and EFTA states the freedom to apply this type of national legislation also on moving nationals from EU member states and EFTA states. Conversely, a different reading of the directive would create inconsistency in the domestic legislation given the paradoxical result of conditioning family reunification on a requirement of sufficient means for own nationals but the same condition violating EU/EEA law for moving nationals. This interpretation of the directive would therefore arguably lead to reverse discrimination, insofar as nationals of the host state who have never exercised their right of freedom of movement would not derive rights of entry and residence from EU/EEA law for their family members.

It is common ground in EU/EEA law that interpretations of the law may result in discrimination against the nationals who have not availed themselves of free movement rights (internal situations) often referred to as reverse discrimination.⁵⁴⁸ This is commonly viewed as an unavoidable consequence of the scope of EU/EEA law. In other words, EU/EEA law cannot impose obligations on EU member states and EFTA states in wholly internal situations.⁵⁴⁹ As stated by the CJEU in *Metock* to refute the governments' argument on reverse discrimination, '[I]t is settled case law that the treaty rules governing freedom of movement for persons and the measures adopted to implement them cannot be applied to activities which have no factor linking them with any of the situations governed by Community law and which are confined in all relevant respects within a single Member State (Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-0000, paragraph 33)'.⁵⁵⁰

Thus, the CJEU addresses the governments' concerns regarding reverse discrimination as a question of EU competence. The justification for upholding a situation of reverse discrimination seems anchored in higher principles of law, namely the treaty freedoms. In the name of strengthening and reinforcing the internal market, domestic legislation that operates counter to this overall goal is not compatible with EU law. The logic seems to be that the validity of the argument is not changed by the lack of reach of EU law into purely internal situations. In that sense, the governments' concerns for reversed discrimination are simply refuted by a reference to the scope of EU law.

This logic is, nevertheless, difficult to apply outside the economic rationale in an EEA context. The reason for this is that the free movement rights for the non-economically active are less clearly spelt out and in contrast to EU primary law are not part of the main part of the EEA Agreement. Hence, whenever the internal market is operating, EU/EEA law has embarked on a journey to break down obstacles to free movement to improve market conditions. This 'breakdown' of national rules is at least in terms of the main part of the EEA Agreement limited to cross-border situations with an economic dimension.⁵⁵¹

However, outside the market rationale, the same type of reasoning on the situation of reverse discrimination presupposes an already defined general right to be relied upon to 'break down' domestic legislation based on the national political priorities. In the EU, the status of Union citizenship has become one of the most important individual rights that the EU guarantees to its

⁵⁴⁸ See, inter alia, with regard to freedom of establishment and freedom of movement for workers, respectively, Case 20/87 *Gauchard* [1987] ECR 4879, paras 12 and 13, and Case C-18/95 *Terhoeve* [1999] ECR I-345, para 26, and the decisions there cited). The same holds good in respect of the provisions of Regulation No 1408/71 (see, to that effect, Case C-153/91 *Petit* [1992] ECR I-4973, para 10, and Joined Cases C-95/99 to C-98/99 and C-180/99 *Khalil and Others* [2001] ECR I-7413, para 70).

⁵⁴⁹ See for example the reasoning in Case C-127/08 *Metock* para 76-78 where difference of treatment was regarded as a consequence of the scope of EU law

⁵⁵⁰ *Metock*, para 77

⁵⁵¹ Based on the fact that there are no parallel provisions to Articles 20-25 TFEU in the main part of the Agreement

citizens.⁵⁵² Hence, the right to move and reside freely for all Union citizens enshrined in the treaty is based on a higher principle of law. In the EU, this fundamental right may justify encroaching on member states' freedom outside the economic rationale in order to protect this free movement right for the non-economically active. In continuation, the fact that the encroachment may lead to reverse discrimination can, as shown above, be refuted by a reference to the scope of EU law. No parallel general right of freedom of movement is, however, enshrined in the main part of the EEA Agreement. In other words, to rebut the argument of reverse discrimination, it seems necessary to first assess whether there is a parallel general right to free movement and residence for all in the EEA Agreement. Without such a general right of free movement, it is difficult to accept that national law requiring sufficient means to obtain family reunification as a general requirement for all including own citizens can violate EEA law for moving non-economically active nationals.

4.3.3.3 A Union citizenship-friendly reading of the directive

The alternative interpretation to the one outlined above is that EEA law, nevertheless, precluded a national measure whereby a person in Mr Clauder's position, that is, a non-economically active person who is a national of one EEA state and enjoys a right of permanent residence in another EEA state, needed to demonstrate that he had sufficient means of subsistence in order for a family member to benefit from a derived right of residence in the second EEA state. In other words, this interpretation is based on a reading of the directive that essentially ignores that the exclusion from Article 16 of family members who did not meet the self-sufficiency criteria was a deliberate legislative choice.

This interpretation would be based on a more teleological form of interpretation taking into account the right of citizens of the Union and their family members to move and reside freely within the territory of the member states. The Explanatory Memorandum to COM (2001)257 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member states in its comments to Article 14 (now Article 16) states the following:

[a]fter a sufficiently long period of residence, it may be assumed that the Union citizen has developed close links with the host Member State and become an integral part of its society, which justifies granting what may be termed an upgraded right of residence. Furthermore, the integration of Union citizens settled long-term in a Member State is a key element in promoting social cohesion, a fundamental objective of the Union.^{553,554}

An argument that could be put forward in support of this interpretation is that the five years of integration in the host state takes precedence over the financial reservations of the EEA states. After this period, a citizen is sufficiently settled to be integrated into the society in the sense of a burden-sharing community. The weakness of the argument is the encroachment on national immigration law whereby own citizens are also subject to a similar requirement based on domestic legislation.

The approach by the EFTA Court is similar to a number of CJEU cases where the CJEU has moved beyond the seemingly (in theory) compatible national legislation with secondary law and scrutinised whether there may be other obligations on the national regulation stemming from in the EU the treaty provisions on Union citizenship.

⁵⁵² Communication from the Commission COM(2010)373 final page 2

⁵⁵³ Explanatory Memorandum to COM(2001)257 - Right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, comments to Article 14 (now Article 16)

⁵⁵⁴ Cited on page 5

Most notably, in *Baumbast*,⁵⁵⁵ the CJEU disregarded the national condition requiring full medical insurance before having the right to a residence permit even though this condition was fully compliant with Article 1(1) of Directive 90/364/EEC.⁵⁵⁶ Thus, in *Baumbast*, the CJEU stated that the right to reside within the territory of a member state was conferred directly on every citizen of the Union disregarding the fact that Mr Baumbast did not comply with the national requirement to have full medical insurance.⁵⁵⁷

4.3.4 *The reasoning of the EFTA Court*

Disagreeing with the governments of Liechtenstein, the Netherlands and Denmark,⁵⁵⁸ the EFTA Court decided to interpret Article 16(1) in conjunction with Article 7(1) of the Citizens Directive as meaning that an EEA national with a right of permanent residence, who is a pensioner and in receipt of social welfare benefits in the host state, may claim the right to family reunification even if the family member will also be claiming social welfare benefits.

The EFTA Court stated, '[The d]irective cannot be interpreted restrictively' in light of its objective of 'promoting the right of nationals of EC member states and EFTA states and their family members to move and reside freely within the territory of the EEA states'.⁵⁵⁹ Furthermore, the Court insisted that the provisions in the directive 'must not in any event be deprived of their effectiveness'.⁵⁶⁰

This terminology is similar to terminology applied in the case law of the CJEU, in particular in the *Metock* case,⁵⁶¹ which is referred to extensively throughout the decision by the EFTA Court. We find the first reference to *Metock* already in paragraph 33, which introduces the findings of the Court. In the *Metock* case, the CJEU refers to recital 3 in the preamble to the directive on the general aim to 'strengthen the right of free movement and residence' of EEA nationals.⁵⁶² Second, the case is cited as a reference for the provisions of the directive not to be interpreted restrictively.⁵⁶³ Third, it is referred to as a source for the general importance of ensuring the protection of family life of nationals of the EEA.⁵⁶⁴ In this context, the EFTA Court also refers to respecting the freedom and dignity of EEA nationals.⁵⁶⁵ Finally, in paragraph 46, the *Metock* case is referred to when the EFTA Court assesses the impact on Mr Clauder's residence right if he is not able to be joined by his wife in his country of residence.

In *Metock*, the CJEU rebuts the intervening governments' submission regarding the lack of EU competence in matters of immigration by, for example, referring to the right to family life as part of

⁵⁵⁵ Case C-413/99 *Baumbast v Secretary of State* [2002] ECR I-7091

⁵⁵⁶ Council Directive 90/364/EEC of 28 June 1990 on the right of residence, OJ 1990 L 180, page 26

⁵⁵⁷ The *Baumbast* approach was taken later in several other cases, see the overview of CJEU case law above. See also Dougan, M. and the criticism of the implicit invalidation of political compromises reached in the secondary legislation through an examination of individual cases in [2006] *The constitutional dimension to the case law on Union citizenship*

⁵⁵⁸ The two other EFTA states, Norway and Iceland did not intervene in the case to make their voices heard

⁵⁵⁹ Para 34

⁵⁶⁰ Para 34

⁵⁶¹ Case C-127/08 *Metock* [2008] ECR I-06241

⁵⁶² *Metock*, para 59, referred to in *Clauder*, para 33

⁵⁶³ The decision para 34 and 48

⁵⁶⁴ The decision para 35

⁵⁶⁵ The decision para 36

eliminating obstacles to the exercise of the fundamental freedoms guaranteed by the treaty, stating in paragraph 56:

Even before the adoption of Directive 2004/38, the Community legislature recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty (Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 38; Case C-459/99 *MRAX* [2002] ECR I-6591, paragraph 53; Case C-157/03 *Commission v Spain* [2005] ECR I-2911, paragraph 26; Case C-503/03 *Commission v Spain* [2006] ECR I-1097, paragraph 41; Case C-441/02 *Commission v Germany* [2006] ECR I-3449, paragraph 109; and Case C-291/05 *Eind* [2007] ECR I-0000, paragraph 44).

In parallel with this approach, in *Metock*, the EFTA Court notes the following in paragraph 35 in *Clauder*:

that even before the adoption of Directive 2004/38, the legislature recognised the importance of ensuring the protection of the family life of nationals of the EEA States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by EEA law.⁵⁶⁶

This statement may be interpreted as showing that the EFTA Court also adheres to the need to legitimise intervention in national immigration law by referring to the fundamental freedoms. However, in the EEA, these fundamental freedoms do not include the general right to move and reside freely for all citizens of the EEA regardless of economic activity as enshrined in the provision of Union citizenship.

Building an argument in favour of a specific legal interpretation on the existence of an already protected value is familiar reasoning from the CJEU. In *Carpenter*,⁵⁶⁷ the Court relied on the protection of family life as having been recognised as important by the EU legislator, but in *Carpenter*, the focus was on the economically active.⁵⁶⁸ The CJEU states in paragraph 38:

In that context it should be remembered that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self-employed workers within the Community (see, for example, Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475); Articles 1 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485), and Articles 1(1)(c) and 4 of the Directive).

The EFTA Court seems to be building its interpretation of Article 16 of the directive precisely on the fact that if EEA nationals were, indirectly, not allowed to lead a normal family life in the host EEA state, the exercise of the right of residence granted to EEA nationals could be seriously obstructed and could become ineffective. However, for persons in the same position as Mr Clauder, there is no

⁵⁶⁶ Para 35

⁵⁶⁷ Case C-60/00 *Carpenter* [2002] ECR I-6279

⁵⁶⁸ *Carpenter*, para 38

fundamental right to move and reside freely. His right of residence was based only on a category created by the directive of long-term residents.

Furthermore, the EFTA Court relied on an argument based on the direction of the changes made in the directive as compared to earlier secondary legislation. The EFTA Court pointed both to the fact that, in its opinion, the directive no longer contained a general requirement of sufficient resources and to the expansion of the rights of family members.⁵⁶⁹ These are both legally valid points, but they are not accurately presented by the Court in paragraph 38:

In this regard, the Court notes that, in contrast to Article 1 of Directive 90/364/EEC and Article 1 of Directive 90/365/EEC, Directive 2004/38 does not contain a general requirement of sufficient resources. Such a requirement exists neither with regard to workers and self-employed persons nor with regard to persons who have acquired a permanent right of residence pursuant to the Directive. Moreover, in comparison to the position under earlier legislation, the Directive has expanded the rights of family members also on several other points. For instance, Article 13 of the Directive now ensures that family members' rights of residence are retained in the event of divorce, annulment of marriage or termination of registered partnership.⁵⁷⁰

The former residence directives concerned the non-economically active. Hence, it was not a change made by the Citizens Directive not to have this condition for the economically active (i.e., workers and self-employed persons). The Citizens Directive joined the regulation of the economically active and the non-economically active.

For persons who are already economically active, the requirement of having sufficient resources is relevant to a lesser degree. The early case law from the CJEU setting aside similar national requirements that were determined to be obstacles to the free movement of workers and the self-employed, in other words for the purpose of the functioning of the internal market, may therefore be considered less intrusive on member states' freedom compared to setting aside similar requirements for the non-economically active.⁵⁷¹

As already demonstrated, the former residence directives on the free movement of non-economically active citizens⁵⁷² merely provided residence rights for those who could support themselves. The purpose was to exclude risks for the social systems in the member states stemming from the immigration of persons who might become a burden on the social assistance systems.⁵⁷³ Article 1 in each of the three residence directives stated that the granting of a residence right was only required for nationals of member states provided that they themselves and the members of their families avoided 'becoming a burden on the social assistance system of the host member states during their period of residence'.⁵⁷⁴

In principle, the Citizens Directive continued the requirement for non-economically active citizens to have sufficient resources and insurance fully covering the risk of illness for themselves and their

⁵⁶⁹ Para 38

⁵⁷⁰ Para 38

⁵⁷¹ See as an example of home state regulation *Singh* and later for the previously economically active in *Eind*

⁵⁷² The string of directives enacted in the early 1990s; Article 1 of Directive 90/364, Directive 90/365, Directive 93/96 (now recast as Article 8(4) of Directive 2004/38)

⁵⁷³ The scope of Directive 90/364 was general, whereas Directive 90/365 concerned retired people and Directive 93/96 concerned students

⁵⁷⁴ Directive 90/365 on retired union citizens refers to social security instead of social assistance system presumably without any intentional legal difference

family members not to become a burden on the social welfare system of the host state.⁵⁷⁵ Thus, from the point of view of the secondary legislation, no general right to free movement and residence existed for the non-economically active either. The only exception was the category created in Article 16, which according to the wording did not include rights to family reunification.

A point of concern is that the EFTA Court discussed insufficiently in its reasoning values that are actually in the balance. The value of free movement for EEA citizens is subject to conditions in the harmonised legislation. The aim of these conditions is to ensure that no burden is imposed on the social assistance system of the host state without the existence of a sufficient, effective link with that state (the link requirement).

It is correct that a new group of migrants was created who had the right to a permanent residence permit after five years. Beyond the creation of this group, however, there is no support for the general statement made by the EFTA Court. The temporary stay category (of persons staying up to 3 months (or 6 months for jobseekers)) has no right to social assistance from the host state. This group must, in other words, support themselves financially. The category of residents between 3 (or 6) months and five years is also required to have sufficient resources for a right of residence in line with the previous legislation.

A relevant question is whether the introduction of a permanent residence permit with the right to equal treatment after five years of residence essentially satisfies the link requirement. The wording in the directive does not support that the legislators intended such an interpretation of the directive. On the contrary, the wording indicates that the legislators believed the condition of sufficient means to be essential.

A novelty in the directive is the already mentioned new category of residents, namely those who have resided for five years and thereby have received a permanent residence permit. For this category, specific rights stem from the provisions in Article 16 but are arguably limited to the rights enshrined in that provision.

Article 16 provides an exception to the general rule whereby the EEA states are entitled to protect the territoriality of their national social welfare benefits systems. The exception for non-economically active persons from the requirement of having sufficient resources after five years of residence is, according to the wording, limited to the category specifically mentioned. This follows from the wording of the directive, from the history of the three residence directives preceding the directive and from the understanding in the legal literature.⁵⁷⁶ Furthermore, Article 16 also clearly states specific rights of family members provided by the provision and thus when a citizen with a permanent residence permit has the right to be united with his or her family without having sufficient resources.⁵⁷⁷ However, the EFTA Court takes the view that there is no general condition in the directive to have sufficient resources, indicating that the wording in Article 16 is not to be interpreted as an exception for this category.⁵⁷⁸ Thus, the EFTA Court seems to disregard the fact that Article 1 of the previous residence directives has been continued, albeit in a different form, by, for example, Article 8(4) of the directive with the exceptions provided in Article 16.

⁵⁷⁵ See Article 14(1) and (2) and Article 7 and Article 24

⁵⁷⁶ K. Hailbronner, (2005) Union citizenship and access to social benefits, CML Rev 2005, 42, page 1245-1267, on page 1261-1262

⁵⁷⁷ This right applies to TCN family members who have legally resided with the Union citizen for a continuous period of 5 years according to 16(2)

⁵⁷⁸ The decision paras 43 and 44

The claim that the requirement of sufficient resources in general (and not only in Article 16) has been discontinued (contrary to the wording of Article 8(4)) is then relied on in the Court's reasoning in two central paragraphs.⁵⁷⁹

The EFTA Court's heavy reliance on and references to the *Metock* case imported the methodology of interpretation in cases regarding Union citizenship rights in the EU into the EEA Agreement. The CJEU's general statements on the interpretation of the directive are clearly based on the Court's interpretation of the rights conferred on Union citizens laid down by the treaty. The right to respect for family life and the respect of freedom and dignity of EEA nationals are all worthy values. The difficulty lies, however, with balancing these individual rights against the well-recognised right of the state (on behalf of the national community of interests) to protect the borders of its national welfare system. This balancing act is arguably one in need of a political decision where all relevant factors can be taken into account and decisions can be legitimately made. Courts are limited in many ways and provide a forum dominated by individual claims and an agenda of furthering integration, which perhaps is not suitable for these difficult balancing acts. Similar criticism has been made against the CJEU and its case law on the rights based on Union citizenship.⁵⁸⁰

The EFTA Court furthermore openly admits that its interpretation is not based on the text of the directive.⁵⁸¹

The EFTA Court refers in paragraph 39 to the *McCarthy*⁵⁸² case, which also concerns the rights of Union citizens. This part of the EFTA Court's reasoning seems largely built on the written submission by the EFTA Surveillance Authority where the reference to the *McCarthy* case seems to fit. The Authority relies on the consequences for Mr Clauder himself if he cannot be joined by his wife in his chosen country of residence, a point that is further expanded by the EFTA Court.

Interestingly, the EFTA Surveillance Authority states that in respect of the Joint Declaration attached to the incorporation of the Citizenship Directive in the EEA Agreement, where the EFTA states declared that Union citizenship is not part of the EEA, the Authority will not rely on any of the case law on Union citizenship in its intervention.⁵⁸³ However, in the paragraph immediately preceding this paragraph, the Authority builds its argument on the concept that the right of family reunification has an indirect impact on the right of residence of Mr Clauder himself, an understanding that the CJEU has made clear in famous citizenship cases like *Chen*⁵⁸⁴ and *Metock*⁵⁸⁵ (see footnote 10 of the intervention). Furthermore, this starting point of respecting the Joint Declaration stands in clear contrast to the rest of the intervention. The *Metock* case is also cited in paragraph 75, and several references to other citizenship cases are made in other paragraphs. In footnote 13, in addition to *Chen*, the cases of *Ibrahim*⁵⁸⁶ and *Teixeira*⁵⁸⁷ are mentioned. The case of C-291/05 *Eind*,⁵⁸⁸

⁵⁷⁹ The decision paras 38 and 48

⁵⁸⁰ Spaventa 2009; 'The proxies used by the Court to define whether an economically inactive citizen is in a comparable situation, such as a 'real link' or a 'degree of integration', may be pragmatic, but seem to somewhat oversimplify the complex interaction between demands of financial, moral, social or cultural reciprocity that underlie sharing arrangements. True comparability seems to require an in-depth analysis of individual cases.'

⁵⁸¹ Paras 43 of the decision, confer para 21 on the submission of the parties, 'although not explicitly stated in the wording of the provision'

⁵⁸² Case C-434/09 *McCarthy* [2011] ECR-3375

⁵⁸³ Written observation from the EFTA Surveillance Authority 29. April 2011, made public through decision 17 March 2014, para 49

⁵⁸⁴ Case C-200/02 *Zhu and Chen* [2004] ECR I-9925

⁵⁸⁵ Case C-127/08 *Metock* [2008] ECR I-6241

⁵⁸⁶ Case C-310/08 *Ibrahim* [2010] ECR I-1065

⁵⁸⁷ Case C-480/08 *Teixeira* [2010] ECR I-1107

mentioned in footnote 14, is discussed several times in the submission, although this case arguably concerns the right of an economically active person (a former worker). Finally, the *Vatsouras* case is relied on in footnote 23.⁵⁸⁹ It is also clear that the Authority is building on the Commission notice on the interpretation of the directive, which, in turn, is largely modelled after the CJEU case law on Union citizenship (see paragraphs 99 and 100 of the written submission). For instance, in paragraph 101, the Authority recommends a proportionality test stemming from the citizenship case law. Thus, clearly, the Authority's submission is influenced by and builds upon the understanding of the directive in the EU through the jurisprudence on Union citizenship.

4.4 The *Clauder* case in the EU legal order

4.4.1 *EU law (exclusive EEA law) in the EU legal order*

A case with facts similar to those of the *Clauder* case as an EU law case would undoubtedly have included in the assessment the right to move and reside freely based on Union citizenship. The reasoning of the EFTA Court is closely linked with making this general right to free movement and residence efficient. Efficiency arguments support the stance that family reunification is needed to ensure the citizen's own right to freely move to and reside in the host state. Absent the right to family reunification, the citizen may be forced to choose between not having a family member joining or giving up integration and moving to the family member abroad.

The CJEU has reiterated on a number of occasions that if Union citizens were not allowed to lead a normal family life in the host state, the exercise of the freedoms they are guaranteed by the treaty would be seriously obstructed and the right of residence could even become ineffective. In addition to *Metock*-like situations, the CJEU has focused on the right to family reunification as part of the fundamental freedom involving also the rights of minors to be joined by family members being caretakers of the child.⁵⁹⁰

In the written observations from the Commission in the *Clauder* case, the right of family reunification as part of the Union citizen's own right to move and reside freely as enshrined in the treaty is relied upon in several paragraphs.⁵⁹¹ The Commission argues extensively with references to case law involving Union citizenship.⁵⁹² The fact that citizenship forms no part of the EEA Agreement did not in any way deter the Commission from these arguments.

4.4.2 *EEA law in the EU legal order*

Even if the outcome of the *Clauder* case interpreted in an EU context would lead to the same result based on the status of being a Union citizen, it is not a given that the EU member states would approve of the outcome being extended to the EEA. Provided the EFTA Court case is accepted as representative of EEA law, the extension represents a potential increased burden on member states' social security systems stemming from including non-economically active EFTA states citizens in the right provided to non-economically active Union citizens. The reciprocity aspect of the extension of what may be termed Union citizenship rights in the EU into the EEA, nevertheless, makes the interpretation less controversial. When analysing the *Gunnarsson* case below, similar interpretations have a much wider potential for causing tension in EU member states when extending EU Union

⁵⁸⁸ Case C-291/05 *Eind* [2007] ECR I-10719

⁵⁸⁹ Joined Cases C-22/08 and 23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585

⁵⁹⁰ See Case C-200/02 *Zhu and Chen* para 45, Case C-310/08 *Ibrahim* and Case C-480/08 *Teixeira*

⁵⁹¹ Written observations from the Commission, 2 may 2011, see in particular para 54-64

⁵⁹² Written observations from the Commission, 2 may 2011, see para 44-64 with references

citizens' rights to the EEA Agreement in situations of rights against the home state. This is the matter of analysis in the next section on rights against the home state.

5 Rights against the home state – Case E-26/13 Atli Gunnarsson

5.1 Introduction

The *Gunnarsson* case raised a novel question in EEA law, both in substance and in methodology. In substance, the question in the case was whether non-economically active persons, who had made use of their free movement rights, could claim rights against their home state (state of origin) based on EEA law. In terms of methodology, the question in the case was whether the principle of homogeneity also includes interpreting identical provisions differently to achieve homogenous rights in the EEA and in the EU (so-called effect-related homogeneity).

5.2 Union citizens' rights against the home state in the EU legal order

The Citizens Directive distinguishes between Chapter II, Regulating the Right of Exit and Entry, and Chapter III, Regulating the Right of Residence on the Territory of Another Member State. The provisions in Chapter II, for example, give the national certain rights against the home state. The home state is prohibited to require exit visas or equivalent formalities and is obliged to issue identity cards or passports for nationals leaving its territory.⁵⁹³ Corresponding obligations on the host state are laid down in Article 5 of the Citizens Directive.

Regulating both home and host state obligations is however limited in the directive to Chapter II on exit and entry. Chapter III has a different structure and establishes only the right of residence on the territory of another member state. This is clear from the wording in Article 3(1) of the Citizens Directive, which only applies to Union citizens (and their family members) who move to or reside in a member state *other than* the Union citizen's home state. The directive does not regulate the Union citizen's and his/her family members' right of residence in the Union citizen's own member state. This has been confirmed by the CJEU in relation to the directive and in relation to the prior legislation that the directive amends or repeals.⁵⁹⁴ Union citizens' right to reside in their own member state is ascribed to them by principles of international law. A state cannot refuse its own nationals to enter and reside in their territory.⁵⁹⁵ The purpose of the directive is to strengthen the right of freedom of movement to other member states. Hence, the Union citizens and the family members may only invoke the directive for the purpose of rights in member states other than the Union citizen's home state.⁵⁹⁶

Nevertheless, the CJEU has found that under certain circumstances a Union citizen and his or her family members may have rights against the home state based on provisions in the treaties.⁵⁹⁷ The derived right for family members to enter and reside in the home state of the Union citizen is based on the consideration that a refusal to allow a right of entry and residence for the family members could interfere with the Union citizen's right of freedom of movement. Similarly, obstacles from the home state may interfere with the Union citizen's personal right to free movement.

⁵⁹³ Citizens Directive Article 4

⁵⁹⁴ See inter alia cases C-60/00 *Carpenter* [2002] ECR I-6279, paras 35-36, C-457/12 *S and G*, paras 34-35 and C-456/12 *O and B* ECLI:EU:C:2014:135, paras 37-43

⁵⁹⁵ European Convention on Human Rights Protocol No. 4 article 3

⁵⁹⁶ See also the wording in Article 7(1) b referring to the need to have sufficient resources not to become a burden on the social assistance system of the *host* member state. Furthermore, Article 24(1) refers to discrimination carried out by the *host* member state, hence the right to equal treatment is with the nationals of that member state (emphasis added)

⁵⁹⁷ For the Union citizen rights, see Case C-224/02 *Pusa*, for family members' derived rights, see *Singh*, *Eind* and *O and B*

According to the CJEU, a granting of a derived right of residence on the TCN family member upon return to the Union citizen's home member state:

seeks to remove the [...] obstacle on leaving the Member State of origin [...], by guaranteeing that the citizen will be able, in his Member State of origin, to continue the family life which he created or strengthened in the host Member State.⁵⁹⁸

The CJEU has ruled that the conditions for granting such a right of residence 'should not, in principle, be stricter than those provided for by the Citizens Directive'.⁵⁹⁹

This analogous application originates from Case C-456/12 *O and B* concerning a TCN family member's right of residence in the Union citizen's state of origin. O, a Nigerian national, lived in Spain. His spouse, a Dutch national, resided with him there for two months without pursuing economic activity. She moved back to the Netherlands when she could not find a job in Spain. B, a Moroccan national, was resident in Belgium. His partner, a Dutch national, was resident in the Netherlands, but she was visiting B in Belgium every weekend for a period of one and a half years. Both the TCNs applied for a right to reside in the Netherlands with their respective wife and partner. The applications were refused. The question before the CJEU was whether the TCNs were entitled to a derived right of residence in the Netherlands on the basis of Article 21(1) TFEU. The CJEU had ruled in previous cases that such a right should be granted to TCN family members of returning Union citizens who had engaged in economic activity in the host member state.

The first case, C-370/90 *Singh*, concerned a United Kingdom national who had resided in Germany for two years as a worker together with her Chinese spouse. They returned to the United Kingdom as self-employed in order to open a business. The CJEU ruled in *Singh* that the rights of movement and establishment conferred upon Community nationals by virtue of Articles 48 and 52 EEC (now Articles 45 and 49 TFEU) 'cannot be *fully effective* if such a person may be *deterred* from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse'.⁶⁰⁰

In Case C-291/05 *Eind*, the question raised was whether a TCN daughter of a Dutch national who had resided in the United Kingdom, on the basis of Regulation 1612/68 Article 10, was entitled to a derived right of residence in the Netherlands when the father moved back to the home state with her after one year and eight months. According to the CJEU, the right of a migrant worker to return to his home member state 'after being gainfully employed in another Member State is conferred by Community law, to the extent necessary to ensure the *useful effect* of the right to free movement for workers under Article 39 EC (now Article 45 TFEU) and the provisions adopted to give effect to that right'. Furthermore, this interpretation is 'substantiated' by the fundamental status of Union citizenship.⁶⁰¹ The father did not pursue any economic activity after returning to the home member state but was in receipt of social assistance. However, the CJEU stated the following:

[a] national of a Member State could be deterred from leaving that Member State in order to pursue gainful employment in the territory of another Member State if he does not have the

⁵⁹⁸ Case C-456/12 *O and B*, para 49

⁵⁹⁹ Case C-456/12 *O and B*, para 50

⁶⁰⁰ Case C-370/90 *Singh*, para 23 (emphasis added)

⁶⁰¹ Case C-291/05 *Eind*, para 32 (emphasis added)

certainty of being able to return to his Member State of origin, irrespective of whether he is going to engage in economic activity in the latter State..⁶⁰²

The CJEU found that a worker's right to return to his/her home member state could not be considered a purely internal situation and that '[b]arriers to family reunification are therefore liable to *undermine* the right to free movement which the nationals of the member states have under Community law'.⁶⁰³

It is clear from the two cases that the TCN family members' right of residence in the Union citizen's home member state in these 'U-turn' situations is based on the prohibition on restrictions on free movement pursuant to the treaty provisions.

Returning to the case of *O and B*, the question was whether the case law resulting from *Singh* and *Eind* could be applied generally in situations covered by Article 21(1) TFEU (i.e. where the Union citizen has not pursued economic activity). The CJEU's answer to this was in the affirmative. However, the scope of application of Article 21(1) TFEU upon return to the home state for the purpose of a right to residence to the TCN family members was limited to circumstances where the 'residence of the Union citizen in the host Member State [by virtue of Article 21(1) TFEU] has been *sufficiently genuine* so as to enable that citizen to *create or strengthen family life* in that Member State'.⁶⁰⁴

It was firmly established in the *O and B* case that Article 7 of the directive did not place any obligations on the home state regarding rights of own nationals who have exercised their free movement rights. The Court was perhaps unusually clear stating that this interpretation of the limits of the application of the directive follows from a 'literal, systematic and teleological interpretation' of the Citizens Directive.⁶⁰⁵ Thus, it follows that a Union citizen may not rely upon Article 7 of the directive against his or her home state under EU law.

Having regard to the first paragraph of its preamble, the Citizens Directive clearly promotes free movement in the context of economic activity (workers, services and establishments) as well as free movement in the context of Union citizens regardless of economic activity. Articles 45, 49 and 56 TFEU constitute a legal basis for rights in the sphere of economic activity. Articles 20 and 21 TFEU constitute the legal basis for rights beyond the sphere of economic activity. The changed legal environment in the EU introduced for example with the provisions on Union citizenship was spelt out by the CJEU in *Baumbast* in the following manner:

Although, before the Treaty on European Union entered into force, the Court had held that that right of residence, conferred directly by the EC Treaty, was subject to the condition that the person concerned was carrying on an economic activity within the meaning of Articles 48, 52 or 59 of the EC Treaty (now, after amendment, Articles 39 EC, 43 EC and 49 EC) (see Case C-363/89 Roux [1991] ECR I-273, paragraph 9), it is none the less the case that, since then, Union citizenship has been introduced into the EC Treaty and Article 18(1) EC has conferred a right, for every citizen, to move and reside freely within the territory of the Member States.⁶⁰⁶

⁶⁰² Case C-291/05 *Eind*, para 35

⁶⁰³ Case C-291/05 *Eind*, para 37 (emphasis added)

⁶⁰⁴ Case C-456/12 *O and B*, para 51 (emphasis added)

⁶⁰⁵ Case C-456/12 *O and B*, para 37

⁶⁰⁶ Case C-413/99 *Baumbast* para 81

This is the legal context when the EFTA Court decides its first case regarding the possibility of invoking the Citizens Directive as incorporated in the EEA Agreement for rights against the home state for the non-economically active moving citizen.

5.3 The Gunnarsson case for rights against the home EFTA state

5.3.1 The facts of the Gunnarsson case

The *Gunnarsson* case concerned two Icelandic citizens, Mr Gunnarsson and his wife. They were both resident in Denmark from 24 January 2004 to 3 September 2009. During that period, they lived on Mr Gunnarsson's disability pension from the Icelandic social insurance administration together with benefit payments received from two Icelandic pension funds. Mr Gunnarsson paid tax in Iceland. Under the Icelandic tax legislation applicable at the time, there was an inter-spousal personal tax credit where husband and wife could pool their tax credit if this was to their financial advantage.

Mr Gunnarsson and his wife's application for tax pooling in Iceland was turned down on the grounds that such pooling was only possible between taxpayers with unlimited tax liability in Iceland (essentially resident taxpayers) or where both spouses were in receipt of an Icelandic pension. As Mr Gunnarsson and his wife were neither resident in Iceland nor both in receipt of a pension pursuant to Icelandic law during the relevant period, the administrative decision concluded that the conditions authorising the transfer of unused personal tax credits between spouses were not fulfilled. Essentially, the national legislation precluded pensioners who were resident in another EEA state to utilise the same tax credit that they would have been able to use if they had been resident in Iceland.

Mr Gunnarsson claimed repayment of the excess taxes paid. The Supreme Court of Iceland decided to seek an advisory opinion from the EFTA Court on the compatibility of the national rule with EEA law. The national court specifically asked the EFTA Court whether it made any difference that the treaty provisions on Union citizenship in EU law were not paralleled in the EEA.⁶⁰⁷ The EFTA Court issued a ruling favourable to Mr Gunnarsson adjudicating that the national rule was incompatible with Directive 90/365 (Directive 90/365 was replaced by Citizens Directive 2004/38) and subsequently the Citizens Directive.

5.3.2 The decision of the EFTA Court

The EFTA Court concluded in *Gunnarsson* that Article 7(1) b of the directive must be interpreted as granting the moving person not merely a right of residence in relation to the host state but also a right to move freely away from the state of nationality:

[t]he latter right prohibits the home State from hindering such a person from moving to another EEA State.⁶⁰⁸

This represents a significant divergence from the CJEU position regarding rights stemming from the directive. The EFTA Court observed that less favourable treatment in the state of nationality of persons who have moved compared to those who have remained would constitute a hindrance on the

⁶⁰⁷ See question 2 from the Supreme Court, cited in decision by the EFTA Court para 29

⁶⁰⁸ Case E-26/13, para 82

right to move freely. This is familiar terminology from the CJEU's case law on the right to move freely, which under the Union citizenship provisions includes the non-economically active.⁶⁰⁹

Arguably, the EFTA Court's diverging interpretation of the directive maintained substantive parity with EU law, ensuring equal levels of protection for individual rights throughout the EEA.⁶¹⁰ The applied methodology is highly unusual. This is the first time the EFTA Court has applied secondary legislation to grant rights under the EEA legal order that did not accrue by virtue of an identical provision within the EU legal order. Divergence compared to the EU legal order on an identical point of law has materialised previously under the EEA Agreement. This has, however, led to a more narrow range of available rights.⁶¹¹ The *Gunnarsson* case is the first case where the EFTA Court has interpreted EEA law to entail more extensive rights than what follows from a settled interpretation of an identical provision by the CJEU. This has a range of implications, which will be returned to in the following sections.

5.3.3 *The reasoning of the EFTA Court*

It is the nature of adjudication that cases that reach the higher levels of any court system are rarely straightforward. Only genuine legal questions will be admitted to the preliminary reference procedure. Without discussing the details of the 'acte clair' doctrine,⁶¹² it follows from the decision in *CIBA*⁶¹³ that if the same question were to be referred to the EFTA Court again, it would be dismissed. Hence, national courts in the EFTA states are not supposed to refer questions to the EFTA Court unless there is a genuine question regarding the interpretation of EEA law.

Given that the Icelandic court decided to refer the *Gunnarsson* case to the EFTA Court, there is a clear presumption that the national court considered that the case could not simply be resolved on the basis of an interpretation of the already existing CJEU case law. Looking carefully at the questions asked by the national court, it is clear that the concern of the national court centres around the possible effects of the treaty provisions on Union citizenship in the EEA Agreement. This is the crux of the matter even if the EFTA Court, seemingly in one sentence, clarifies that these unparalleled provisions of Union citizenship do not apply in the EEA.

The EFTA Court in *Gunnarsson* formulated its reasoning by referring to rights against the home state for moving individuals being already inherent in Directive 90/365 and stated that

individuals cannot be deprived of rights that they have already acquired under the EEA Agreement before the introduction of Union Citizenship in the EU.⁶¹⁴

⁶⁰⁹ See for instance the C-224/02 *Pusa* and Case C-520/04 *Turpeinen* [2006] ECR I-10685. Both cases involved retired Finnish nationals who moved to Spain and who incurred greater tax liability in Finland than would have applied had they remained resident there. In neither case did the CJEU consider the provisions of Directive 90/365 EEC (which preceded Directive 2004/38). The CJEU decided that the rights of Union citizens stemming from the treaty were violated when the national rules had the effect of placing some of its nationals at a disadvantage 'simply because they [had] exercised their freedom to move and to reside in another member State', see *Pusa* paragraph 20 and *Turpeinen* paragraph 22

⁶¹⁰ Supporting this interpretation of the decision, see Article 'Citizenship by the back door? Gunnarsson', CML rev 52: 1-24, 2015. The authors seem to embrace so called 'effect-related homogeneity' which according to judge Baudenbacher represents one of three aspects of homogeneity, see Baudenbacher 'The EFTA Court and the ECJ – Coming in parts but winning together' in *The Court of Justice and the Construction of Europe: Analysis and perspectives on Sixty years of case Law*, (Springer/Asser Press, 2013) page 183

⁶¹¹ See for example Case E-4/04 *Pedical* [2005] EFTA Ct. Rep. 1

⁶¹² Established by the CJEU in Case C-283/81 *CILFIT* [1982] ECR 3415

⁶¹³ Case E-6/01 *CIBA* [2002] EFTA Ct. Rep. 281, paras 21-23

⁶¹⁴ Para 80

The logic of the Court seems to be that given that (in the Court's view) rights for individuals against their home state already existed before the introduction of Union citizenship, this additional legal base was not necessary in an EEA context in order to arrive to a in substance parallel end result.

The reasoning of the Court cannot be reconciled with the case law from the CJEU interpreting the relevant secondary legislation. Directive 90/365, as well as the other residence directives, was never set out to prevent any obstacles to free movement, and it has never been interpreted in that way. Rather, the residence directives, much like the Citizens Directive replacing the residence directives, were about prescribing conditions governing the exercise of the right to move to and reside in the host state. The residence directives ensured the right to move to and reside in the host state for pensioners, students and persons with sufficient means. A general right for all to move and reside freely interpreted to include also the right not to meet obstacles when exercising this freedom from the home state has always been a *treaty-based right* in EU law whether for the economically active (Articles 45, 49 and 56 TFEU) or for the non-economically active (Article 21(1) TFEU).

In *D'Hoop*⁶¹⁵ and later in *Pusa*,⁶¹⁶ the CJEU referred to the status of being a Union citizen in order to justify a general right to free movement regardless of economic activity. Furthermore, this general right to free movement could only be fully effective if obstacles raised by legislation of the home state penalising the exercise of free movement also had to be compatible with EU law. In other words, the protection of free movement for Union citizens depended on the scope of national legislation to be reviewed under EU law extending to all obstacles to free movement including that of the home state. However, for the non-economically active, this general right was based on the existence of the provisions on Citizenship of the Union when adjudicated on by the CJEU.

To this end, the EFTA Court's reasoning in *Gunnarsson* hardly seems limited to the restriction at stake, namely a residence requirement for the application of a tax advantage. Rather, the Court's reasoning in the case indicates that any obstacle on the part of the home state may potentially be incompatible with EEA law. Arguably, through its legal reasoning, the EFTA Court has effectively paralleled the free movement right of Union citizens regardless of economic activity also in the EEA Agreement. In other words, with the *Gunnarsson* case, the EEA Agreement includes free movement rights regardless of economic activity in parallel with EU law.

Gunnarsson is the clearest example of a case decided by the EFTA Court on how to apply the concept of Union citizenship in EEA law. The case is criticised for its lack of justification and explanation of the result but embraced for securing equal legal protection for moving citizens in the EEA as in the EU.⁶¹⁷ A question remains for further comment, namely whether the CJEU will follow the lead of the EFTA Court and embrace the homogeneity in effect doctrine in its own interpretation of EEA law. The assessment of this question requires an analysis of the *Gunnarsson* case in the EU legal order.

5.4 The Gunnarsson case in the EU legal order

5.4.1 Introduction

Gunnarsson was an EFTA state national, and the case concerned obligations on an EFTA state for an own national having exercised his right to free movement in the territory of the EEA. *Pusa* and

⁶¹⁵ Case C-224/98 *D'Hoop* [2002] ECR I-06191

⁶¹⁶ Case C-224/02 *Pusa* [2004] ECR I-5763

⁶¹⁷ Hannesson, CML rev

Turpeinen concerned Union citizens, and the cases concerned obligations on an EU member state for own nationals having exercised their free movement rights in the territory of the EU. This next section will analyse the potential obligations on EU member states for own nationals who have exercised free movement to the territory of the EFTA states.

The decision in *Gunnarsson* has sparked a new debate in EEA law on the possibility of a foreign (to the EU and its member states) court deciding on EU member states' legal obligations. This possibility is not limited to *Gunnarsson* but can be deduced also from decisions by the EFTA Court in other areas of law.⁶¹⁸ The final word on whether the EFTA Court decision will in the end limit EU member states' sovereignty beyond EU law obligations can be finally adjudicated in the CJEU. Until the CJEU decides on this question, the EFTA Court's decision is, however, a valid legal source on how to interpret EEA law generally and as such may impose legal limits on member states' sovereignty in areas such as the right to welfare benefits and family reunification with TCNs. Furthermore, it can also be argued that once the EFTA Court has decided upon the right interpretation (formally limited to the EFTA pillar), there is a threshold inherent in the legal architecture of the EEA Agreement for the CJEU to reach a different conclusion in the EU pillar.

Traditionally, the EEA Agreement has not been the source of additional obligations on the member states of the EU beyond the very aim of the agreement to increase the geographical area of the internal market and apply parallel rules to facilitate the free movement of goods, services, economic actors and capital. To this end, the agreement has ensured economic participation of the EFTA states in the internal market with mutual benefits for all parties to the agreement. Thus, the EEA legal order has developed in parallel with the EU legal order but never to go beyond the obligations on member states stemming from EU law itself.

The recent case of *Gunnarsson* has challenged this traditional functioning of the EEA Agreement. The EFTA Court has widened the scope of the agreement and created rights for individuals with corresponding obligations for states beyond rights and obligations already existing under EU law. Directly, the case concerns the EFTA states. Given that all EU member states are also party to the EEA Agreement, any obligation on states under the agreement (if not challenged and later reversed) are, however, also possible obligations on the EU member states.

5.4.2 Reciprocity – *The same legal rights and obligations in the whole of the EEA*

EEA law is binding upon the EU and its member states through the EEA Agreement. It is not foreseen that EEA law will be different in the EFTA and in the EU legal order. Hence, if the case law from the EFTA Court is estimated to represent a valid interpretation of EEA law in the EFTA pillar, it will potentially also be a valid interpretation in the EU pillar. This view is based on the reflection of the universal assumption that an international agreement is intended to have the same legal content regardless of where and by whom it is interpreted and applied. International agreements are generally regarded as having one correct interpretation regardless of where they apply.

Hence, even if the EFTA Court only has jurisdiction in the EFTA states and *Gunnarsson* is about an EFTA state's obligations towards own non-economically active nationals who have exercised free movement to a state party to the EEA Agreement, the decision from the EFTA Court carries substantial legal weight when interpreting EEA law in general, including EEA law obligations on EU member states.

⁶¹⁸ In particular in the area of fundamental rights and the UK and Polish opt outs of the Charter, see Protocol No. 30 on the application of the Charter of Fundamental Rights of the EU to the UK and Poland

Up until now, case law from the EFTA Court, which in a similar manner has widened the scope of the EEA Agreement through interpretation, has not extended EU member states' legal obligations.⁶¹⁹ The obligations stemming from the EEA Agreement have already existed as obligations on the EU member states through EU law. The case law from the EFTA Court has therefore had the more welcoming effect seen from the perspective of the EU member states to increase the obligations of the EFTA states and to this end ensure reciprocity.⁶²⁰ From the perspective of the EFTA states, the EFTA Court case law has, however, raised controversies and disputes.⁶²¹ By and large, the EFTA states nevertheless seem to have accepted and adjusted to the EFTA Court case law including the interpretations that have been based on a rather vague reference to general principles going far beyond a more textual and literal understanding of the provisions.⁶²² However, unexpectedly, the effects of the EFTA Court case law on the EU member states' obligations go beyond those that can be deduced from EU law in isolation. The final word on the correct interpretation of EEA law in the EU legal order lies with the CJEU, and its opinion is awaited with great interest. Absent an opinion from the CJEU, the case law from the EFTA Court is highly relevant to establish EU member states' obligations under the EEA Agreement.

From the point of view of the EU and its member states, EEA law, and in particular the case law from the EFTA Court, has not been attributed much significance or academic analysis. True, the EEA Agreement creates rights and obligations not only for the EFTA states but also for the EU and its member states, but the traditional understanding has been that this has limited significance besides what already follows from EU law in isolation. The EEA Agreement extends the internal market to include a larger geographical area (the territory of the EEA-EFTA states) with the necessary corollary for the EU and its member states in the field of internal market and competition law. This extension geographically is, however, for the EU and its member states just a different form of participating in the internal market for said states (as an alternative to membership of the Union) and in that sense is no different from extending the internal market through inclusion of new member states.

In contrast, for the EFTA states, the EEA Agreement, as a form of participation in the internal market with continuous adaptations of national law to include EU internal market and competition law, has always been seen as significant and has generated academic analysis. Since the agreement was entered into in 1992, the tension between the supranational elements in the agreement and the necessary encroachment on national sovereignty has been thoroughly analysed and debated.

5.4.3 *The right to move and reside freely within 'the territory of the member states' – The cross-border element*

The provisions on citizenship of the Union (Articles 20(2)(a) and 21(1) TFEU) ensure the right to move and reside freely within 'the territory of the member states' subject to certain limitations and conditions.⁶²³ The treaty provisions have been interpreted to include a number of rights against both the home state and the host state whenever Union law is applicable. Not only the right to move and reside in another member state but also additional rights giving effect to this free movement right are

⁶¹⁹ Case E-9/97 *Sveinbjörnsdóttir* on state liability, Case E-8/97 *TV1000* [1998] EFTA Ct. Rep. 68 on the application of fundamental rights

⁶²⁰ HH Fredriksen has demonstrated how EEA law is part of EU law and therefore already has included state liability

⁶²¹ One example being the *Karlsson* E-4/01 case trying to revise the *Sveinbjörnsdóttir* case

⁶²² The *STX* case Rt. 2012 page 1447 which may be an exception, see the speech by Justice Skoghøy with further references, EFTA seminar 7-8 October 2014

⁶²³ Articles 20(2)(a) and 21(1)

covered by the provisions. Thus, rights to welfare benefits and rights to family reunification⁶²⁴ are also provided to a Union citizen and holders of derived rights in order to give effect to the free movement right. Correspondingly, the member states' freedom to legislate in areas covered by the free movement rights is limited. Hence, national limitations on rights to welfare benefits and rights to family reunification can be challenged under EU free movement law both in relation to the host state and in relation to the home state.

The right to move and reside freely, including all the additional rights that the treaty provisions have been interpreted to include, giving effect to the free movement rights presupposes that the treaty provisions are applicable. If Union law is not applicable, a specific question will be exclusively dealt with under national law. For instance, the rights to welfare benefits and the rights to family reunification for own nationals who have not availed themselves of any free movement rights will be decided according to national law, and the substantive rights vary from member state to member state. The national law in these internal situations (own national against home state) cannot, save in exceptional circumstances, be challenged under EU law on the grounds that the provisions violate the rights of a Union citizen. Thus, national laws restricting rights to welfare benefits or the right to family reunification for own nationals are generally not in violation of EU law obligations and cannot be challenged under these provisions.⁶²⁵ For such rights to potentially be anchored in EU law and consequently for the national law to be assessed as potentially incompatible, there must be an element of free movement rights involved.

This demonstrates the importance of the criteria of free movement being involved. Only then will the citizens be able to potentially deduce any rights from EU law.

Hence, the treaty provisions (the Union citizenship provisions included) are generally understood to require a cross-border element, i.e. purely internal situations are outside the scope of the provisions.⁶²⁶ Thus, a cross-border element must be established in order for the treaty provisions on Union citizenship to give individual rights under EU law irrespective of national limitations. It is well known that this cross-border element need not be physical movements in order for the provisions to apply. In fact, the Court has been lenient in its interpretation of what may constitute a cross-border element. It is sufficient to refer to cases like *Alokpa, Chen* and *McCarthy 'II'*⁶²⁷ where dual citizenship in two member states was sufficient for the condition to be met. However, there is no doubt that the cross-border element needs to include a situation involving two or more member states. Hence, a situation involving a member state and a third country (a non-EU-member state) will be considered equal to a purely internal situation and thus covered only by national legislation. In other words, for example, dual citizenship in an EU member state and a third country will not fulfil the criteria of a cross-border element that is needed to potentially give individual rights under the treaty provisions on Union citizenship. Equally, movement between an EU member state and a third country (a non-EU-member state) will not fulfil the criteria of a cross-border element under the same provisions. In conclusion, Union citizenship rights according to the treaty provisions are limited to

⁶²⁴ As demonstrated in this report

⁶²⁵ This situation of reverse discrimination has been criticised by a number of academics, see one contribution from K. Groenendijk, *Reverse Discrimination, Family Reunification and Union Citizens of Immigrant Origin in The Reconceptualization of European Union*, Citizenship, E. Guild, C J. Gortazar Rotaache and D. Kostakopoulou, (2014) page 169-189

⁶²⁶ The *Zambrano* case (C-34/09) is an exception but the legal significance of the case has later been modified. The decision is now interpreted to only give rights to a union citizen when the essence of this citizenship is threatened referring essentially to situations when a Union citizen risks being expelled from the territory of the Union. Given that states cannot expel their own nationals it is difficult to see when this situation can occur outside the *Zambrano*-type cases, namely in the case of a child and the need for a caretaker in order to stay in the territory of the Union

⁶²⁷ Cases C-86/12 *Alokpa*, C-200/02 *Chen*, C-202/13 *McCarthy 'II'*

situations involving two or more member states of the Union and not only one member state and a third country (a non-EU-member state).

The right to move and reside freely under the Union citizenship provisions is limited to the territory of the member states. The EFTA states are not member states of the EU. The EFTA states are linked to the EU through an association agreement. Even if the association agreement connects the EFTA states closer to the EU than any other association agreement and indeed has a number of supranational elements in parallel with the EU and contrary to international agreements in general, it is still only an association agreement. Thus, the EFTA states remain outside the EU as non-members, and their territory is outside the territory of the Union. Furthermore, the citizens of the EFTA states party to the agreement are not Union citizens.⁶²⁸

The expression ‘the territory of the member states’ therefore does not include the territory of the EFTA states party to the EEA Agreement, and these states must be considered as third countries in this relation.

Thus, Union citizenship rights cannot be rooted in cross-border elements limited to the territory of one member state and an EFTA state, neither in the form of dual citizenship in an EU member state and an EFTA state nor in the form of movements between the territory of an EU member state and an EFTA state. Thus, before moving to the next step of the analysis, a provisional conclusion is that the Union citizenship rights are limited to situations involving a cross-border element between two or more member states of the Union.

With *Gunnarsson*, this limitation on the extent to which member states’ obligations fall to be assessed for compatibility with EU law may have come to an end. A logical consequence of the decision is that movement in the EEA, hence movement between any states party to the EEA Agreement even by non-economically active persons, is sufficient to trigger an assessment of member states’ obligations under EEA law. Continuing this line of reasoning, *Gunnarsson* may therefore have extended the territory upon which movement by individuals may trigger scrutiny of member states’ national law.

Already limited to the EU legal order, the case law on Union citizenship rights is controversial and contested. Recent cases in the field of territorial protection of welfare benefits are illustrative.⁶²⁹ Even if the CJEU may be perceived as slowing down the pace of integration in terms of free movement rights for the non-economically active, it would no doubt create controversies if the EEA Agreement suddenly extended member states’ obligations beyond EU law obligations.

Beyond this territorial extension of the relevant area for own nationals to move in order to enjoy protection from home state obstacles, the *Gunnarsson* case may also be interpreted as incorporating ‘Union citizen-like protection’ for all EEA nationals, including citizens of EFTA states, in the protection already enjoyed by citizens of the Union. This has potential consequences in terms of affording protection for a wider category of people as well as for affording a wider scope of rights than what follows from the current secondary legislation, which undoubtedly has been made part of the EEA Agreement. As demonstrated, the CJEU case law on rights of Union citizens based on the treaty articles has gone beyond rights stemming from the secondary legislation and to some extent ignored the negotiated limits therein. Needless to say, such an interpretation of *Gunnarsson* will

⁶²⁸ As made abundantly clear by all Contracting parties to the EEA Agreement in the Joint declaration incorporating the Citizens Directive into the EEA Agreement, see above

⁶²⁹ See previous analysis of the *Dano*, *Alimanovic* cases

potentially have substantial consequences for individual rights and corresponding states' obligations under EEA law.

This seems problematic in the EU legal order for several reasons.

First, the principal objection to this understanding of *Gunnarsson* is the fact that the rights stemming from Union citizenship, which include free movement rights of non-economically active citizens, are part of building the EU as an ever-closer Union. Building a Union as well as building a nation depends on a range of factors including creating a common identity and developing solidarities. Free movement rights for individuals detached from market objectives substantiate this Union building. Part of building a Union is also to define the insiders and the outsiders—us and them.⁶³⁰ Only by this notion can common identities and mutual solidarities develop. On the inside, the citizens should ideally move freely, and therefore, the states have obligations not to create barriers to movement. This mutual obligation between the states is motivated by the creation of a Union but logically cannot extend beyond the territory of this very same Union. The EFTA states have chosen not to be part of the Union. They are associated to the Union, but they are not member states. Their citizens are not Union citizens by the very definition of the fundamental condition for having Union citizenship, namely to be a citizen of a member state.⁶³¹ Including the same free movement rights to the nationals of EFTA states and in their territory would therefore arguably undermine the very aim of creating an ever-closer Union.

Second, the CJEU has in its past case law not refrained from expressing the differences between the EU and the EEA legal order. Thus, historically speaking, the fundamental aim of homogeneity in the EEA Agreement has not prevented the CJEU from putting at times more emphasis on the differences between the two legal orders. In its first decision on the EEA Agreement, the CJEU underlined the fundamental differences between the two legal orders, referring to European unity as a unique concern of the EU legal order going far beyond the economic objective of the EEA legal order.⁶³² Its heavy emphasis on the different objectives of the two legal orders was also evident in the line of case law from the CJEU concerning tax deductions.⁶³³

Furthermore, the CJEU has a long history dating back to the *Polydor* case⁶³⁴ of refusing to accept that an interpretation given to provisions of EU law can be automatically applied by analogy to the interpretation of a free trade agreement focusing in particular on the different aims of the treaties.

⁶³⁰ In the literature this is often referred to as inclusionary ideologies, see C. Barnard, *The substantive law of the EU*, 2013, chapter 12 on Union citizenship p 433 with further references

⁶³¹ Article 20(1) TFEU, Union citizenship is condition on being a national of a member state

⁶³² Opinion 1/91, European Court reports 1991 Page I-06079

First paragraph second section states the following: '[w]ith regard to the comparison of the objectives of the provisions of the agreement and those of Community law, it must be observed that the agreement is concerned with the application of rules on free trade and competition in economic and commercial relations between the Contracting Parties. In contrast, as far as the Community is concerned, the rules on free trade and competition have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement. Indeed, the EEC Treaty aims to achieve economic integration leading to the establishment of an internal market and economic and monetary union and the objective of all the Community treaties is to contribute together to making concrete progress towards European unity'

⁶³³ The string of cases started with Case C-72/09 *Rimbaud* [2010] ECR I-10659 and continued with cases like Case C-267/09 *Commission v Portugal* [2011] ECR I-03197, Case C-342/10 *Commission v Finland* ECLI:EU:C:2012:688, Case C-387/11 *Commission v Belgium* ECLI:EU:C:2012:670, Case C-112/14 *Commission v United Kingdom* ECLI:EU:C:2014:2369. The cases all concern the application of Article 40 EEA and the lack of corresponding provisions in the EEA to those of Directive 77/799/EEA (now Directive 2011/16/EU) on mutual assistance between member states' authorities in the field of direct taxation

⁶³⁴ Case 270/80 *Polydor* [1982] ECR 329

The position in *Polydor* was strengthened by the CJEU's express reference to it in its judgment in *Portugal v. Council* of 1999.⁶³⁵

An opposite approach from the one described above can be seen in the recent case concerning the UK's obligations towards moving EEA nationals under the previous Regulation 1408/71.⁶³⁶ The case involved precisely the rights of moving non-economically active persons but was limited to whether a specific interpretation in a piece of secondary legislation would apply equally in the EEA legal order as in the EU legal order. The case is analysed more extensively above. The case may however shed limited light on the question that essentially concerns the application of a non-paralleled treaty provision in the EEA. Given the potentially broad and to some extent unpredictable consequences deriving from a positive answer to this question on all member states of the Union, it prompts a much more cautious approach from the CJEU.

5.5 Concluding remarks

A number of arguments must be assessed more closely in order to determine the correct interpretation of EEA law obligations for the contracting parties to the EEA Agreement regarding free movement rights for the non-economically active citizens in the EEA. Notwithstanding this observation, the decision in *Gunnarsson* has legal validity absent contrary decisions. The next section will focus on adjacent case law from the EFTA Court regarding the coordination regime for social security. This field also influences the right to free movement for the non-economically active and therefore sheds light on the overall question addressed.

6 EFTA Court case law on the coordination regime for social security

6.1 Introduction

This section will analyse case law from the EFTA Court outside the field of the Citizens Directive. The case law analysed concerns rights under the coordination regime for social security where Union citizenship has been a decisive factor for the development of the law in the EU legal order. In summary, the EFTA Court has moved the EEA Agreement beyond the economically active, and the case law may be summarised as rather 'Union citizenship friendly', developing EEA law in parallel with EU also under the coordination regime.

6.2 Case E-5/06 EFTA Surveillance Authority v. The Principality of Liechtenstein

6.2.1 *The coordination system for social security*

The first step to develop the EEA Agreement in the direction of encompassing social rights beyond the economically active was taken in Case E-5/06 regarding the understanding of the coordination system in Regulation 1408/71.⁶³⁷ The coordination system for social security in Regulations 1408/71 and 574/72 was made part of the EEA Agreement through the inclusion in Point 1 of Annex VI at the adoption of the agreement. The main reason for adopting a coordination system was based on the fact that national social welfare systems in large remain built on the principle of territoriality and

⁶³⁵ Case C-149/96 *Portugal v. Council* [1999] ECR I-8395

⁶³⁶ Case C-431/11 *UK v Council*

⁶³⁷ Case E-5/06 *EFTA Surveillance Authority v The Principality of Liechtenstein* [2007] EFTA Ct. Rep. 296. The Regulation is later replaced by Regulation 883/2004, see note above

nationality.⁶³⁸ Territoriality of the national welfare systems means that EEA states in principle confine payments to residents and for consumption within the state borders. Not being able to export a benefit would seriously deter the beneficiary from using his or her free right of movement. The EEA Agreement, therefore, guarantees, subject to the coordination, that a person who has been covered for a certain period under an EEA state's social welfare system does not lose entitlement to a benefit as a consequence of settling in another EEA state. However, in this lie also the limits of the regulation. Regulation 1408/71 only aims to overrule the 'principle of territoriality' as far as this is necessary to prevent people who cross national frontiers from being disadvantaged in the field of social security.

It is essential to understand that rather than being harmonised, social security is coordinated. Coordination in the EU means that the individual will not lose his or her social security rights as a consequence of exercising his or her right to freedom of movement. Social security coordination aims to secure access to social security in the new host state and to prevent the loss of acquired social security rights in the former country of residence or employment (home state). Coordination is a method that leaves the competence to legislate on social security matters in the hands of the EEA states and secures the possibility of maintaining a variety of different national social security systems. 'It is based on the understanding that disparities would and should exist, but ought not to create an obstacle to free movement'.⁶³⁹

The coordination regime includes social welfare-type benefits, which typically cover social security schemes as opposed to social assistance schemes. Social security-type schemes are characterised by legally defined rights and an element of contribution by the beneficiary, typically through previous work engagement. This payment of social charges by the workers and/or their employers entitles the workers to sickness, unemployment or pension benefits. The level of the benefit is fixed, and it generally does not depend on other sources of income. Normally, payments are funded out of collectively paid contributions.

The coordination regime does not cover social assistance-type benefits, which are not legally defined rights and which are generally means tested. Social assistance is subsidiary in nature. These benefit schemes are usually offered to all members of a society and serve as a financial safety net for those in financial need. Normally, they are paid out of general tax revenues, and enjoyment does not depend on previous contribution.

The legal question in Case E-5/06 concerned a benefit that was 'half way' between traditional social security and social assistance. The so-called special non-contributory benefits of a mixed kind are based on a legally defined right, but they do not depend on periods of work or contributions, and they are intended to relieve a clear financial need. Other examples than the benefit in the case would be supplements to pension and special benefits for disabled persons.

There are three main reasons why social assistance-type benefits are not covered by the coordination regime and thus why enjoyment is normally limited by the territoriality principle. Such benefits are perceived as being connected to an understanding of solidarity and thus the responsibility of the state, which normally does not extend beyond the borders. Furthermore, such benefits are determined

⁶³⁸ See generally on the Co-ordination regime for social security systems in A.P. Van der Mei, (2003) *Free Movement of Persons Within the European Community Cross-Border Access to Public Benefits*, Oxford – Portland Oregon which also includes an analysis of the EEA dimension to the Co-ordination

⁶³⁹ M. Sakslien, (2000), *The Concept of Residence and Social Security: Reflections on Finnish, Swedish and Community Legislation*, *European Journal of Migration and Law* 2: 157–183, 2000

by the cost of living in each state and in a way presuppose consumption within the state territory. A third obstacle concerns the administrative difficulties of checking the fulfilment of conditions for eligibility and other more technical obstacles involved for export of benefits. The question for the EFTA Court was how to balance these considerations for 'special non-contributory benefits of a mixed kind' with free movement rights.⁶⁴⁰

6.2.2 *The non-contributory benefit in the form of a helplessness allowance*

The non-contributory benefit in Case E-5/06 was in the form of a helplessness allowance. According to the national law, a person was considered to be helpless if he permanently required a degree of help from third persons or personal surveillance in order to carry out daily tasks such as getting up, getting dressed and undressed, preparing meals, maintaining personal hygiene and engaging in social interaction. The allowance was part of a system that provided specific protection for the disabled who were unfortunate enough not to be able to accomplish daily tasks on their own. It was obvious that the majority of beneficiaries would not have sufficient means of subsistence without the benefit. The award of the helplessness allowance was not conditional upon the completion of periods of insurance but depended only on the degree of helplessness. Thus, there was a link between the helplessness allowance and social assistance.⁶⁴¹

The question in the case was whether the requirement of residence in Liechtenstein for entitlement to the helplessness allowance was in accordance with EEA law.

The justification for limiting the export of this benefit was mainly that it was meant to guarantee a level of subsistence taking into account the cost of such help and integration in Liechtenstein as well as the fact that the benefit was not based on the payment of contribution but on the needs of the persons. Given that a comparable benefit would not (most likely did not) exist in a new host state, the loss of the benefit would, however, evidently create an obstacle to the right of free movement.

6.2.3 *The parties to the case – The principal question*

At the time, the relevance of the case seemed to have been perceived as limited. The case was regarded as a question of interpretation limited to a specific benefit in Liechtenstein and thus of little general significance. The largest EFTA state, Norway, did not make an intervention in the case, and the same is true for Iceland. Thus, the voices of the other EFTA states were not heard in the case. On the EU side, the UK chose to intervene both in the written and in the oral procedure as well as the actor repeatedly present in the EFTA Court, namely the Commission.

Even though the case concerned a specific social benefit exclusive to the social welfare system in Liechtenstein, the principal question of the case was one of the boundaries of basic systems of solidarity guaranteeing a minimum level of subsistence for non-economically active persons. Here, the very boundaries of the national solidarity mechanisms were at stake. For economically active persons, participation in national solidarity is to a large extent taken for granted in the context of the internal market of the EEA. The direct contribution to the economic life of the host state secures the right to participate in national social systems. This fits the traditional paradigm of solidarity in the EEA based on economic integration.

For non-economically active persons, the link to the participation of these persons in the economic internal market is mostly lacking. Consequently, the question is directly related to the definition of

⁶⁴⁰ See the decision paras 65-69 in particular

⁶⁴¹ See a reference to the relevant national law in the decision paras 20-29

the scope of the solidarity mechanisms set up at the national level by the EEA state. A balance needs to be struck between the free movement rights also for non-economically active persons and the interest of the EEA states to limit access to their solidarity systems.

6.2.4 *The background for the case – The case law of the CJEU*

The EFTA Court case can only be properly understood by taking account of a development in the EU legal order where the CJEU in the year 2001 changed its opinion on the discretion of the member states to refuse the export of certain benefits.

In this regard, the case is also interesting in relation to the limitation inherent in SCA Article 3 on the relevance of later case law from the CJEU. Switzerland has used exactly this line of reasoning in their bilateral relation with the EU refusing to export parallel benefits.

The story of the ‘special non-contributory benefits of a mixed kind’ began with the CJEU developing a broad definition of social security benefits. This subjected several national ‘special non-contributory benefits’ to the export provisions.⁶⁴² In a reaction to this case law, a separate coordination regime was created for these benefits by introducing Articles 4(2)a and 10(a) and Annex IIa in Regulation 1408/71 whereby member states could apply a residence condition preventing the export of such benefits.⁶⁴³

In *Snares*⁶⁴⁴ and *Partridge*,⁶⁴⁵ the ECJ was confronted with the question of whether the limitation of export of Annex IIa benefits was compatible with the fundamental freedom of free movement. The Court concluded that the member states were entitled to limit the exportability of the mixed-type non-contributory benefits insofar as they are closely linked to the social environment of the member state. The Court did not, however, examine in detail whether the benefits in these cases were to be considered as ‘special non-contributory benefits of a mixed kind’. In other words, the Court left a considerable margin of discretion to the national systems.

In *Jauch*⁶⁴⁶ and *Leclere*,⁶⁴⁷ however, the Court did examine this question. It considered the two benefits at stake—the Austrian ‘care allowance’ and the Luxembourg maternity allowance, respectively—as not corresponding to the criteria of being ‘special’ and of a ‘mixed kind’ in order to justify their non-exportation. Hence, the listing in Annex IIa was declared invalid. The Court motivated its position by stating that derogations from the principle of the exportability of social security benefits must be interpreted strictly. For the purpose of this paper, it is not necessary to go into further detail of later case law where the Court has both confirmed and invalidated the member states’ position that the benefit should be listed in Annex IIa.⁶⁴⁸ The main point in this context is that the CJEU changed its approach from leaving the choice to the discretion of the member states to engaging itself in a judicial review of the benefit and substituting if necessary the member states’ view on the listing with that of the Court.

⁶⁴² The first case was Case 1/72 *Frilli* [1972] ECR 667

⁶⁴³ Regulation 1247/92

⁶⁴⁴ Case C-20/96 *Snares* [1997] ECR I-6057

⁶⁴⁵ Case C-297/96 *Partridge* [1998] ECR I-3467

⁶⁴⁶ Case C-215/99 *Jauch* [2001] ECR I-1901

⁶⁴⁷ Case C-43/99 *Leclere* [2001] ECR I-4265

⁶⁴⁸ See as an example of confirming the listing in Case C-160/02 *Skalka* [2004] ECR I-5613, on the Austrian Compensatory supplement to pensions. See also Case C-299/05 *Commission v Parliament and Council* [2007] ECR I-08695 on the Finnish Child care allowance, the Swedish ‘Disability allowance and care allowance for disabled children’ and the UK ‘Disability Living Allowance, Attendance Allowance and Carer’s Allowance

6.2.5 *The listing of the helpless allowance by Liechtenstein*

When it acceded to the EEA Agreement, Liechtenstein classified the helplessness allowance within the system of Regulation 1408/71 as a ‘special non-contributory benefit’ in accordance with Article 4(2a) of the regulation. All the contracting parties to the EEA Agreement had in principle assessed the benefit against the conditions for listing it in Annex IIa. Liechtenstein had adapted its scheme in order to fit the conditions. Therefore, arguably, Liechtenstein could in good faith rely on the consensus and the result reached by the contracting parties when adopting the EEA Agreement.

The substantial reasons for the listing were also clearly explained by the government in the case, demonstrating why exporting the benefit would go beyond the solidarity objective in the national system.⁶⁴⁹ The government stressed that there are two systems in place in Liechtenstein that cover the need for domiciliary care. The basic system, on the one hand, of which the helplessness allowance is a part, provides specific protection for the disabled and has a strong emphasis on improving or maintaining quality of life. The sickness insurance system, on the other hand, of which domiciliary health care is a part, has as its aim to improve or maintain the state of health. It was argued that these two benefits should be distinguished and that only the latter benefit is a sickness insurance benefit in accordance with Article 4(1) of Regulation 1408/71 (thus exportable). The helplessness allowance was a ‘mixed-type benefit’, which had characteristics of both social security and social assistance, thereby in the view of the government rightfully belonging in Annex IIa to Regulation 1408/71 (thus not exportable). Moreover, it was argued that the helplessness allowance differed from the benefits at issue in *Jauch*⁶⁵⁰ on the Austrian care allowance, in that this case concerned a contribution-based scheme, the purpose of which was more closely linked to health care than the Liechtenstein benefit. It was argued that the helplessness allowance was more similar to the UK systems at issue in *Snares*⁶⁵¹ (on the UK disability care allowance) and *Partridge*⁶⁵² (on the UK attendance allowance).

6.2.6 *The view of the EFTA Court*

Of central importance for the EFTA Court decision was whether the case law of the CJEU that stated that the listing itself does not have constitutive effect was relevant in the EEA. There were at least two main lines of argument against applying the same understanding in an EEA context, taking into account the sensitive substantive issue at stake, namely that national boundaries of solidarity would be expanded.

The first is the complete turnaround by the CJEU in its understanding of member states’ competence over their own benefits. In striking contrast to earlier case law, the CJEU has since 2001 begun to assess, independently of a listing in the Annex, whether the benefit in question fulfils the conditions in Article 4(2a) or rather should be classified as a benefit under either Article 4(1) or 4(4). Until 2001, the CJEU had accepted the member states’ choice of classification without scrutinising in detail whether the conditions were fulfilled. Thus, as long as there was in a sense a political agreement between the member states, there was no reason to believe that such benefits would be exportable.

⁶⁴⁹ See the Report for the Hearing paras 65-80 and the decision of the Court paras 45-55

⁶⁵⁰ Case C-215/99 *Jauch* [2001] ECR I-1901

⁶⁵¹ Case C-20/96 *Snares* [1997] ECR I-6057

⁶⁵² Case C-297/96 *Partridge* [1998] ECR I-3467

The principle of homogeneity clearly spoke in favour of the EFTA Court adopting the most recent view of the CJEU. Indeed, the most efficient way of ensuring the homogeneity principle is to always take note of the present stage of law as perceived by the CJEU. However, the fact that the CJEU had completely changed and reversed its position on a legal question means that there is little predictability and possibility for affected parties to adapt to the situation. Nevertheless, in concurrence with the EFTA Court's earlier position, when confronted with new and/or changed law through the jurisprudence of the CJEU, the latter's most recent view prevailed.⁶⁵³ The EFTA Court chose to follow the CJEU despite its concerns about expanding the territorial limits of the national welfare benefits.

However, the EFTA Court was confronted with a second obstacle created by the particular structure of the EEA. The entry of the benefit in Annex IIa with the result that the Liechtenstein helplessness allowance did not have to be exported to residents in other EEA states was the result of the accession negotiations. Arguably, this listing had to be considered as the result of consent amongst the contracting parties of the EEA Agreement. The fact that the Liechtenstein entry into Annex IIa formed part of EEA Council Decision 1/95 could therefore be interpreted as meaning that the relevant rules for interpretation followed the rules of public international law. Hence, the question was whether the listing should be interpreted as part of the EEA Council decision, which was to be interpreted in accordance with Article 26 of the Vienna Convention on the Law of Treaties.⁶⁵⁴ To this end, the argument would be that every treaty in force is binding upon the parties to it and must be performed by them in good faith in the sense of *pacta sunt servanda*.

Furthermore, as stated by Liechtenstein in no uncertain terms, at the time, the entry into Annex IIa was considered as having constitutive effect, meaning that benefits listed therein were recognised as being non-exportable. Until the year 2001, the CJEU did not question whether the listing of a benefit in Annex IIa was compatible with Community law. When applying a residence requirement, Liechtenstein was thus relying in good faith on this understanding at the time of the conclusion of the EEA Agreement.

The EFTA Court, confronted with this second obstacle, again made use of the homogeneity principle and this time in an unprecedented manner.⁶⁵⁵ According to the Court, the line of reasoning by the Liechtenstein Government even in a sensitive area such as expanding the national boundaries of solidarity could not succeed.

The EFTA Court decided that Liechtenstein was obliged to grant the benefit to applicants residing in an EEA state other than Liechtenstein, including its own nationals who had availed themselves of the right to free movement. According to Article 19(1)(b) of the regulation, persons employed or self-employed in Liechtenstein but residing outside the state should therefore receive the helplessness allowance. Article 25(1)(b) of the regulation stipulated that the same was the case for unemployed persons residing outside Liechtenstein that were formerly employed or self-employed in the state, provided they fulfilled the other conditions in Regulation 1408/71 for being subject to Liechtenstein social security law. As for pensioners receiving a pension from Liechtenstein without residing in that state, the same principle followed from Article 28(1)(b) of the regulation. Hence, the entitlement to the helplessness allowance is not, as regards the circle of persons covered by these provisions, subject to the condition that the person be resident in the territory of Liechtenstein.

⁶⁵³ Reference is made to the *L'Oreal* case E-9/07 and 10/07

⁶⁵⁴ See the Report to the Hearing para 40

⁶⁵⁵ See the decision para 63 where the Court frames the question as if it is a matter of Liechtenstein having other obligations than the other Contracting Parties to the Agreement

6.2.7 Concluding remarks

The reason why this decision can be seen as the first step towards creating transnational solidarity with non-economic contributors is that Liechtenstein was forced to give up its territorial principle for a benefit closely resembling social assistance schemes. This decision meant that Liechtenstein had to pay this benefit to categories of people not residing in its territory and not contributing to the finances of the state. The main objective of the coordination system is to ensure the free movement of primarily economically active persons while at the same time respecting the special characteristics of national social security legislation. Regulation 1408/71 has, nevertheless, always been applicable to non-economically active persons, such as pensioners, unemployed persons and the family members of workers and self-employed persons. Even students can be covered by the legislation provided that they are or have been subject to the legislation of one or more EEA state.⁶⁵⁶ Despite the primary objective of the regulation, which concerns the free movement of economically active persons, the relevant parameter for being covered by the coordination system is not the exercise of an economic activity as such but the fact of being covered or having been covered as an employed or self-employed person by the social security system of an EEA state (or being a family member of these persons).⁶⁵⁷

Consequently, a large number of the non-economically active persons in the EEA are covered by this coordination of social security, making any extension of the regimes to social assistance-like benefits inevitably also an expansion of the solidarity previously limited by territorial boundaries. This is the case even more in Regulation 883/2004, which refers in the definition of its personal scope to all nationals of a member state (in the adapted EEA text, this is a reference to all nationals of an EEA state) who are or have been subject to the legislation of one or more member states (EEA state),⁶⁵⁸ without referring any longer to the status of employed or self-employed persons. The personal scope of the coordination system is defined in such a broad manner that almost all citizens of the EEA states will be covered by it.⁶⁵⁹

Taking this into account, it is not surprising that the UK decided to try to invalidate the adoption of this regulation in the EEA Agreement.⁶⁶⁰ What is perhaps quite surprising is that the adoption does not seem to have initiated any controversy in the EFTA states.

Through this decision, the EFTA Court demonstrated how the EEA Agreement affects the boundaries of the national solidarity systems and laid the ground for future cases.⁶⁶¹ When Regulation 1408/71 was adopted into the EEA Agreement, one may safely assume that the EFTA states believed that the ceiling for how much of the welfare systems the states were expected to export was established. The application of the homogeneity principle in later case law, however, proved that it was no longer a ceiling but a floor.

⁶⁵⁶ Students have been introduced in the scope of Regulation 1408/71 by Regulation 307/1999 of 8 February 1999

⁶⁵⁷ On the implied solidarity with non-economic actors through the Co-ordination regime of social security, see Herwig Verschueren, *European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems*, *European Journal of Migration and Law* 9 (2007) 307–346

⁶⁵⁸ Article 2

⁶⁵⁹ For a discussion of personal scope in the EU see Pennings, 'Inclusion and Exclusion of Persons and Benefits in the New Co-ordination Regulation', in: Spaventa and Dougan (eds.), *Social Welfare and EU Law*, Oxford: Hart 2005, 245–246

⁶⁶⁰ Case C-431/11 *UK v Council*

⁶⁶¹ Later case law which expands this solidarity dimension further makes references to Case E-5/06, see as an example paras 36 and 47 in Case E-4/07 *Jon Gunnar Porkelsson v Gildi Pension Fund* [2008] EFTA Ct. Rep. 3

6.3 Case E-4/07 Jon Gunnar Porkelsson v Gildi Pension Fund

6.3.1 *The facts of the case and the legal dispute*

In a preliminary reference from a national court in Iceland, the EFTA Court was in Case E-4/07⁶⁶² asked about the exportability of a not yet acquired invalidity benefit from an Icelandic pension fund. The dispute arose in a situation where the accident that triggered the payment of the benefit happened after the claimant had found employment, set up a new residence in another EEA state and was paying contributions for sickness insurance in his new place of residence. In essence, the question was whether the national rule that only allowed the export of acquired rights, thereby confining the solidarity of the national system, accordingly violated the freedom of movement of workers and/or export provisions in Regulation 1408/71.

The claimant was an Icelandic mariner who in September 1995 left his job in Iceland to move to Denmark, where he continued to work as a mariner. He paid contributions to a Danish pension fund. On 16 September 1996, while at work on board a Danish fishing vessel, he suffered an accident that left him an invalid. At the time of the accident, the claimant had accrued rights to pension payments from several Icelandic pension funds. The export of these existing rights was not the subject of the case. These rights were not in any way reduced, modified, suspended, withdrawn or confiscated, cf. Article 10 of Regulation 1408/71.⁶⁶³ For his accident, he was also awarded a lump-sum payment from his Danish pension fund as well as receiving a monthly pension from the Danish municipality where he lived. In accordance with the principle in Regulation 1408/71, the state where the claimant worked and lived had assumed responsibility under its existing social welfare system for the Icelandic mariner (*lex loci laboris*).

The subject of the case was whether the claimant under EEA law had a right to have his invalidity pension (from Iceland) calculated on the basis of projected points, i.e. pension points that he would have been able to accrue with the Icelandic pension fund, had he remained a member of that pension fund and continued working until reaching the age of retirement. The reason he did not fulfil this requirement was that he failed to pay contributions to the fund for at least 6 of the 12 months preceding the accident.⁶⁶⁴ The reason he had not paid the contribution was that he had moved to Denmark and taken up employment there. The dispute concerned whether the '6 out of the last 12 months' rule infringed the right to freedom of movement of workers and/or provisions on export in Regulation 1408/71.⁶⁶⁵

It was not disputed in the case that the same lack of calculation based on projected pension points would occur if a national worker moving within Iceland started to pay premiums to another national pension fund not party to the same agreement as the Gildi Pension Fund.⁶⁶⁶ This distinction in Icelandic law was based on a premise that the right to disability benefits based on projection did not constitute an acquired right in a legal sense. Basically, a member in an Icelandic pension fund is entitled to specific benefits in the event of disability, in proportion to the member's contribution to the fund. Given that the right to projection depended on ongoing payments to his pension fund, this claim was rejected by the fund.

⁶⁶² Decision 1 February 2008

⁶⁶³ These was undisputed in the case, see para 67 of the decision

⁶⁶⁴ The national rules are described in the decision at paras 7-14

⁶⁶⁵ One of the questions in the case was whether this was a national rule or simply part of an industrial Agreement. For the purpose of this analysis it is not necessary to investigate this question further

⁶⁶⁶ See the decision para 71

6.3.2 *No obstacle to the free movement of workers – Article 28 EEA*

Social security coordination is limited to securing access to social security in the new host country and preventing losses of acquired social security rights in the former country of residence or employment. The fact that social rights in one EEA state are better than those in another is not in itself contrary to Regulation 1408/71. Coordination is a method that leaves the competence to legislate on social security matters in the hands of the EEA states and secures the possibility of maintaining a variety of different national social security systems. In fact, the regulation does not detract from the power of the EEA states to organise their social security schemes.

The starting point for the claimant was, however, that the national rule violated the free movement of workers in Article 28.⁶⁶⁷ The general provisions of free movement preclude all national provisions, which, although applicable without discrimination on the grounds of nationality, are nevertheless liable to hinder or make less attractive the exercise of the fundamental freedoms guaranteed by the EEA Agreement on citizens.⁶⁶⁸ The added value of the prohibition of non-discriminatory rules for the free movement of persons concerns primarily the possibility to challenge rules imposed by the state of origin that hamper the right to work in another EEA state.⁶⁶⁹ The judgment in *Graf* demonstrates, nevertheless, that there are limits to the prohibition for the member state of origin to apply rules that may hamper the right to move to another member state.⁶⁷⁰ The *Graf* case involved a German national who voluntarily terminated his employment in Austria in order to take up a new job in Germany. Mr Graf claimed that he was entitled to compensation from his former employer under Austrian law. The employer argued that the law only gave right to compensation if the contract was terminated by the employer. The CJEU made it clear that in order for a national rule to be an obstacle to free movement of workers, the rule must affect access of workers to labour markets in other EEA states.⁶⁷¹ The Austrian rule depended on a future and hypothetical event that was too uncertain and indirect a possibility for the legislation to be capable of being regarded as liable to hinder the free movement of workers.

Similarly, the events in Case E-4/07 leading up to the claimant not being entitled to a calculation of projected points seemed too uncertain and indirect a possibility for the national legislation to be regarded as liable to hinder the free movement of workers. First of all, the issue of calculation based on projected points would only arise in the case of a future hypothetical event such as an accident. Furthermore, the stopping of payment into Icelandic pension funds occurred simultaneously with the starting of payments into the Danish system. There is interplay between the public social security system and the independent funds in Iceland, which aims at preventing citizens from being compensated several times for the same loss.⁶⁷² There was no such coordination between the rights accrued under the Danish payments and the rights accrued under the Icelandic system. If the claimant wanted full protection under both sets of rules, he could also have chosen voluntarily to continue paying contributions to the Icelandic fund. Thus, the national rule was difficult to perceive as an obstacle.

⁶⁶⁷ See the decision para 5

⁶⁶⁸ Case C-19/92 *Kraus* [1993] ECR I-1663 para 32 and Case C-55/94 *Gebhard* [1995] ECR I-4165 para 37

⁶⁶⁹ See Case C-18/95 *Terhoeve* [1999] ECR I-345

⁶⁷⁰ Case C-190/98 *Graf* [2000] ECR I-493

⁶⁷¹ See Case C-190/98 *Graf* [2000] ECR I-493 on the limit of what constitutes an obstacle to free movement, paras 23-25

⁶⁷² See the decision para 70 where Iceland draws attention to the possibility that if the former mariner would receive payments in line with his projected entitlements from the pension funds, he should receive less from the public social security systems concerned

In *Hartmann*, the German Government argued successfully that it should not be overlooked that by transferring residence to another member state other forms of entitlement may be opened.

It should not be overlooked that by transferring his residence to another Member State other forms of entitlement may be opened in the host Member State. To paraphrase the German Government at the hearing, where Member States are obliged not to impose any restrictions on their nationals wishing to move to another Member State, neither are they required to give them a bonus for leaving.⁶⁷³

Having protection under both sets of rules, both Danish and Icelandic, without the same coordination as nationals would seem like a bonus. Finally, the national rule applied equally to internal and external situations, in that moving to another job within Iceland could also trigger the same risk. The national rule consequently did not hinder access to employment markets in other EEA states. Thus, the facts of the case did not support the claimant's principal objection that the national rule was an obstacle to the free movement of workers as laid down in Article 28 EEA.

The EFTA Court seems to be of a similar opinion regarding the lack of application of free movement of workers rules in the decision, although the Court does not give any reasons for its position. In the decision paragraph 54, the Court rejects the claimant's principal submission and states that it does not find reasons to rely on the freedom of movement of workers as the legal base in the case. The Court therefore spells out rather clearly that it does not find any of the fundamental freedoms applicable to the case. It seems clear that the case does not concern the freedom of movement of economically active persons. In other words, the Court does not think that the free movement of workers was obstructed by a national rule requiring payments to the pension fund in the last 6 out of 12 months in order to have the calculation based on projected points.

This view of the EFTA Court means that the Court does not follow the line of reasoning established by the EFTA Surveillance Authority in its written submission in the case. The Authority bases its argumentation on the premise that the national rule violated the free movement of workers.⁶⁷⁴ The Authority sees the principle of free movement of workers as underlying Regulation 1408/71.⁶⁷⁵ The Authority therefore suggests that the answer on the application of the regulation 'would follow equally if Articles 28 and 29 EEA were applied directly. Regulation 1408/71 simply lays down detailed rules implementing the principles set out in those provisions and is not meant to create any additional rights for the individual which go beyond what already follows from the main provisions of the agreement'.⁶⁷⁶

Having established that the case was not about the free movement of economically active persons, the next question was whether the claimant had a right based on the EEA Agreement also protecting the free movement of non-economically active persons. For this right to exist, the EFTA Court has to build on its previous understanding from Case E-5/06 whereby the agreement also contains a principle of solidarity beyond factors of production.⁶⁷⁷

⁶⁷³ Opinion of Advocate General Geelhoed in Case C-212/05 *Hartmann v Freistaat* [2007] ECR I-6303, para 86

⁶⁷⁴ See in particular paras 67-80 of the written intervention by the Authority 18. June 2007, made public after decision 19 March 2014

⁶⁷⁵ Written intervention by the Authority 18. June 2007, para 79

⁶⁷⁶ Written intervention by the Authority 18. June 2007, para 80

⁶⁷⁷ And indeed several references are made to this case in the decision, see i.a. para 47

6.3.3 *Exporting benefits to a non-economically active person*

Thus, the case is really about exporting welfare benefits to a non-economically active person. The starting point for the concept of exporting welfare benefits is that it violates the territoriality of the welfare state and its public benefit scheme. Territoriality means that public benefits are preserved for persons residing or working within the state territory; conversely, public benefits are not intended for those living or working outside the state border, including the state's own citizens. Territoriality also implies that welfare state benefits must be consumed within the state borders. Public benefits such as education, housing or health care often can only be effectively provided and consumed in the state territory, and in principle, territoriality for cash benefits implies that they cannot be transferred abroad. Thus, moving to other states is interpreted as giving up membership and hence entitlement to social welfare benefits. An important reasoning underlying non-exportability is that governments lack sufficient powers to effectively supervise and enforce conditions of eligibility in other states. In summary, citizens who choose to go abroad and no longer participate in the national community—or for that matter pay taxes to the national community or submit themselves to supervision by the national authorities—in principle forfeit the expectation of welfare support from their country of origin.

Objectively, the situation was that the claimant had voluntarily given up his job in Iceland and had found new employment in another EEA state where he had set up residence. Thus, by his own choice, he had left his country of origin and he was no longer an economic contributor to the finances of his home country. This was perhaps even more evident in the case at hand given that the problem arose precisely from the fact that the claimant had ceased to pay contributions to the pension fund. Thus, the claimant had given up membership in the social welfare community in his state of origin and had become a member in the social welfare community in his new country of employment and residence.

The principal question was whether EEA law requires the country of origin in such a situation to still take social responsibility for one of its citizens even after the citizen has given up membership of the social welfare community. This is the so-called home state requirement. In EU law, this issue has been subject to an extensive review of national rules in light of the provisions of Union citizenship. There is a strong policy objective in the EU of a general right to free movement and residence to be enjoyed in a meaningful way by all citizens regardless of their financial and economic status. Union citizenship thus provides the legal base in the EU to require the country of origin to continue, at least temporarily, to take social responsibility even after the citizen has given up his/her membership in the national community of solidarity.

The conceptual underpinning seems to be that any national rule that places those who have moved (or have returned after having exercised a right to move) at a disadvantage compared to those who have not moved may involve an element of discrimination or an obstacle that must undergo scrutiny by the Court for compliance with the principle of proportionality. Territoriality limitations place citizens at a disadvantage 'simply' because they have exercised their right of movement.

Thus, in *D'Hoop*,⁶⁷⁸ the CJEU made clear that member states cannot impose rules that have the effect of placing at a disadvantage their own citizens who have exercised the right to move. This is stated quite clearly by the Court:

⁶⁷⁸ Case C-224/98 *D'Hoop* [2002] ECR I-06191

In that a citizen of the Union must be granted in all Member States the same treatment in law as that accorded to the nationals of those Member States who find themselves in the same situation, it would be incompatible with the right to freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation of freedom of movement.⁶⁷⁹

In *De Cuyper*,⁶⁸⁰ a similar reasoning was applied in relation to a residence requirement to receive unemployment benefits. Belgian rules requiring that those in receipt of such benefits had to reside within the national territory were found to fall within the scope of Article 18(1) EC (now Article 21(1) TFEU). The ruling in *De Cuyper* is a good example of the far-reaching consequences of the case law. Pre-Union citizenship, the residence requirement would have not been subject to the proportionality/necessity scrutiny, since it was compatible with Regulation 1408/71.⁶⁸¹ Post-Union citizenship, the residence requirement must undergo scrutiny by the Court. The latest perhaps most far-reaching case in this line of thinking by the CJEU is the *Stewart* case on obligations on member states to export an incapacity benefit in youth.⁶⁸² The home state requirements towards Union citizens thus aim not only to prevent discrimination but also to have potential obstacles to movement removed.

The right to mobility gives rise to two claims: first, the right to non-discrimination on the grounds of mobility and, secondly, the right to have potential obstacles to mobility removed, regardless of whether they are discriminatory or not.⁶⁸³

6.3.4 *The view of the EFTA Court*

The Court chooses to rely on an interpretation of Regulation 1408/71 to some extent against both the wording and a literal interpretation of the requirements to export welfare benefits under the regulation. First of all, the main objective of the coordination system is to protect the free movement of workers including their families. The EFTA Surveillance Authority sees this as an essential component of the application of the regulation.⁶⁸⁴ The Court itself disagreed with the Authority as to whether the national rule in the case was an obstacle to the free movement of workers as laid down in Article 28 EEA.

Furthermore, the regulation establishes a structure for the right to export of acquired welfare benefits to prevent the loss of such benefits from being an obstacle to free movement.⁶⁸⁵ In Case E-4/07, there was no existing welfare benefit to export when the claimant decided to seek work in another EEA state and settle there. Given that the possible right arose only after the claimant had left the solidarity community of which he used to be part, the case was really about the continued social responsibility of the states of origin for their own citizens.⁶⁸⁶

⁶⁷⁹ Case C-224/98 *D'Hoop* [2002] ECR I-06191, para 30

⁶⁸⁰ Case C-406/04 *De Cuyper* [2006] ECR I-06947

⁶⁸¹ Article 10(1), confer the limited access to export the benefit in Article 69(1)

⁶⁸² Case C-503/09 *Lucy Stewart*

⁶⁸³ A. Somek, (2007), *Solidarity decomposed*, 32 (6) *EL rev* 787-818, on p 793

⁶⁸⁴ Written intervention by the Authority 18. June 2007, paras 79 and 80

⁶⁸⁵ The projection of entitlements did not constitute acquired social security rights within the meaning of the regulation, see Article 29 EEA and the decision para 35 on the intervention by the Icelandic Government

⁶⁸⁶ For this argument it is also referred to the structure of the pension funds in Iceland and the interplay with the basic social security system as discussed above

In addition, the coordination regime does not provide for the harmonisation of national social security laws. The regulation is thus not intended to give individuals substantive rights that go beyond their rights under the national legislation concerned. In other words, the individual has to fulfil all the national requirements to be eligible for the support. The regulation only aims for what can be termed a procedural right, namely that of exportability of the benefit. Thus, substantively, the conditions for the right to the benefit are determined by national law. Procedurally, national law cannot hinder the export of an already existing substantive right in the situations covered by the regulation.

The rules on projection apply equally to everyone working in Iceland, and there are various reasons why a worker may lose the right to projected points. The national substantive requirement for eligibility was membership of the pension fund. When this national condition was not satisfied regardless of the reason being movement within or outside Iceland, no right existed under national law. Given that the regulation does not create new rights substantively but aims at ensuring exportability of existing rights, the Icelandic mariner arguably did not have a right to projected points under the regulation. There was simply no substantive right under national law to export. In citizenship cases, this last point is to a large extent disregarded building on an understanding that the person who moves requires special protection even of non-discriminatory rules in his or her country of origin.

Citizenship not only protects the national from one Member State against discrimination by another but also the Member States own national against being worse off than fellow nationals who do not avail themselves of the opportunities offered by Art.18. The national plays the role of an “honorary foreigner” inasmuch as he or she shares with foreigners the essential characteristic of being mobile or having moved.⁶⁸⁷

The coordination regime is about the right to export benefits to not deter freedom of movement. To this end, the regime sets a limit on the principle of territoriality but only as far as the EEA states have been willing to do so in the agreed coordinated regime.⁶⁸⁸ This limit may, however, not comply with the requirements under the provisions on Union citizenship as has been illustrated by numerous cases from the CJEU. In fact, it is apparent that the prohibition to export benefits always entails a potential infringement of an individual’s right to freely move throughout the EU, an infringement that might be justified—in practical cases—only by the rule of reason, i.e. by applying national law in conformity with the principles of proportionality.

The provisions on Union citizenship have accordingly prompted the CJEU to go beyond the agreed legislative limits of the regulation.⁶⁸⁹

The EFTA Court has no such legal sources available as an interpretative tool of EEA law beyond the fundamental freedoms, and in this case, as we have seen, the latter were not applicable. Interestingly, the homogeneity principle seemed nevertheless to trump any objection to such expansion of the rights of individuals under the EEA agreement even at the expense of private parties with competing interests.⁶⁹⁰ Thus, the EFTA Court ruled in favour of the Icelandic claimant and gave him the right under EEA law to have his pension points calculated based on projected points.

⁶⁸⁷ A. Somek, (2007), *Solidarity decomposed*, 32 (6) *EL rev* 787-818, on page 793

⁶⁸⁸ For a full account of the view of the Icelandic government of how far the coordination regime required export of benefits, see *The Report for the Hearing* paras 63-76

⁶⁸⁹ Dougan, *Constitutional impacts*, cases like *De Cuyper*, *Baumbast*, *Grzyleck* referred to above

⁶⁹⁰ In the literature this has been suggested as an absolute limit on the homogeneity principle. Thus, in cases involving duties on private parties, the EFTA Court cannot rely on the homogeneity principle in the same way as in cases involving duties on states. The rule of law

Through this case law, it has become evident that the EFTA Court is also ready to protect the non-economically active free movers under EEA law. The next section analyses two cases concerning Norway where the Court encroached on the national territorial boundaries of welfare solidarity.

6.4 The special character of unemployment benefits – Case E-3/12

6.4.1 Introduction

Benefits relating to involuntary unemployment aim to offer a guarantee of support in the event of temporary and involuntary unemployment. Those entitled to such benefits are thus people forming part of the active working population on the regular labour market. Normally, the benefits have the character of a payment that, up to a certain maximum, is related to the last salary earned.

These characteristics imply that those receiving unemployment benefits must remain available on the labour market. National requirements for the eligibility of the benefit vary, but generally, the unemployed must be resident in the state responsible for the benefit and registered with a body in said state, which facilitates finding a new position. In general, an unemployed person has the greatest chance of finding work in the last state of employment.⁶⁹¹

Generally, those entitled to benefits must, in addition, accept any offer of suitable employment and may not undertake any activities whereby they receive income over and above their unemployment benefit. In the absence of any system of cooperation between authorities in the different EEA states, a residence requirement may also be appropriate in order to ensure that effective checks on an unemployed person's remunerated activity and family situation are carried out.

As described by Advocate General Geelhoed in his opinion in the *De Cuyper case*, '[T]he aim of these requirements—which in principle must be strictly applied—is to prevent improper use or abuse of unemployment benefits, and to prevent unfair competition on the labour market by those receiving unemployment benefits'.⁶⁹²

6.4.2 Export of unemployment benefits, Regulation 1408/71

This context also explains the rationale behind not including unemployment benefits in the general prohibition of residence requirements in Regulation No 1408/71. Article 10(1) of Regulation No 1408/71 concerns the waiving of residence clauses included in national legislation on social security benefits. It contains a prohibition on all forms of modification of certain social security benefits on the grounds that the recipient resides in a member state other than the state responsible for payment. The social security benefits listed in Article 10(1) to which that prohibition applies do not, however, include unemployment benefit. Therefore, in general, the regulation does not prohibit a residence requirement in the case of national rules governing unemployment benefit.

In relation to the general proposition that restrictions on exporting entitlement to unemployment benefits are not prohibited, Regulation No 1408/71 provides two exceptions. Article 69 provides for entitlement to unemployment benefit where an unemployed person moves to another member state for no more than three months as a registered jobseeker in order to look for work. Article 71(1)

constitute an obstacle to such interpretation, see Nils Fenger, Limits to dynamic homogeneity between EC law and EEA law, *Festschrift til Claus Gulmann*, page 131-155

⁶⁹¹ Case E-3/12 *Staten v/Arbejdsdepartementet v Stig Arne Jonsson* [2013] EFTA Ct. Rep. 136. See also the factual material relied upon by the CJEU in the *De Cuyper case*

⁶⁹² Opinion of Advocate General, Case C- 406/04 para 59

provides for entitlement to unemployment benefit for unemployed persons who, during their last employment, resided in a member state other than the state in which they are insured for social security purposes. Mr Jonsson's case relates to the interpretation of this last article.

Article 71(1) must be interpreted and understood in its entirety. The objective of the article in line with the general objective of the regulation is to prevent the *simultaneous* application of a number of national legislative systems and the complications that might ensue. Furthermore, the objective is to ensure that the persons covered are not left *without* social security cover because there is no legislation that is applicable to them.

Article 71(1) distinguishes between frontier workers (governed by a) and non-frontier workers (governed by b). Furthermore, in each category, there is a distinction between the partially and the wholly unemployed. The wholly unemployed genuine frontier worker does not have any choice under the system of *litra* (a): he is subject to the state of residence. This is the case even if the frontier worker only fulfils the conditions for unemployment benefits in the state of last employment or would have received considerably higher benefits if subject to the employment state. Genuine frontier workers may only exceptionally, based on case law, remain under the jurisdiction of the state of last employment if they are atypical or 'false' genuine frontier workers.

According to Article 71(1)(b)(i) concerning a wholly unemployed worker other than a frontier worker (which is the category Mr Jonsson falls into), he/she is given a choice between being subject to the legislation of the state of last employment (the competent state) and the state of residence. The choice is made by the unemployed person based on where he/she makes himself/herself available for the employment service.⁶⁹³ A logical interpretation from the wording of the article is that by returning to the territory of the residence state, the unemployed has chosen this country for the unemployment benefit.

This was, however, not the way the regulation was interpreted by the EFTA Court. Before looking more closely into this decision by the EFTA Court, interesting observations can be made on the case law of the CJEU on the export of unemployment benefits and the right to move and reside freely as a Union citizen.

6.4.3 Case law from the CJEU on exporting unemployment benefits and Union citizenship

The CJEU has considered the limits of the obligation to export unemployment benefits in Regulation 1408/71 and the provisions on Union citizenship both in *De Cuyper*⁶⁹⁴ and in *Petersen*.⁶⁹⁵ The CJEU subjected the national residence requirement in the state of last employment to a proportionality test in both cases even though the national requirement was in compliance with the right to refuse export of such benefits in Regulation 1408/17.⁶⁹⁶

Mr De Cuyper was a Belgian national who had been employed in Belgium and was subsequently granted unemployment benefit. Some months later, he turned 50, at which age he was exempted from various national control procedures. He then moved to France. On becoming aware of De Cuyper's change of residence, the Belgian authority terminated his entitlement on the basis of the

⁶⁹³ This understanding is in line with the understanding expressed by the intervention of the EFTA Surveillance Authority of 16 August 2012 in the case, made public by decision 17 march 2014, see paras 23 and 24

⁶⁹⁴ C-406/04 *Gérald De Cuyper v Office national de l'emploi* [2006] ECR I-6947

⁶⁹⁵ Case C-228/07 *Jørn Petersen v Arbejdsmarktservice* [2008] ECR I-6989

⁶⁹⁶ Regulation 1408/71 Article 10. Articles 69 and 71 were not applicable in the cases

national requirement that he must be actually resident in Belgium. The case concerned whether the national requirement violated the right to move and reside freely as a Union citizen. The case was exceptional in the sense that it subjected a national rule compatible with provisions in the secondary legislation to a proportionality review.⁶⁹⁷ However, the CJEU was quite receptive to the motivation behind the national rule. In particular, the Court held that a residence clause reflected ‘the need to monitor the employment and family situation of unemployed persons’.⁶⁹⁸ The Court also accepted that the effectiveness of monitoring arrangements was dependent to a large extent on the fact that it was unexpected and carried out on the spot and, for that reason, accepted that less restrictive measures would mean that monitoring would be less effective.⁶⁹⁹ Close contact with the employment services is normally essential as part of a job-search and monitoring requirement.⁷⁰⁰

In *Petersen*, the Court reached the opposite conclusion, ruling that the national residence clause in Austria regarding payments of unemployment benefits was in violation of Article 39 EC (now Article 45 TFEU) of free movement of workers. Mr Petersen was a German national who had worked in Austria. The case concerned a benefit that was given based on a reduced capacity or incapacity to work in anticipation of an invalidity pension. A main question in the case was whether the benefit was an unemployment benefit or an invalidity benefit. Unemployment benefits are generally not subject to requirements of export by Regulation 1408/71, whereas invalidity benefits are. The Court concluded that the benefit was indeed an unemployment benefit.

An interesting aspect of the case is that the Court sees the worker as a category of Union citizen and applies case law relevant for the interpretation of the legal question without distinguishing between case law regarding economically and non-economically active citizens. There are numerous examples of this in the case law.⁷⁰¹ In addition, the opinion of the advocate general in the case makes it clear that EU law is moving in the direction of not differentiating between the scope of the articles on citizenship and the articles on freedom of movement of workers. It follows from paragraph 23 of the opinion that ‘[t]he Court is advancing steadily towards achieving a uniform level of protection in the field of the free movement of persons, using the provisions on citizenship as a helpful tool’. The Court refers to this paragraph of the opinion in paragraph 23 of the judgment. The Advocate General’s conclusion is that ‘[a]ccordingly, in the light of Articles 39 EC and 18 EC, a measure such as the one at issue, which provides for different treatment based on the place of residence of the recipient of a social security benefit, is incompatible with Community law’.⁷⁰² Thus, no distinction is made between these two legal bases in the treaty. Consequently, it follows from the general right to free movement and residence regardless of economic activity that national residence requirements prohibiting export will undergo a proportionality scrutiny by the Court increasingly amounting to the same test.

⁶⁹⁷ See the comparison with *Tas Hagen*, Case C-192/05 [2006] ECR I-10451 by M. Cousins, (2007) Citizenship, residence and social security, *European Law review*, 2007, 32(3), 386-395

⁶⁹⁸ Case C-406/04 [2006] ECR I-10451 para 41

⁶⁹⁹ The outcome of the case has been characterised as slightly surprising (compared to other cases on export of benefits and Union Citizenship like the *Tas-Hagen* Case C-192/05) given that a core social security benefit which is subject for co-ordination and (albeit limited) export was unaffected by the concept of Union citizenship, see page 393 Cousins

⁷⁰⁰ In the *De Cuyper* case many of the normal components of the ‘unemployment’ benefit payable had been removed because of the choice of the Belgian legislature to exempt unemployed above a certain age from the requirements of being available for work and actually look for work.

⁷⁰¹ See paras 38, 39 (*De Cuyper*), para 42 (C-135/99 *Elsen* [2000] ECR I-10409), para 45 (*Trojani*), para 48 (C-413/01 *Ninni-Orasche* [2003] ECR I-13187, *Collins*), para 49 (C-57/96 *Meints* 1997 I-06689) and para 53 (*Hartmann*)

⁷⁰² The opinion para 77

Furthermore, in *Petersen*, the proportionality test seems to have been applied quite strictly, for instance by denying that protecting the integrity of the national boundaries of social security systems is an important concern. The Court argues that given that the Austrian Government was ready to accept Mr Petersen as eligible had he remained in Austria, the Government has thus demonstrated the economic capacity to bear the burden of the benefit.⁷⁰³ It is difficult to see in which individual cases the state can demonstrate that it does not have the economic capacity to bear the burden of the one individual receiving support.

Unlike the advocate general, the Court did not refer to Article 18 EC in its conclusion. The Court nevertheless adopted the same approach as the advocate general and also protected movement of Union citizens in the case of a non-economic actor as Mr Petersen was at the time.

6.4.4 *The facts of the Jonsson case*

The case concerned a Swedish national living in Sweden who frequently (starting from 1983) worked in Norway. His last job before becoming unemployed in 2008 was in Norway. Mr Jonsson returned to his home in Sweden after becoming unemployed. Mr Jonsson applied for and received an unemployment benefit from Sweden subsequent to Norway's rejection of his claim. The claim was rejected in Norway on the grounds that Mr Jonsson did not reside there and therefore failed to meet the conditions for entitlement to unemployment benefit. The requirement of residence in Norway is also related to the requirement of being a genuine jobseeker available for work, which requires that the individual in question must register with and report regularly to the Norwegian Labour and Welfare Administration.⁷⁰⁴ The question in the case was the compatibility with EEA law of the requirement of residence in Norway to be eligible for an unemployment benefit.

6.4.5 *National law*

The general requirement of actual stay in Norway applies equally to both Norwegian and foreign nationals. It simply means that unemployment benefits are only awarded for the periods in which the unemployed person is actually present in Norway. A Norwegian worker is not entitled to receive unemployment benefits while abroad, whether on holiday or for other reasons. Such information must be given in detail every 14 days on the employment status form. There are certain exemptions from the residence requirement enshrined in the regulation regarding frontier workers and non-genuine frontier workers who become fully unemployed and can choose between registering as unemployed in the competent state or in the resident state. The exemptions represent groups that could easily have been excluded from the right to unemployment benefit in both of the states involved. This applies, for example, to daily commuters who work in Norway but live in another country. If such daily commuters become partially unemployed, they must pursuant to Regulation 1408/71 Article 71(1)(a)(i) apply for benefits in Norway. However, they often have no place to live/stay in Norway, and a requirement for stay in Norway is therefore not applied in relation to this group. These considerations did not apply in the situation of Mr Jonsson. They demonstrate clearly, however, that the national regulation takes account of the special situation of certain categories of migrant workers.

The requirement of actual stay in Norway is substantiated for several reasons. First, it establishes a connection between the state in which the right to unemployment benefits is acquired and the obligation to pay these benefits. The benefits are calculated on the basis of previous income, usually

⁷⁰³ See the judgment para 59

⁷⁰⁴ National Insurance Act of 28 February 1997 nr. 19 section 4-2 and 4-5

in Norway, and the level of compensation of previous income is based on the premise that the unemployed person is actually living in Norway.

Norway has a substantially higher wage level than most other EEA states and also a higher rate of compensation than most states. The calculation of unemployment benefits should seek to balance two interests in particular: that of ensuring a reasonable income for the unemployed but at the same time that of providing sufficient incentives for him or her to resume work as soon as possible. If the unemployed person lives in a state with a substantially lower cost level than Norway, this balance will be disturbed. In addition, there will be a disturbance of competition on the job market in the state of residence.

It was precisely these national concerns that the CJEU accepted when it accepted the denial of export of an unemployment benefit in the *De Cuyper* case. The administrative concerns were less visible in that case given that the applicant was receiving an unemployment benefit but, as a result of his age, was exempted from the requirement of being available for a new job. However, there were administrative concerns regarding monitoring his family situation and whether he had actually taken up a new job. In fact, the advocate general and the CJEU relied precisely on the general interest of the state and of the job market in general when they accepted denial of export. In *Petersen*, however, the CJEU relied heavily on the right to free movement in its assessment of the national residence requirement.

In the *Jonsson* case, the obligation to live or be present in Norway relates strongly to other conditions for unemployment benefits. The unemployed must actively search for employment, and several of the requirements are more easily complied with if the person stays in the country. The jobseeker must, in other words, be a 'genuine jobseeker' with a duty to report and appear in person.

The control of unemployment benefits is primarily based on controlling different registers to which the Norwegian Labour and Welfare Administration has access. A comparable control is not possible for persons living abroad. The control unit does not have the competence to access foreign registers. There are no international agreements on the control of unemployment benefits.

6.4.6 *The EFTA Court decision*

The EFTA Court decided that the national requirement of stay in Norway for entitlement to an unemployment benefit for a person in Mr Jonsson's situation violated EEA law. By this decision, the EFTA Court seemed to disregard the regulation's main concern, namely that of guaranteeing the migrant worker an unemployment benefit. It is difficult to see how the free movement of workers is facilitated in any way by the worker being able to select this favourable position vis a vis other national unemployed workers. The rationale behind the Court's interpretation does not accommodate the migrant worker's special situation but seems to privilege him contrary to the objectives of the regulation. This kind of privileging of moving individuals coincides with the emphasis on free movement rights under the citizenship provisions. As demonstrated, the CJEU is not concerned with the possibility of creating reverse discrimination under its citizenship jurisprudence. Rather, the moving individual is considered to be in a somewhat privileged position. The EFTA Court has also demonstrated that it does indeed include a principle of solidarity in the EEA Agreement.

6.5 **Exporting child benefits, Case E-6/12**

6.5.1 *Introduction*

This case will be analysed under two different approaches to CJEU case law. First, the case will be analysed against the backdrop of a case concerning the requirement stemming from citizenship of

exporting an incapacity benefit in youth.⁷⁰⁵ In this case, there is an interesting difference between the opinion of the Advocate General and that of the CJEU. The advocate general bases the opinion solely on the regulation and accepts that residence requirements can be a legitimate connecting factor to the national welfare system. The CJEU by contrast applies the provisions of Union citizenship and the proportionality review therein to require that national systems be open to other connecting factors. Thus, a residence requirement as a limit to national solidarity does not seem to be in conformity with the rights of Union citizens.

Second, the case will be analysed against the backdrop of the changed methodology stemming from the CJEU citizenship case law. The changed methodology is that national authorities are now required to consider the personal situation of the claimant so that even when the national rule in theory is compatible with EU law, its application to that particular claimant might be contrary to the requirements of proportionality.⁷⁰⁶ This personalised approach seems to have influenced the EFTA Court when it assessed the administrative practice in the child support case.

6.5.2 Case law from the CJEU on exporting youth benefits and Union citizenship

In *Stewart*,⁷⁰⁷ the CJEU adopted the logic from the *Petersen* case⁷⁰⁸ more explicitly and interpreted the right to export of benefits under Regulation 1408/71 in light of the right of movement of Union citizens without any previous or future economic activity being involved. The case concerned an incapacity benefit in youth limited by UK legislation to persons with ordinary residence, past and present, in Great Britain. The condition of residence, reinforced by a condition requiring actual presence, on which entitlement to the benefit was dependent, was in fact a substitution for the condition of having contributed to the general social welfare system.⁷⁰⁹

Ms Stewart was a British national with Down's syndrome who was born in November of 1989. In August 2000, she moved with her parents to Spain. She had been awarded a disability living allowance from the UK. Ms Stewart had never worked and probably would never be able to due to her disability. Ms Stewart's mother, on her daughter's behalf, made a claim for short-term incapacity benefit in youth for her daughter from her 16th birthday. The claim was refused by the Secretary of State for Work and Pensions on the grounds that Ms Stewart did not satisfy the condition of presence in Great Britain.

To understand the case, it is necessary to understand the residence condition required by national law. Often, conditions for entitlement to social benefits are based on some sort of contribution to the social security scheme. Generally, this requirement is considered to constitute an objective consideration of public interest, which is capable of justifying a restriction on the freedom of movement of persons. Conditions of residence are, however, generally held to be incompatible with the requirements of EU law when they apply as 'additional' or complementary conditions to this often-general condition for entitlement to social benefits. Residence conditions in these cases essentially serve to exclude beneficiaries exercising their right of freedom of movement.

⁷⁰⁵ Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* [2011] ECR I-6497

⁷⁰⁶ See Case C-140/12 *Brey*, see also the alleged modifications to this general rule in the recent case of *Dano* C-333/13

⁷⁰⁷ Case C-503/09 *Lucy Stewart v Secretary of State for Work and Pensions* [2011] ECR I-6497

⁷⁰⁸ Case C-228/07 *Jørn Petersen v Arbejdsmarktservice* [2008], ECR I-6989

⁷⁰⁹ The opinion of the Advocate General is built on this understanding of the UK system, see opinion of the Advocate General in Case C-503/71, especially paras 8-18 on national law, see also para 64

However, the residence condition in the *Stewart* case arose in a different context as a condition of entitlement to short-term incapacity benefit in youth that, in the interests of beneficiaries, replaced the ordinary condition of contribution. To this end, the condition reflected the extent of the national solidarity involved.

In this connection, the Advocate General refers to the Court's case law that has repeatedly held that the member states retain their powers to organise their social security systems provided that they comply with EU law when exercising those powers.⁷¹⁰ This retention of powers means that it is for the member states to define both the extent of their social security systems and the conditions of entitlement to social benefits paid out under them provided that such conditions comply with EU law and, most importantly, provided that they are not discriminatory. It is for the member states alone to define their degree of national solidarity and the conditions under which it is to be given expression. In paragraph 54, the advocate general further refers to the fact that Regulation 1408/71 only pursues the objective of coordinating the social security laws of the member states, not their harmonisation.

The Advocate General then advises the national court to examine the present condition of residence to which entitlement to short-term incapacity benefit in youth is subject, in that it replaces the ordinary condition of contribution and fulfils, consequently, the function of connection usually placed on that condition.

The CJEU takes a different approach. First, it does not accept the UK Government's first line of arguments, namely that the regulation permits a distinction to be drawn between the acquisition of a benefit, on the one hand, and its retention, once acquired, on the other. In a broad interpretation of the purpose of Article 10 of Regulation 1408/71 as protecting persons from any adverse effects that might arise from the transfer of their residence from one member state to another, the Court stated the following:

It follows from that principle not only that the person concerned retains the right to receive benefits referred to in that provision acquired under the legislation of one or more Member States even after taking up residence in another Member State, but also that the acquisition of such entitlement may not be refused on the sole ground that he or she does not reside in the Member State in which the institution responsible for payment is situated.⁷¹¹

Through this statement, the Court made it clear that the state of origin retains its social responsibility even after a claimant has settled in another member state. In this regard, it may be observed that the regulation does not harmonise social welfare benefits and may therefore allow the claimant to receive benefits both from the new state of residence and from the home state.

Even though the national court did not ask for guidance regarding the consequences of citizenship of the Union in order to resolve the case, the CJEU bases all its following reasoning in paragraphs 77–89 on this line of case law. This is particularly striking, because there are no references to Union citizenship in the opinion of the advocate general. The status of citizens of the Union is repeated by the Court to be the fundamental status of nationals of the member states.⁷¹² Referring to cases like *D'Hoop*⁷¹³ and *Pusa*,⁷¹⁴ the Court finds that it would be incompatible with the right to freedom of

⁷¹⁰ Opinion of the Advocate General para 53

⁷¹¹ See the judgment para 61

⁷¹² Judgment para 80

⁷¹³ Case C-224/98 *D'Hoop* [2002] ECR I-06191

⁷¹⁴ Case C-224/02 *Pusa* [2004] ECR I-5763

movement were citizens to receive, in the member state of which they are nationals, treatment less favourable than that which they would enjoy if they had not availed themselves of the opportunities offered by the treaty in relation to freedom of movement. The national requirement is then held by the Court not to satisfy the proportionality test.⁷¹⁵

The motivation inherent in national law of limiting the boundaries of its solidarity system replacing the requirement of contribution with a requirement of past and present residence in the UK, consequently, does not resonate in the Court. Instead, the Court substitutes the national limit of who is entitled to the benefit with its own criteria. The person's connection to the society can be fulfilled by any number of factors.

This line of thinking does not correspond well with the fact that contribution is one factor that is also recognised in Regulation 1408/71. In fact, Regulation 1408/71 does not absolutely prohibit residence from constituting, under certain conditions, a criterion of connection to the social welfare system of a member state in the same way as might a period of employment. This is demonstrated, in particular, by Article 18 of the regulation, which contemplates the possibility of national legislatures making 'the acquisition, retention or recovery of the right to benefits conditional upon the completion of periods of insurance, employment or residence'.

The Court, despite in principle recognising the right to require a connection, sets the threshold so low that the national choices are not respected and the national system has to be moderated in a way that significantly expands the boundaries of solidarity.

In essence, the opinion of the Advocate General exclusively based on the regulation seems to give a wider margin of discretion to the member states' organisation of their social welfare system, leaving the door open for residence requirements as a legal connecting factor to the national systems provided that the residence requirement is not an additional requirement that only works to exclude possible beneficiaries who would otherwise comply with the conditions and be eligible for the benefit in question. However, the CJEU reasoning based on the provisions on Union citizenship seems to deny the possibility of 'residence-like requirements' because the connecting factor to the national welfare system can always be fulfilled with less restrictive means and thereby respect the right to free movement and residence. The proportionality assessment appears to require that connecting factors in national law do not unconditionally require residence. This backdrop may explain the conclusion of the EFTA Court in the case on child support.

6.5.3 *The facts of the child support case*

In the child support case, the EFTA Court allegedly interpreted rights of migrant workers to national welfare benefits in the host state, but in reality, it applied EEA law to broaden the scope of rights holders beyond those who satisfy the national condition of eligibility arguably beyond the broadening of the scope required by EEA law in relation to national residence requirements.⁷¹⁶

The case, which concerned the Norwegian administrative practice for entitlement to child support, was initiated by two unresolved cases. These cases were recorded in the SOLVIT database, an online problem-solving network in which EEA states work together to solve problems caused in the application of internal market law by public authorities. The two cases concerned a Lithuanian and a Slovakian mother working and residing with their children in Lithuania and in Slovakia,

⁷¹⁵ See the judgment paras 87-110

⁷¹⁶ Case E-6/12 *Child support* [2013] EFTA Ct. Rep. 618

respectively. In both cases, the parents of the child were separated, and the fathers were residing and working in Norway. The mothers were entitled to child support in their respective state of residence, and the cases only involved a so-called topping-up of the first benefit. The Norwegian administrative practice in question concerned the lack of evaluation of whether a child living together with another parent outside Norway was mainly dependent on the parent who is living in Norway and separated from the other parent.

6.5.4 *The legal question in the case – National law and EEA law*

In Norway, the public contribution of a child benefit is paid to the parent with whom the child lives. According to national law, the benefit is a right for the parent and not for the child. The beneficiary is thus the parent. In a situation where the parents are married, the parents can decide to whom this support is paid. In the case where the parents are divorced, the benefit is paid to the parent with whom the child lives if this person is eligible for the benefit. The parent who does not live with the child has no right to the child benefit regardless of this parent's general rights and obligations as a parent. This means that under national law, the parent (in the two cases above, the mother) must have a sufficient link to the Norwegian welfare system that entitles this person to be a beneficiary and thus eligible for payments.

There is an absolute condition for payment that the child lives with the parent who qualifies for the benefit. In addition, there is a geographical requirement that the child lives with the parent in Norway. For the understanding of the case, it is fundamental to keep these two conditions apart and evaluate them separately.

The second condition of geographical residence in Norway for the right to payment of social security benefits stems from the obvious need to limit rights to benefits to persons who are members of the Norwegian welfare system. The social security system is national in the absence of a harmonised European social security system. Consequently, in every system, a link is required between the beneficiary and the national system responsible for the support. As will be demonstrated shortly, the geographical requirement is, however, modified to accommodate the situation of a migrant worker. The national requirement to have one's habitual abode with the child in the home state was the subject of the case.

It is the national system that must determine the scope, content and conditions for eligibility of rights. The EFTA Court recognised this in paragraph 72 through stating that 'the EEA States must nevertheless comply with EEA law when exercising that power'.

The harmonised regulation in this area is in principle related to workers, and its object or aim is to ensure adequate coverage in a cross-border situation. The idea is that exercising your cross-border rights should neither increase nor decrease your eligibility for social security payments. The regulation provides for a system of coordination of social security legislation, and it is intended to ensure equal treatment under the various national legislations. The overall goal is to prevent migrant workers from being deterred from exercising their right to freedom of movement under the EEA Agreement.

In the case of the child support benefit, in Norway, the adaptation to the harmonised legislation has caused some changes in the geographical residence requirement. It is important to note, however, that the change concerns the conditions of the parent living with the child in Norway (the second condition) but not a change in terms of the condition whereby only the parent with whom the child lives has the right to general child support (the first condition). In the situation where one of the parents is a worker and employed in Norway and has his or her habitual abode in the country where

the other parent lives with the child, the family will be eligible for the benefit. This modification ensures that a cross-border situation is not deterred. Thus, a worker who has exercised his or her right to take up employment in another EEA country will have rights equal to those of other workers in the country of employment who have not exercised this right. In other words, the requirement of geographical residence with the child in Norway does not apply in a cross-border situation.

In terms of the examples above where the wife and child lived in Lithuania and Slovakia, respectively, the child support was paid to the fathers working in Norway so long as their habitual abode was with the rest of the family when in Lithuania and Slovakia, respectively. When the parents divorced, custody of the child was given to the mother, and the father no longer lived with the child. Consequently, the father no longer had the right to child support under the Norwegian welfare system. This was a consequence not of any cross-border event but simply of the change in the family situation.

It should be noted that this condition applies equally to national workers. Thus, both national and migrant workers will lose their right to a child benefit if they no longer live with their child.

The main objective of the regulation is to ensure equal treatment. Equal treatment may require modifications in national laws in order to avoid national conditions that may deter free movement of workers. It is generally held that free movement of workers requires payment of the same benefits irrespective of the cross-border element in the particular situation. Cross-border workers cannot be put at a disadvantage compared to a national worker. Therefore, the substantive question was whether the Norwegian administrative practice deterred workers in a cross-border situation.

Comparing the situation of the migrant worker with the situation of a national worker demonstrates that there is no disadvantage to the former category. In the same situation, the national worker who does not live with the child will also be denied the right to child support. Consequently, there was no real argument in the case related to the national practice having the effect of deterring free movement as a consequence of discriminatory treatment. The question is rather whether the other parent has a sufficient link to the Norwegian welfare system that makes this person eligible for benefits. In the two cases from Lithuania and Slovakia, the mothers had no connection to the Norwegian welfare system and were therefore denied the benefit.

6.5.5 *The decision of the EFTA Court*

The EFTA Court did not approach the case based on an evaluation of whether the parent who was refused the right to the welfare benefit had a sufficient link to the national social welfare system.

In reality, however, the Court extended the *ratione persona* of the regulation and disregarded the structure of eligibility to benefits stemming from national law.

An argument being put forward in the case was that in a purely internal situation, the other parent would normally be eligible for the child support, because this parent would often be residing in Norway. The argument is not especially persuasive given that there is a relevant factual difference between the two situations. Discrimination does not occur when different situations are treated differently. In relation to the entitlement to national welfare benefits, distinguishing between mothers living in Norway and mothers living outside of Norway seems highly relevant. The most relevant comparator to the mothers living with their child in Lithuania and Slovakia, respectively, and receiving the national child support in these states would be the next-door mothers also living with their child in these states. An underlying justification for the right to a welfare benefit of child support is the cost of raising a child. Residing with your child in Norway entails a completely

different level of costs than residing in either Lithuania or Slovakia. As long as the welfare states are still national in nature, residing inside or outside the state is a legitimate distinguishing factor given the need for each state to establish the criteria for membership of and exclusion from its welfare society. Thus, the comparison with a divorced mother living in Norway is neither convincing nor legally accurate.

This line of reasoning also seems to resonate with the opinion of the advocate general in the *Stewart* case.⁷¹⁷ The national condition was not working to the detriment of the migrant worker compared with the national worker. In other words, it was not a traditional residence requirement that would exclude beneficiaries solely because they have exercised their right to move. On the contrary, the national system waived the residence condition for migrant workers who habitually lived with the child when in the home state. It will be recalled that the advocate general interpreted the regulation in such a way as to keep the door open for such limitations to the national solidarity, whereas the Court, which based its decision on Union citizenship provisions, did not accept this as a connecting factor, requiring other possible connecting factors under the proportionality test.

The EFTA Court based its decision on an interpretation of Article 1(f)(i) of the regulation in combination with Article 73. Article 1(f)(i) lays down the basic requirement for the definition of family members. The purpose of the article is to ensure that a national residence requirement does not deprive a worker in a cross-border situation of the same child benefits as a national worker. To this end, the provision requires that when national legislation regards as a 'member of the family' only a person living under the same roof as the employed person (requiring, for example, regular residence with the child), this condition shall be considered satisfied if the person in question is mainly dependent on that person. The objective is to modify national residence requirements that deter free movement of workers. The Court makes a reference to *Slanina* when interpreting this provision.⁷¹⁸

The *Slanina* case concerned a different factual and legal situation from the Norwegian administrative practice concerning child support. Ms Slanina was a divorced Austrian national who had always been the parent having the right to the child benefit. The question in this case was whether her decision to transfer her residence to another member state (Greece) was a sufficient reason for denying her continued support. It was, in other words, a classical free movement question, namely whether the fact that a person exercises his or her right to move to another member state means that the state of origin can deny child benefits justified by the lack of fulfilment of the condition that the child's centre of interest and permanent residence must be in Austria. This differs from the child support case, in which the mothers had never been considered eligible for the support. Thus, the case was not about a transfer of geographical residence leading to the denial of the welfare benefit.

The objective of Article 1(f)(i) of the regulation is to ensure the proper application of a residence requirement in a cross-border situation. Thus, the aim is to make sure that a condition of residence in Norway does not put a migrant worker at a disadvantage compared to fellow workers. The application of the residence requirement in a cross-border situation is ensured by the administrative practice of regular abode as described above.

⁷¹⁷ Case C-503/07

⁷¹⁸ Case C-363/08 *Slanina* ECR [2009] I-11111

The other condition for being eligible for child support in the national legislation—namely the right only for the parent who lives with the child to receive child support—has no cross-border implications. Not being able to claim a benefit that fellow workers cannot claim can hardly disadvantage the migrant worker or deter free movement.

This understanding in national law does not mean, however, that Article 1(f)(i) is not applied in Norway, which seemed to be the argument of the EFTA Court. The child falls within the scope of being a family member of the migrant worker. Being a family member is, however, not the only national condition. In order to be eligible for the child benefit, the parent has to live with the child either in Norway or in the home country of the migrant worker. This requirement is independent from the rights and obligations the parent has towards his/her child both for national and for migrant workers. By not respecting this national condition for the eligibility of a right to child support, the EFTA Court effectively broadened EEA law to encompass rights holders who were not eligible for the benefit in the national system in question. Thus, the limits of the national solidarity were not respected. Furthermore, the case is an interesting example of how the EFTA Court is influenced by the changed methodology stemming largely from CJEU citizenship cases. This changed methodology will be the subject of the next section.

6.5.6 *Union citizenship changing the methodology of the CJEU's scrutiny of national measures*

The case law of the CJEU on Union citizenship indicates that at a national level it is no longer possible to adopt blanket rules in relation to citizens.⁷¹⁹ Rather, the personal circumstances of the claimant might be relevant in determining the rights. Thus, the national authorities must take into consideration the personal situation of the claimant so that even when the national rule in theory is compatible with EU law, its application to that particular claimant might be contrary to the requirements of proportionality. This *ad hoc* proportionality assessment required by the CJEU concerning the migrant transforms the legislative act of general application into a 'quasi-administrative act' where the authorities always have to exercise discretion in applying the black letter of the law to Union citizens.⁷²⁰

This changed methodology occurred first in healthcare cases. These cases concerned mainly the interaction of secondary legislation with the free movement of services. Since Article 56 TFEU is paralleled by Article 36 EEA, these cases are within areas of legislative homogeneity between the EU and the EEA.⁷²¹ The question in the initial cases was whether national measures that correctly implemented Article 22 of Regulation 1408/71 were consistent with the free movement of services.⁷²² Thus, the homogeneous application of the methodology may be anchored in this early case law. However, the citizenship case law has given this novel interpretative technique significant constitutional implications.⁷²³ The principle of proportionality is applied to secondary legislation not to assess the legislation's compatibility with the treaty, nor as an interpretative aid, but rather to potentially displace the clear wording of the secondary legislation.

⁷¹⁹ Spaventa, E. (2010) The Constitutional impact of Union citizenship in Neergaard, U. Nielsen, R and Roseberry, L. (eds) *The Role of Courts in developing a European social model – Theoretical and Methodological Perspectives*, p 144

⁷²⁰ E. Spaventa, (2008), *Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects*, CMLR 45:13-45, on page 41, 2008

⁷²¹ This was also recognised by the EFTA Court in Cases E-11/07 and E-1/08, *Olga Rindal and Therese Slinning v Staten v/Dispensasjons - og klagenemnda for bidrag til behandling i utlandet* [2008] EFTA Ct. Rep. 320

⁷²² See Case-C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473 and Case C-385/99 *Muller Faure and van Riet* [2003] ECR I-4509

⁷²³ M. Dougan, (2006), *The Constitutional Dimension to the case law on Union citizenship*, 31 EL Rev. (2006), 613

The case law on citizenship is characterised by attention towards the individual and towards the individual's particular circumstances. There has been a move away from assessing the national legislation in the abstract; in other words, rather than assessing whether it complies with secondary EU law in general, the concrete facts of the specific case are examined more carefully to determine whether the application of the national law in the case is proportional. The proportionality assessment shifts from the traditional abstract assessment (i.e. the legislation is proportionate or is not proportionate) to a concrete assessment (the legislation applied in this way to this claimant is proportionate or not proportionate). As a result, the application of a piece of domestic legislation might be incompatible with EU law in the case at issue and yet be compatible with EU law in a situation where the circumstances are different.^{724,725}

This renewed attention to the individual is the result of an interpretative technique most clearly demonstrated in the case of *Baumbast*.⁷²⁶ The national rules at issue in *Baumbast* implemented correctly the conditions of sufficient resources and comprehensive health insurance as prescribed and defined by Directive 90/364. Said directive was compatible with the treaty, and the case did not concern the exercise of discretion by the member state. The effect of Union citizenship was nevertheless to impose a proportionality assessment of otherwise compatible national requirements. This obliged the authorities to take into account the personal circumstances of the claimants and led to the need to disapply the relevant provisions of national law in relation to those claimants in certain circumstances. It is this 'personalised' assessment of proportionality that brings about a qualitative change in the expansion of judicial review of national rules.⁷²⁷ Needless to point out, this revised methodology further limits the member states' freedom to legislate and introduces additional requirements for the national legislation to be compatible with EU law.

The *Baumbast* case concerns host state requirements. The same approach—namely, the requirement that member states avoid imposing blanket rules in situations concerning Union citizens—can be found in cases concerning home state requirements. In *De Cuyper*,⁷²⁸ the CJEU clarified that even when a prohibition on the exportation of a benefit is consistent with Regulation 1408/71, the member state must still justify why it is imposing a residence requirement on a claimant. This case law was revisited in the literature after Case C-158/07 *Förster*⁷²⁹ where the CJEU allegedly accepted the political compromise in the Citizenship Directive (2004/38) by not requiring a concrete factual assessment.⁷³⁰ Later case law like the *Vatsouras* case⁷³¹ seems, however, to confirm the *Baumbast* line of case law, giving real effect to the treaty provisions and the right to move and reside freely conferred by the citizenship provisions.

⁷²⁴ E. Spaventa, [2008] Seeing the wood despite the trees? On the scope of union citizenship and its constitutional effects, CMLR 45:13-45, on page 42, 2008

⁷²⁵ This move from abstract to concrete proportionality is not unique to the Union citizenship case law. In the case of *Carpenter* (Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279) the issue related to the residence right of a third country spouse in the UK. The Court confines its ruling to the particular facts of the case so that the UK legislation is not declared incompatible with EU law as such. The case concerns fundamental rights as enshrined in the Charter of Fundamental Rights. Also in this substantive field there is a lack of legislative homogeneity since the Charter is not part of the EEA Agreement

⁷²⁶ Case C-413/99 *Baumbast and R v Secretary of State for the Home department* [2002] ECR I-7091

⁷²⁷ Spaventa, E. (2010) The Constitutional impact of Union citizenship in Neergaard, U. Nielsen, R and Roseberry, L. (eds) *The Role of Courts in developing a European social model – Theoretical and Methodological Perspectives*

⁷²⁸ Case C-406/04 *De Cuyper* [2006] ECR I-6947

⁷²⁹ Case C-158/07 *Förster* [2008] ECR I-8507; Spaventa, E. (2010) *The Constitutional impact of Union citizenship* in Neergaard, U. Nielsen, R and Roseberry, L. (eds) *The Role of Courts in developing a European social model – Theoretical and Methodological Perspectives*, p 158-165

⁷³⁰ Spaventa, Eleanor [2010] *The Constitutional impact of Union Citizenship*, complete the reference

⁷³¹ Cases C-22/08 and 23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585

In the child support case, the EFTA Court had to decide whether an administrative practice of always denying the right to export child benefits in situations where the migrant worker divorced the parent living with the child was compatible with EEA law. In theory, the national rule or the general practice did not violate any provisions of Regulation 1408/71.

The administrative practice did not, however, comply with EEA law according to the EFTA Court largely based on its failure to take into account individual circumstances on the part of the claimant. This line of thinking in the decision fits well with the described requirements of member states imposed by the CJEU in its case law on citizenship rights. The national legislation with the administrative practice failed to consider the individuals in each case and excluded from the right to child benefit those claimants who after divorce no longer lived with the child. The EFTA Court's refusal to accept this national administrative practice and its requirement that the Norwegian administrative authority take individuals into consideration provides another example of a citizenship-friendly reading of the EEA Agreement and paralleling EEA law with developments of EU law.

6.6 Summary

The EFTA Court has interpreted the coordination regime for social security on several occasions. The cases analysed in more detail here reveal a tendency to reach an interpretative outcome in each case to ensure free movement rights beyond economically active citizens. This finding from the case law on the coordination regime supports the claim that the EFTA Court ensures above all a parallel development of EEA law with the corresponding EU law including the same right to free movement for non-economically active persons.

7 Concluding observations

This section of the study has discussed the case law from the EEA Courts with a view to explore the possibility of 'more room for manoeuvre' for Norway as an EFTA state in the context of the Citizens Directive. The question initially asked by the UDI concerned possible consequences of the EEA Agreement lacking the Union citizenship provisions as enshrined in Articles 20–25 TFEU. The starting point for the analysis was decision No 158/2007 by the EEA Committee regarding the incorporation of the Citizens Directive in the EEA Agreement and in particular the Joint Declaration stating essentially that Union citizenship and immigration law are not part of the EEA Agreement.

The study is commissioned by the UDI with the objective of assisting the administrative authority in its daily application of immigration law. The starting point for the analysis of the position under EEA law therefore relates to the UDI's position of being an administrative subordinate organ obliged to apply national immigration law in Norway in full compliance with Norway's obligations under the EEA Agreement. The EFTA Court is the authoritative institution on the interpretation of EFTA states' obligations under EEA law.⁷³² Absent a contrary opinion from the CJEU on the state of EEA law, the administrative bodies must comply with the current state of the law as interpreted by the EFTA Court. Given the pending or soon-to-be-pending cases as well as the possibility of the CJEU being confronted with a case similar to Case E-26/13 *Gunnarsson*, the state of the law as interpreted by the EFTA Court may change in the near future. The conclusion in this report is nevertheless based on an interpretation of the law as it stands at the cut-off date. Based on the law as it stands, our analysis is the following.

⁷³² Only exceptionally will national courts refrain from accepting this authority of the EFTA Court, see the discussion centered around the Supreme Court of Norway's decision in the *STX* case, HR-2013-00496-A

The material is limited but based on the existing decisions from the EEA Courts the right to move and reside freely for Union citizens as provided in EU law is paralleled in the EEA Agreement for EEA nationals. This includes rights to free movement, residence and equal treatment. This right to freedom of movement includes not only the explicit rights laid down by the directive regarding rights against the home state (such as avoiding exit barriers and the obligation to issue the necessary identity cards in Chapter II) but also the right for the moving individual not to meet certain obstacles to movement from the home state in parallel with the rights for Union citizens in the EU legal order. In essence, it has not been possible to identify in existing case law grounds for more ‘room for manoeuvre’ regarding the interpretation and application of the Citizens Directive as incorporated in the EEA Agreement. On the contrary, there is support for an interpretation of the directive that ensures the same right of freedom of movement for EU member state and EFTA state nationals under the EEA Agreement as for Union citizens in the territory of the EU. Rights for Union citizens going beyond free movement rights are not part of the EEA Agreement.⁷³³ To this end, there is no support in the case law from the Courts to interpret the Joint Declaration to mean that there is ‘more room for manoeuvre’ for EFTA states under the Citizens Directive as part of EEA law even if EEA law does not include the treaty provisions on Union citizenship or on immigration policy.

⁷³³ Confer Part III of the Report for the discussion and delimitation of Union citizenship rights in an EEA context

Part IV: Norwegian immigration law relating to nationals of EEA/EFTA states

1 Introduction

1.1 Aim of this chapter

The aim of the following part of the study is to provide a review of the national implementing legislation, including administrative practices and national case law relating to the Citizens Directive.

There is little Norwegian literature on the specific subject of the Citizens Directive. The most comprehensive account is found in Vevstad's commentary to the Norwegian Immigration Act⁷³⁴, which in the following is consulted where appropriate.

Particular issues that may arise under national law are identified, taking into account questions that have been raised by the EFTA Surveillance Authority.

1.2 General public attitude towards immigration and free movement

A survey conducted by Statistics Norway in 2014⁷³⁵ indicates an overall more positive attitude towards immigration in Norway than in previous years. The Norwegian population to a large extent seems to recognise the contribution of immigrants to the labour market. The survey shows that 77 per cent agree strongly or on the whole that 'most immigrants make an important contribution to Norwegian working life', and 70 per cent agree that 'Labour immigration from non-Nordic countries makes a mainly positive contribution to the Norwegian economy'. The survey also shows that 29 per cent agree that 'immigrants abuse the social welfare system', which means a fall of 3 percentage points compared with the previous year. Regarding immigrants' impact on security, 60 per cent rejected the statement 'Most immigrants represent a source of insecurity in society', which means an increase of 8 per cent compared with 2013.

2 Implementation of Directive 2004/38: General assessment

2.1 National implementing legislation

In 2001, an expert commission was appointed to consider and prepare a proposal for a new Norwegian immigration act.⁷³⁶ The commission submitted its Official Norwegian Report (hereinafter 'NOU') on 19 October 2004 (NOU, 2004, p.20). At that time, Directive 2004/38/EC (hereinafter 'the directive') was still under consideration by the EEA Joint Committee. In its report, the expert commission noted that the expected outcome of the discussions in the Joint Committee was still

⁷³⁴ Vigdis Vevstad (2012), ed., Lov av 15. Mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (utlendingsloven), (Oslo: Universitetsforlaget), digital edition, commentary to chapter 13

⁷³⁵ Svein Blom (2014), Holdninger til innvandrere og innvandring 2014 (Oslo-Kongsvinger: Statistisk sentralbyrå) page 5. The survey is available at http://www.ssb.no/befolkning/artikler-og-publikasjoner/_attachment/208570?_ts=14a04ea4e40. Note that the survey does not distinguish between immigration from EEA states and immigration from other states

⁷³⁶ Royal decree of 14 December 2001

unclear.⁷³⁷ In particular, the commission pointed out that the directive is based on the EU rules on Union citizenship as introduced by the Treaty of Maastricht, which have no equivalent in the EEA Agreement. The decision of the Joint Committee therefore depended not only on purely legal assessments, but also on political considerations at the EEA level. Against this background, it was decided that the commission would base its proposal on the state of law still in force within the EEA and that necessary adjustments could be made at a later stage.⁷³⁸

The subsequent work relating to the new immigration legislation was therefore carried out in two separate stages. First, the new immigration act – the Act of 15 May 2008 No. 35 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm (hereinafter ‘Immigration Act 2008’, ‘Immigration Act’ or ‘IA’) – was adopted.⁷³⁹ However, the chapter concerning the nationals of EEA member states and the nationals of EFTA (Chapter 13) was left open.

After the approval of Decision No. 158/2007 by Parliament⁷⁴⁰, the implications of the directive were dealt with in a separate bill, namely Ot.prp. No. 72 (2007–2008). The bill was referred to the Parliament’s Standing Committee on Local Government and Public Administration, which submitted its recommendation in Innst. O. No. 33 (2008–2009). The final bill was approved on 9 January 2009 and incorporated into the Immigration Act, which entered into force on 1 January 2010⁷⁴¹.

Most of the material provisions of the directive have been transposed in Chapter 13 of the Immigration Act and Chapter 19 of the Immigration Regulation (hereinafter also ‘IR’)⁷⁴². The table of correspondence below was included in the preparatory works relating to the implementing legislation and shows the connection between the directive and the Immigration Act.⁷⁴³

Directive 2004/38/EC	Bill to implement Directive 2004/38/EC into Immigration Act 2008
Art. 1	§ 1 and Chapter 13, cf. §§ 112–116 and 120
Art. 2	§ 110 first and third paragraph
Art. 3	§ 110
Art. 4(1) and (2)	Immigration Act 2008 Chapter 2
Art. 4(3) and (4)	See Chapter 7.14.2 of the bill
Art. 5(1)–(3)	Immigration Act 2008 Chapter 2
Art. 5(4)	§ 121 fourth paragraph

⁷³⁷ NOU 2004: 20 section 7.7

⁷³⁸ NOU 2004: 20 section 4.5.3.2 and 7.7

⁷³⁹ Ot.prp. No. 75 (2006-2007), Innst. O. No. 42 (2007-2008) and Besl. O. No. 51 (2007-2008)

⁷⁴⁰ Norw.: ‘Storting’. See St.prp. No. 42 (2007-2008), Innst. S. No. 231 (2007-2008) and Resolution 490 of 23 May 2008

⁷⁴¹ Besl. O. No. 46 (2008-2009) Vedtak til lov om endringer i utlendingslovgivinga (reglar for EØS- og EFTA-borgarar o.a.). An English translation of the Immigration Act, updated as of 1 April 2014, is available at <https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/>

⁷⁴² Regulation of 15 October 2009 No. 1286 on the Entry of Foreign Nationals into the Kingdom of Norway and their Stay in the Realm. An English translation of the Immigration Regulation, updated as of 1 April 2014, is available at <https://www.regjeringen.no/globalassets/upload/jd/dokumenter/forskrifter/immigration-regulations.pdf>

⁷⁴³ Ot.prp. No. 72 (2007-2008) pages 50-51

Directive 2004/38/EC	Bill to implement Directive 2004/38/EC into Immigration Act 2008
Art. 5 (5)	§ 111 fourth paragraph
Art. 6(1) and (2)	§ 111 first and second paragraphs
Art. 7(1) a–c	§ 112 first paragraph, letter a–d
Art. 7(1) d	§ 113 first paragraph
Art. 7(2)	§ 114 first paragraph
Art. 7(3) a–d	§ 112 second paragraph, letters a–d
Art. 7(4) first sentence	§ 113 second paragraph
Art. 8(1) and (2) first and second sentence	§ 117 first paragraph
Art. 8(3)	§ 117 second paragraph, letters a–c
Art. 8(4)	§ 117 fourth paragraph, cf. § 112
Art. 8(5) a–d	§ 117 third paragraph, letters a–d, cf. § 113
Art. 9(1) and (2)	§ 118 first paragraph
Art. 10(1) first sentence	§ 118 first paragraph, first sentence and fourth paragraph
Art. 10(1) second sentence	§ 118 first paragraph, second sentence
Art. 10(2) a–d	§ 118 second paragraph, letters a–d
Art. 10(2) e–f	§ 118, cf. § 110 third and fifth paragraphs
Art. 11(1) and (2)	§ 118 fourth and fifth paragraphs
Art. 12(1) and (3)	§ 113 third paragraph
Art. 12(2) and (3)	§ 114 third paragraph
Art. 13(1)	§ 113 fourth paragraph
Art. 13(2)	§ 114 fourth paragraph
Art. 14(1)	§ 111 fourth paragraph
Art. 14(2)	§§ 112 and 117
Art. 14(3)	§ 122
Art. 14(4)	§ 122 and § 111 third paragraph
Art. 15	§§ 120–124
Art. 16(1)	§ 115 first paragraph
Art. 16(2)	§ 116 first paragraph
Art. 16(3)	§ 115 first and sixth paragraphs
Art. 16(4)	§ 115 first and sixth paragraphs
Art. 17(1)	§ 115 second paragraph

Directive 2004/38/EC	Bill to implement Directive 2004/38/EC into Immigration Act 2008
Art. 17(2)	§ 115 fifth paragraph and § 116 fifth paragraph
Art. 17(3)	§ 115 fourth paragraph and § 116 second paragraph
Art. 17(4)	§ 115 fifth paragraph and § 116 second paragraph
Art. 18	§ 116 first paragraph
Art. 19(1)	§ 119 first paragraph
Art. 19(2)	§ 119 fourth paragraph
Art. 20(1) and (2) first sentence	§ 119 second and fourth paragraphs
Art. 20(3)	§ 116 first paragraph
Art. 21	§ 119 fourth paragraph
Art. 22	§ 109 second and fifth paragraphs
Art. 23	§ 109 second paragraph
Art. 24(1) and (2)	See Sections 7.14.1 and 7.14.2 of the bill
Art. 25	§ 117 fourth paragraph, § 118 fifth paragraph
Art. 26	No proposition
Art. 27(1)	§§ 121, 122 and 123
Art. 27(2)	§ 122 first and fourth paragraphs
Art. 27(3)	§§ 117, 118, 120, 121, 122–124
Art. 27(4)	No proposition
Art. 28(1)	§ 122 fourth paragraph
Art. 28(2)	§ 122 second paragraph, letter a
Art. 28(3)	§ 122 second paragraph, letters b and c
Art. 29	§ 123
Art. 30	§§ 121, 122 and 123
Art. 31	§§ 120–124
Art. 32	§ 124
Art. 33	§§ 121–124
Art. 34	No proposition
Art. 35	§ 120
Art. 36	No proposition
Art. 37	§ 109 third paragraph
Art. 38-42	No proposition

2.2 Institutional context and complaint procedures

The main principles of Norwegian immigration regulation shall be approved by Parliament. Most importantly, the Parliament adopts the Immigration Act with its amendments.⁷⁴⁴

The responsibility for the implementation of the Immigration Act is divided between the Ministry of Justice and Public Security ('JD') and the Ministry of Labour and Social Affairs ('ASD'). JD has administrative responsibility for the provisions relating to expulsion, entry bans and rejection due to insufficient travel documents.⁷⁴⁵

UDI is the central administrative authority, subordinate to JD. The directorate implements and coordinates asylum and migration policies and makes the initial decision in most immigration cases, including cases that are regulated by Chapter 13 of the Immigration Act. UDI may be instructed by the relevant ministry on matters of interpretation and the exercise of discretion, but not in individual cases.⁷⁴⁶ UDI may in turn instruct the police and the Foreign Service missions in immigration matters.

Appeals against decisions made by UDI are addressed to UDI itself. The directorate may then either reverse its initial decision or forward the case to the Immigration Appeals Board (UNE). UNE is a quasi-judicial administrative body under the administrative authority of JD. UNE cannot be instructed by a ministry with regard to the interpretation of law, the exercise of discretion or decisions in individual cases. However, JD may decide that a decision made by UDI in favour of a foreign national shall be reviewed by UNE and issue instructions concerning the prioritisation of cases as well as organisational and administrative matters.⁷⁴⁷

Decisions made by UNE in individual cases can be appealed through the regular judicial system. Proceedings are to be brought before Oslo District Court.⁷⁴⁸

The overview below shows the overall organisation of the Norwegian immigration administration.⁷⁴⁹

⁷⁴⁴ IA section 75 first paragraph

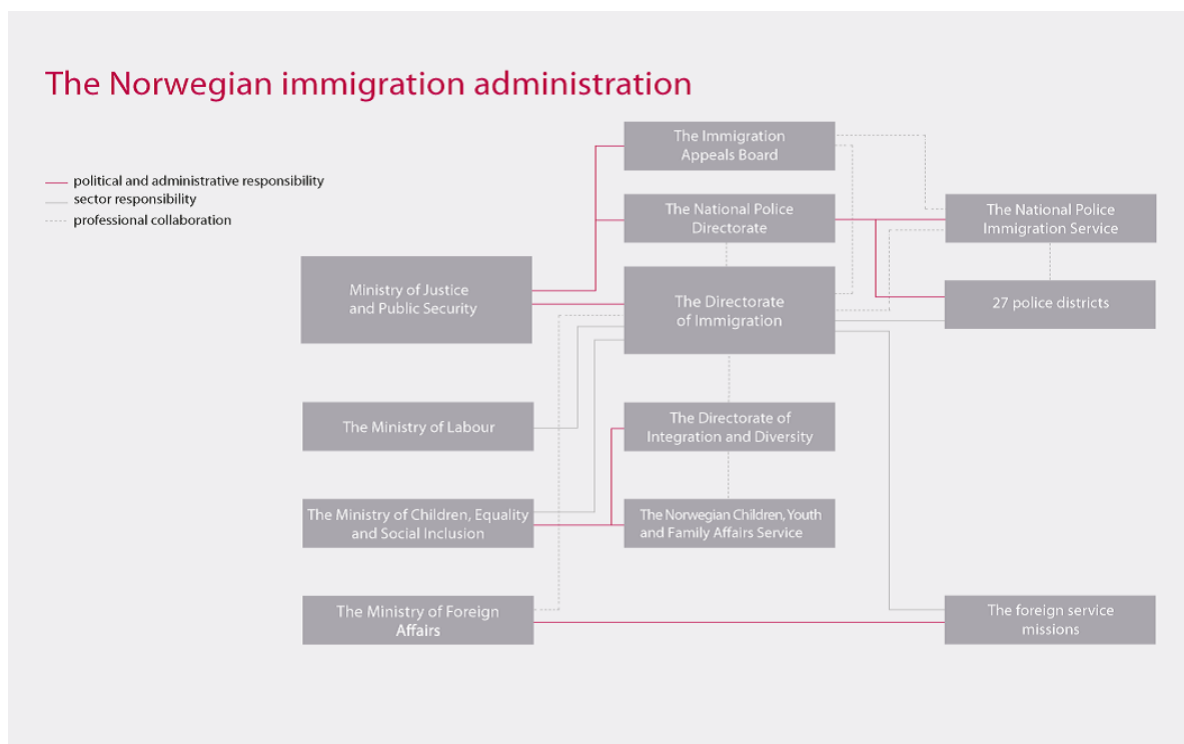
⁷⁴⁵ IA section 122, 123, 124 and 121 first paragraph, letter a and c. See also royal decree of 24 June 2011 No. 626

⁷⁴⁶ This follows a contrario from IA section 76 second paragraph

⁷⁴⁷ IA section 76 second and third paragraphs

⁷⁴⁸ IA section 79

⁷⁴⁹ See also Report to the European Migration Network from the Norwegian Contact Point regarding the Organisation of Asylum and Migration Policies in Norway (2012), available at http://www.udi.no/globalassets/global/european-migration-network_i/studies-reports/organisation-asylum-norway.pdf



2.3 Administrative policies and guidelines

The ministries and UDI regularly issue circulars setting out instructions and guidelines concerning the interpretation and enforcement of Chapter 13 of the Immigration Act, including the following:

- Ministry Circular of 20 January 2014 (No. AI-1/2014): Instruction on the interpretation of the Immigration Act Section 110, second and third paragraphs – right of residence for family members
- Ministry Circular of 17 June 2013 (No. GI-02/2013): Instruction concerning adjustment of expulsion practice for foreigners who have been convicted pursuant to Sections 257 and 391 a of the Penal Act
- Ministry Circular of 1 January 2010 (No. A-63/2009): On the entry into force of new Immigration Act and new Immigration Regulation from 1 January 2010
- UDI Circular of 21 July 2011 (No. 2011-037): Independent right of residence for EEA nationals – conditions and documentary requirements – Immigration Act Section 112, cf. Immigration Regulation Sections 19-12, 19-13 and 1913a
- UDI Circular of 29 July 2011 (No. 2011-035): Routines for cases relating to the EEA rules in Norwegian immigration law
- UDI Circular of 11 March 2011 (No. 2011-016): Circular on permanent residence right, cf. Immigration Act Sections 115 and 116
- UDI Circular of 9 February 2011 (No. 2011-010): Quick procedure – routines for expulsion due to gross violence and violence in close relations

- UDI Circular of 26 May 2010 (No. 2010-181): Guidelines for preparing visa cases – documentation requirements. An English translation of the circular is available at http://www.udiregelverk.no/en/documents/udi-circulars/rs-2010-181e/#_Toc278282618
- UDI Circular of 5 July 2010 (No. 2010-069): Repeal of entry restriction or access to Norway for limited visits without repeal of entry restriction – Immigration Act Sections 71, second paragraph, and 124, second paragraph
- UDI Circular of 1 January 2010 (No. 2010-025): Family immigration with an EEA national – the Immigration Act Section 110 and the Immigration Regulations Section 19-7. An English translation of the circular is available at <http://www.udiregelverk.no/en/documents/udi-circulars/rs-2010-025/>.
- UDI Circular of 20 July 2011 (No. 2010-022): Rejection and expulsion of EEA nationals on grounds of public policy or security
- UDI Circular of 1 January 2010 (No. 2010-005): Procedural routines – expulsion of convicted foreigners, cf. Immigration Act Section 67, first paragraph, letter c, Section 68, first paragraph, letter b or Section 122

Some circulars relating to the general provisions of the Immigration Act are also considered relevant for the interpretation of the EEA rules in Chapter 13, including:

- Ministry Circular of 21 January 2010 (No. GI-01/2010): Instruction on marriages of convenience, cf. Immigration Act Section 40, fourth paragraph
- UDI Circular of 1 January 2010 (No. 2010-034): The permanent and established relationship of cohabitation condition – the Immigration Act Section 41. An English translation of the circular is available at <http://www.udiregelverk.no/en/documents/udi-circulars/rs-2010-034e/>.
- UDI Circular No. 2010-024: Expulsion pursuant to Immigration Act Sections 66, 67 and 68 – breach of the Immigration Act and/or legal offences
- UDI Circular of 1 January 2010 (No. 2010-002): Permanent and temporary residence permit for adopted children – Immigration Act Section 42 third paragraph and Section 62, cf. Immigration Regulation Section 11-1, second paragraph

3 Specific assessment: Interpretation of the individual provisions of the directive

3.1 Personal scope: To whom does it apply?

3.1.1 'Foreign nationals covered by the EEA Agreement or the EFTA Convention' and 'Nationals of countries covered by the EEA Agreement'

The personal scope of the Norwegian legislation implementing Directive 2004/38 is stipulated in IA Sections 109 and 110 and IR Sections 19-1, 19-6, 19-7 and 19-8.

IA Section 109, first paragraph states:

This chapter regulates the right to enter and stay in the realm of *foreign nationals covered by the EEA Agreement or the EFTA Convention*.⁷⁵⁰

The term ‘foreign nationals covered by the EEA Agreement or the EFTA Convention’ encompasses three categories of nationals: Nationals of EEA countries, nationals of EFTA countries, (i.e. Swiss nationals) and, lastly, TCN to the extent that the EEA Agreement or the EFTA Convention confers them rights of entry and residence.⁷⁵¹

The term ‘foreign national’ is in IA Section 5, first paragraph defined as ‘any person who is not a Norwegian national’. Norwegian nationals are thus, in principle, not subject to Chapter 13. An exception applies for Norwegian nationals who are returning to the realm after having exercised their right of free movement under the EEA Agreement, see 3.2.2.1.

Further details concerning the personal scope of Chapter 13 are given in IA Section 110. According to Section 110, first paragraph, the provisions of Chapter 13 apply to ‘nationals of countries covered by the EEA Agreement (EEA nationals)’. Section 19-1 of the IR specifies that the term ‘EEA nationals’ also includes the nationals of countries covered by the EFTA Convention, but not the EEA Agreement (i.e. Swiss nationals).⁷⁵² Other nationals than EEA nationals are subject to IA Chapter 13 if they are either the family members or employees of EEA enterprises within the meaning of the act. Family members are dealt with in 3.1.2. The latter group falls outside the scope of this study and will therefore not be given particular consideration.

Some specific groups of persons are given more extensive rights, namely economically active persons, persons that are economically inactive but have sufficient resources not to become a burden on the Norwegian social assistance system and students. These concepts are presented in 3.1.3–3.1.5.

3.1.2 *Family members*

3.1.2.1 Overview

IA Section 110, second paragraph includes family members in the scope of Chapter 13. The provision does not differ between family members who are themselves EEA nationals and family members who are TCNs. Since EEA nationals regularly will have an independent right of residence irrespective of their relationship with another EEA national, the provisions concerning family members are, however, especially important for TCNs.

The provision does, however, draw a clear distinction between the family members of EEA nationals and the family members of Norwegian nationals. While the family members of EEA nationals are subject to the provisions of Chapter 13 ‘as long as they accompany or are reunited with an EEA

⁷⁵⁰ Emphasis added

⁷⁵¹ Cf. also Vigdis Vevstad (2012), ed., Lov av 15. Mai 2008 nr. 35 om utlendingers adgang til riket og deres opphold her (utlendingsloven), (Oslo: Universitetsforlaget), digital edition, commentary to section 109, para 1

⁷⁵² The reason for the distinction between ‘EEA nationals’ and ‘EFTA nationals’ is that directive 2004/38 was not included into the EFTA Convention. When the directive was implemented into Norwegian law, the question therefore arose whether Switzerland – an EFTA country not party to the EEA Agreement – should be covered by the implementing legislation. Although it was expected that Switzerland at some point would enter into an agreement with the EU and that the EFTA Convention would be revised accordingly, the position of Switzerland regarding the directive was still unclear. In general, the expected common interests of Norway and Switzerland towards the EU called for a positive approach towards Switzerland. Also, having three different sets of rules (regulating EEA nationals, Swiss nationals and third country nationals respectively) was considered to entail unnecessary administrative burdens. As a consequence, the IR provides that Swiss nationals are treated as EEA nationals. Cf. Ot.prp. No. 72 (2007-2008) pages 13 and 27 and Innst. O. No. 33 (2008-2009) page 2. See also consultation paper of 23 March 2009 regarding draft regulations to chapter 13 of the Immigration Act, prepared by the former Ministry of Labor and Social Inclusion, page 4

national’, family members of a Norwegian national are subject to the provisions only if the Norwegian national in addition has ‘exercised the right to free movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country’.

The position of returning nationals and their family members, including the requirement of having exercised the right to free movement, is primarily assessed under 3.2.2.1. Below, the study first of all concentrates on the key concept of ‘family member’ as defined in the third paragraph of IA Section 110, which states:

‘Family member’ means:

- a spouse,
- a cohabitant, if there is a permanent connection with the EEA national and this connection can be documented,
- a relative in direct line of descent from an EEA national or from a foreign national mentioned in (a) or (b), who is under the age of 21 or who is dependent upon the EEA national, and
- a relative in direct line of ascent from an EEA national or of a foreign national mentioned in (a) or (b) who is dependent upon the EEA national.

In addition, IR Section 19-7 includes certain other groups of persons in the definition of family member. These will be dealt with under 3.1.2.8.

3.1.2.2 ‘Accompany or reunite’

According to IA Section 110, second paragraph, first sentence, family members are subject to the EEA-specific rules of the act as long as they ‘accompany or are reunited’ with an EEA national. Read in isolation, the term as such indicates that the family relationship must already have been established at the time the EEA national enters the host state. UDI Circular No. 2010-181 seems to be based on such an interpretation, as it stipulates that it is a ‘condition that the family was established before entry to Norway, cf. the Immigration Act Section 110, second paragraph’.⁷⁵³

3.1.2.3 Spouses and registered partners

Contraction and dissolution of marriage

‘Spouse’ within the meaning of IA Section 110, third paragraph, letter a, is any person who has contracted a valid marriage with an EEA national in Norway or abroad and, in the latter case, whose marriage is recognised in Norway (see below).

The requirements for contracting a marriage in Norway are laid down in the Norwegian Marriage Act⁷⁵⁴ (hereinafter ‘MA’) Chapter 13. Dissolution is regulated in Chapter 4. According to Section 19, a marriage may be dissolved either by divorce or, if the marriage was contracted between close relatives or while one of the spouses was still married, directly.⁷⁵⁵ A divorce may be obtained in four different ways:

- by separation (Section 21)

⁷⁵³ UDI Circular No. 2010-181 section 7.2.18

⁷⁵⁴ Norwegian Marriage Act of 4 July 1991 No. 47. An English translation of the Marriage Act, last amended January 2009, is available at <https://www.regjeringen.no/en/dokumenter/the-marriage-act/id448401/>

⁷⁵⁵ Cf. MA section 24 as well as the prohibitions laid down in sections 3 and 4

- by termination of cohabitation (Section 22)
- by direct divorce on grounds of abuse and forced marriage (Section 23)
- by direct divorce if one of the spouses has contracted a new marriage (Section 24 third paragraph)

‘Separation’ pursuant to the MA means separation by decree or, exceptionally, judgment by the county governor cf. Section 25.⁷⁵⁶ A spouse may request a separation if he or she finds that cohabitation cannot continue.⁷⁵⁷ The request may be withdrawn until a decree has been issued.⁷⁵⁸

Separation has several legal effects beyond being a condition for subsequent divorce.⁷⁵⁹ A spouse may for instance demand the division of assets that are in joint ownership after a separation decree has been issued.⁷⁶⁰ The economic basis for the division may be determined at an even earlier date – for example, when the request for separation was received by the county governor.⁷⁶¹ A spouse will also lose rights pursuant to the law of inheritance and succession.⁷⁶²

The legal effects of separation are generally conditioned by the termination of cohabitation. Thus, if the spouses continue or resume living together, the legal effects of the separation normally cease.⁷⁶³ When the spouses have been separated for one year, each of them may demand a divorce.⁷⁶⁴

Divorce may, as indicated above, also be obtained by the termination of cohabitation. As opposed to separation, this does not require a decree or judgment. If the spouses have not cohabited for at least two years, each of them may demand a divorce.⁷⁶⁵

Recognition of foreign marriages

Recognition of foreign marriages is regulated in MA Section 18a. Marriages contracted outside Norway are generally recognised for the purpose of the application of IA Chapter 13.⁷⁶⁶ Nevertheless, Section 18a contains some important reservations.

Firstly, a marriage contracted outside Norway shall, according to MA Section 18a, first paragraph, fourth sentence, not be recognised ‘if this would obviously be offensive to Norwegian public policy (ordre public)’. The exception represents a codification of the ordre public doctrine in private international law, according to which recognition may be refused if this would be inconsistent with

⁷⁵⁶ Cf. MA section 25 first paragraph and Vera Holmøy, Peter Lødrup and John Asland (2013), *Ekteskapsloven med kommentarer*, volume 1 (Oslo: Gyldendal Juridisk) page 131

⁷⁵⁷ MA section 20 first paragraph

⁷⁵⁸ Cf. MA section 25 first paragraph

⁷⁵⁹ See Holmøy, Lødrup and Asland (2013) pages 134-135

⁷⁶⁰ MA section 57 first paragraph, letter a

⁷⁶¹ MA section 60 first paragraph, letter a

⁷⁶² Act relating to Inheritance of 3 March 1972 No. 5 (‘Inheritance Act’) sections 8 and 66 no. 3

⁷⁶³ MA section 20 second paragraph. See Holmøy, Lødrup and Asland (2013) pages 133 et seq. for a more thorough presentation of this condition

⁷⁶⁴ MA section 21

⁷⁶⁵ MA section 22. For legal effects of termination of cohabitation see Holmøy, Lødrup and Asland (2013) page 143

⁷⁶⁶ MA section 18a first paragraph, first sentence

fundamental ethical and/or legal values.⁷⁶⁷ Typical examples of marriages not consistent with Norwegian ordre public are marriages contracted by very young parties or without consent.

In order for a marriage to be regarded as inconsistent with Norwegian ordre public due to low age, it is assumed that one or both parties must at least be younger than 15 years old. Where a marriage is contracted by a representative of the spouse, a distinction must be drawn between situations where a third party is authorised both to choose the spouse and contract the marriage on the other parties' behalf and situations where a third party is merely authorised to contract the marriage on the spouses' behalf (i.e. to represent him or her under the ceremony). In the first case, the marriage would, due to the lack of consent, be clearly inconsistent with Norwegian ordre public and not admissible – a view that is also taken by other European countries. In the latter case, however, the lack of presence is a question of formal nature, which generally is subject to the law of the country in which the marriage is contracted. Since arrangements of this kind are acceptable in various countries in Europe, Latin America and the USA, it follows from Norwegian private international law that a foreign marriage contracted in this way is not inconsistent with ordre public.⁷⁶⁸

The current state of law concerning the question of whether polygamous marriages validly contracted abroad are inconsistent with Norwegian ordre public, and consequently not admissible, seems to be unclear.⁷⁶⁹

Secondly, MA Section 18a, second paragraph, first sentence imposes particular restrictions on marriages that are contracted outside Norway, but where at least one of the parties was a Norwegian national or a permanent resident in Norway at the time of marriage. The assessment of whether a person was a permanent resident at the time of marriage is based on the concept of domicile in private international law.⁷⁷⁰ In these cases, a marriage shall not be recognised if:

- a) the marriage was contracted without the presence of both parties at the marriage ceremony,
- b) one of the parties was under 18 years of age, or
- c) one of the parties was already married.

The primary objectives of the restrictions in the second paragraph of Section 18a are to prevent persons that have a strong connection to Norway from contracting marriages abroad in order to circumvent Norwegian marriage requirements and, in particular, to counter forced marriages, marriages involving minors and polygamous marriages.⁷⁷¹ In the present context, the question arises of whether the non-fulfilment of these conditions may provide a basis for restricting the right of residence for a spouse pursuant to IA Chapter 13. With regard to the condition in Section 18a, second paragraph, letter a, which requires both parties to be present at the marriage ceremony, Vevstad points out that the sole fact that a third party is authorised to act on spouses' behalf during the ceremony (see above) does not necessarily imply that it is entered into without consent or that it

⁷⁶⁷ Ot.prp. No. 100 (2005-2006) pages 12 and 69. The relation between foreign marriages and Norwegian ordre public is dealt with by Helge J. Thue (2002), *Internasjonal privatrett. Personrett, familierett og arverett* (Oslo: Gyldendal akademisk) pages 337 et seqq. See also Helge J. Thue 'Anerkjennelse av ekteskap stiftet i utlandet', *Tidsskrift for Familierett, arverett og barnevernrettslige spørsmål* (2003), pages 12 et seqq.

⁷⁶⁸ Ot.prp. No. 100 (2005-2006) pages 12-13 and Thue (2002) pages 338-341

⁷⁶⁹ Ot.prp. No. 100 (2005-2006) page 45 and Thue (2002) pages 342 et seqq. See also Peter Lødrup and Tone Sverdrup (2009), *Familieretten* (Oslo) pages 67-68

⁷⁷⁰ In the preparatory works relating to the MA it is pointed out that the concept of domicile to a large extent is reflected in Regulation of 5 November 1992 No. 979 on when a Foreign National shall be considered Permanently Resident in connection with the Assessment of Marriage Requirements. Hence, the provisions of the regulation will be relevant in this respect, cf. Ot.prp. No. 100 (2005-2006) page 70

⁷⁷¹ Ot.prp. No. 100 (2005-2006) chapters 6, 7 and 8

constitutes a marriage of convenience. Such marriages may, according to Vevstad, hardly be regarded as a sufficient threat to public policy to justify an exception from a spouse's residence right under the directive.⁷⁷²

According to MA Section 18a, second paragraph, second sentence, a marriage may, at the request of both parties, be recognised even though the conditions in letters a–c are not fulfilled 'if there are strong reasons for doing so'. It follows from the preparatory works that this constitutes a narrow exception, applicable only to those cases where non-recognition would clearly be unreasonable.⁷⁷³

The issue of marriages of convenience will be examined more closely in 3.5.

Registered partners

IA Section 110, third paragraph does not explicitly include registered partners in the definition of 'family member'. The reason for this is that registered partners are treated as equivalent to spouses, cf. MA Section 95, second paragraph, which states:

The provisions of Norwegian law concerning marriage and parties to marriage apply correspondingly to registered partnership and registered partners.

Hence, references to a spouse or marriage in the IA apply equally to registered partners and registered partnerships. A registered partnership validly contracted outside of Norway is recognised subject to the same restrictions as a marriage.⁷⁷⁴ Registered partnerships are, however, not automatically recognised as marriages – for this both parties need to give their consent.⁷⁷⁵

A more complicated question is whether, and under which conditions, other regulated forms of relationships outside Norway are recognised as marriages or registered partnerships. Generally, such relationships are recognised as marriages if they have 'primarily the same legal consequences as marriage in the country where it was contracted'.⁷⁷⁶ This may exclude some forms of regulated relationships from the Marriage Act, and consequently from the definition of 'spouse' in IA Section 110, third paragraph, letter a.⁷⁷⁷

Implications of Metock

The bill to implement Directive 2004/38 into IA Chapter 13 was introduced in June 2008 (i.e. shortly before the CJEU delivered its judgment in Case C-127/08 *Metock*).⁷⁷⁸ The possible implications of *Metock* were addressed during its consideration by Parliament.⁷⁷⁹ Emphasising the fact that the

⁷⁷² Vevstad (2012) commentary to section 110, para 6

⁷⁷³ Ot.prp. No. 100 (2005-2006) page 70. The fact that children are involved does not automatically lead to the conclusion that the marriage should be recognized. The decision must be based on a 'specific and very thorough assessment of the individual case, where the best interests of the child shall be a fundamental consideration' (our translation)

⁷⁷⁴ Cf. Ot.prp. No. 72 (2007-2008) page 63

⁷⁷⁵ Cf. MA section 95 fifth paragraph, which states that a partnership registered in Norway will apply as a marriage on the consent of both partners. The same must presumably apply to partnerships contracted outside the realm, cf. Ot.prp. No. 33 (2007-2008) pages 85 and 90-91. See also Holmøy, Lødrup and Asland (2013) page 121

⁷⁷⁶ MA section 18a first paragraph, second sentence

⁷⁷⁷ Examples of relationships that could fall outside the term 'spouse' are the French form of civil union PACS (Pacte civil de solidarité) or different forms of 'domestic partnerships' that may be contracted in some American states. These regulated forms of cohabitation generally have far less legal consequences than a marriage. Cf. Ot.prp. No. 33 (2007-2008) pages 84-85. See also Holmøy, Lødrup and Asland (2013) page 121 and Vevstad (2012) commentary to section 110, para 8

⁷⁷⁸ Case C-127/08 *Metock* [2008] ECR I-6241

⁷⁷⁹ Innst. O. No. 33 (2008-2009) pages 2 and 16-17

Commission would issue guidelines for the transposition and application of the directive – including the issues raised by the *Metock* judgment – the matter was eventually solved by providing a possibility in the act to make necessary adjustments and/or restrictions by regulations, cf. Section 110, fifth paragraph.

The implications of *Metock* have later been dealt with to some extent, though not by regulations, but by circular letters. In Circular No. A-63/2009, the former Ministry of Labour and Social Inclusion stresses the wish to consider ‘further guidelines on how the Directive shall be interpreted in order to avoid abuse of the rules following the judgment’.⁷⁸⁰ It is pointed out that *Metock* ‘inter alia implies that the Member States no longer may require that a third country national shall have had prior lawful residence in another Member State in order to be reunited with a Union citizen who has exercised the right to free movement’.

Certain adaptations made by Denmark in cooperation with the Commission to tackle abuse were given particular attention in the mentioned circular from 2009. The ministry, inter alia, noted that Danish returning nationals must have had an ‘actual and genuine stay in the other EU/EEA country (actual relocation)’ in order to be reunited with family members in Denmark. In addition, the family member (i.e. the TCN) ‘must have had actual cohabitation with the Danish national in the EU/EEA country where the right to free movement was exercised’. Finally, the ministry announced its intention to issue further instructions on how to interpret and apply the Commission guidelines⁷⁸¹ based both on the guidelines and the Danish solutions. This indicates that Danish law may be relevant for the interpretation of the Norwegian rules in this respect.

The ministry followed up its intentions in Circular No. AI-1/2010⁷⁸², which was later replaced by Circular No. AI-1/2014. Introductorily, the ministry in Circular No. AI-1/2014 observes that the CJEU in *Metock* held that TCNs that are married to an EEA citizen may rely on the directive irrespective of where and when the marriage is contracted. Furthermore, it is irrelevant how the TCN entered the host country and whether the prior residence within the EEA was lawful. Subsequently, more detailed conditions are stipulated, including, inter alia, a requirement of an ‘actual and genuine stay’ in another EEA country (for returning Norwegian nationals) or in Norway (for EEA nationals who are not Norwegian nationals) and ‘actual cohabitation’ for Norwegian nationals and their family members.

The stated purpose of Circular No. AI-1/2014 is ‘to reduce the risk of illegal entry and residence in cases concerning the right of residence for family member and counter abuse of rights under the EEA rules’.⁷⁸³ Moreover, since the instructions are not exclusively relevant to spouses and registered partners, other relevant issues are discussed where relevant.

In the present context, it is nevertheless worth mentioning that in order to establish whether a stay has been ‘actual and genuine’, emphasis is, inter alia, placed on the ‘duration of the marriage (cohabitation)’.⁷⁸⁴ This seems to indicate that the duration of the marriage or partnership is regarded as relevant for the application of Chapter 13 to spouses and registered partners.

⁷⁸⁰ Ministry Circular No. A-63/2009 annex 19 (our translation)

⁷⁸¹ COM (2009) 313 final

⁷⁸² Ministry Circular No. AI-1/2010, Instruction on the interpretation of the Immigration Act section 110 second paragraph – right of residence for family members

⁷⁸³ Ministry Circular No. AI-1/2014 Introduction (our translation)

⁷⁸⁴ Ministry Circular No. AI-1/2014 Norwegian reference person and Reference person from another EEA country (our translation)

3.1.2.4 Cohabitants

Cohabitants fall within the definition of family members. According to the preparatory works, the reason for this is partly that cohabitants to a large extent are treated as equivalent to spouses under Norwegian law and partly that the immigration rules already provided for the possibility of family immigration based on cohabitation when the directive was implemented. Same-sex relationships are covered on the same basis as opposite-sex relationships.⁷⁸⁵

Legislative background

Cohabitation was already a relevant basis for family immigration before the Immigration Act 1988 was adopted. Although not explicitly regulated by an act or regulation, cohabitation was considered under the rules on reasonableness and administrative discretion. When the Immigration Act 1988 was introduced, it was decided that more specific provisions on cohabitation should be given by regulation.⁷⁸⁶ Criteria were subsequently laid down in the Immigration Regulation 1990 Section 23, first paragraph, letter b. Accordingly, cohabitants had a right to obtain a residence permit if both parties were aged 18 or over, had lived in a permanent and established relationship of cohabitation for at least two years, were not married and intended to continue their cohabitation. A discretionary provision gave the possibility to obtain a residence permit for cohabitants that did not fulfil the two-year requirements, but had or expected children, as well as to cohabitants that were married, but encountered permanent impediments concerning the dissolution of the marriage, cf. Immigration Regulation 1990 Section 24, first paragraph, letter b.

The rules on cohabitation of the Immigration Regulation 1990 were for the most part incorporated into the general provisions on resident permits of the Immigration Act 2008 (Section 41). An amendment was made for cohabitants that do not fulfil the two-year requirement, but already have children; these are now given a right to obtain a residence permit, as opposed to a possibility subject to administrative discretion. Furthermore, cohabitants expecting a child together were given the possibility to obtain a residence permit.⁷⁸⁷ More detailed conditions for accumulating time as cohabitants as well as the requirement that neither party may be married were included in the general provisions on resident permits of the Immigration Regulation 2009 (Section 9-2).

When Directive 2004/38/EC was later incorporated into Chapter 13, cohabitants were thus included in the definition of family members of EEA nationals. Further provisions regarding cohabitation were to be made by regulation, cf. IA Section 110, fifth paragraph.⁷⁸⁸ In its consultation paper regarding the draft regulations to Chapter 13, the former Ministry of Labour and Social Inclusion points out that EEA citizens and their family members may not be subject to more stringent requirements than citizens who rely on the general provisions of the IA. Nor did the ministry at that time see a need to introduce more liberal provisions for EEA citizens and their family members. Hence, it was concluded that a regulation pursuant to IA Section 110 could either replicate or refer to the general provisions (i.e. Section 41) and the appurtenant regulations.⁷⁸⁹ As a result, in order to determine the scope of application of the cohabitation provisions in Chapter 13, one must to a large extent draw upon the general provisions in IA Section 41 and IR Section 9-2, cf. IR Section 19-6.⁷⁹⁰

⁷⁸⁵ Ot.prp. No. 72 (2007-2008) page 26 and Ot.prp. No. 75 (2006-2007) page 424

⁷⁸⁶ Ot.prp. No. 46 (1986-1987) pages 62 and 196

⁷⁸⁷ Ot.prp. No. 75 (2006-2007) page 207

⁷⁸⁸ Cf. also Ot.prp. No. 72 (2007-2008) pages 26 and 62

⁷⁸⁹ Consultation paper of 23 March 2009 pages 12-13

⁷⁹⁰ Ot.prp. No. 75 (2006-2007) page 424

General requirements

‘Cohabitation’ as such is not defined in the IA, and Norwegian law does not provide a general statutory definition of the term. The criteria therefore vary depending on the field of law, the objective of the relevant legislation and the type of rights and/or obligations involved. In general, however, cohabitation is understood as a relationship where two persons live together in a ‘marriage-like relationship’.⁷⁹¹ The preparatory works of the Immigration Act 1988 are clearly based on the same assumption:

The Ministry is not of the opinion that the provisions relating to marriage should be applied to informal relationships of cohabitation without further ado. Due to the control considerations associated with cases falling within the Immigration Act, precisely the informal nature of these relationships call for special rules. Firstly, there must be a *permanent cohabitation arrangement that for all practical purposes reminds of marriage*. Something else would not create a sufficiently strong *basis for connection* to give the same reason for granting a residence permit.⁷⁹²

IA Section 110, third paragraph, letter b requires that there is a ‘permanent connection’ between the cohabitants and that this connection can be documented. It follows from IR Section 19-6 that the requirement is deemed to be met where the cohabitants meet the conditions mentioned in IA Section 41 and IR Section 9-2. Section 41, first paragraph states:

An applicant who has *lived in a permanent and established relationship of cohabitation for at least two years* with a sponsor as mentioned in section 40, first paragraph, shall be entitled to a residence permit when the parties *intend to continue their cohabitation*.⁷⁹³

Thus, if two persons have lived in a relationship for at least two years and intend to continue their cohabitation, it is presumed that the connection between the parties is of such a strong character that it provides a sufficient basis for granting a resident permit under the general provisions and, consequently, a right of residence under Chapter 13. The application of a minimum requirement regarding the duration of a relationship of cohabitation is in the preparatory works regarded both as a suitable and necessary measure to ensure proper control and overcome the challenges relating to evidence of such personal matters.⁷⁹⁴

Other basic requirements are laid down in Section 41, fourth paragraph, according to which neither party may be under the age of 18 nor be married.

Accumulation of the cohabitation period

In principle, the requirement of having lived in a permanent and established relationship applies to the last two years. Where the cohabitation is interrupted for practical reasons, such as work, the applicable guidelines stipulate that the condition is nevertheless met if the cohabitants ‘can document regular contact to the extent to which their financial situation and work has permitted, and the parties

⁷⁹¹ See for example Inheritance Act section 28a, Act relating to Limited Liability Companies of 13 June 1997 No. 44 section 1-5, Act relating to Enforcement of 26 June 1992 No. 86 section 7-13 and Basic Collective Agreement for the Civil Service section 2.9. See also NOU 1999: 25 pages 35 et seqq. and John Asland et al. (2014), *Nordisk samboerrett* (Oslo: Gyldendal akademisk) pages 57 et seqq.

⁷⁹² Ot.prp. No. 46 (1986-1987) pages 62-63 (our translation). Emphasis added

⁷⁹³ Emphasis added

⁷⁹⁴ Ot.prp. No. 46 (1986-1987) page 63 and Ot.prp. No. 75 (2006-2007) page 207

have concrete plans to move together'.⁷⁹⁵ According to Ministry Circular No. A-63/2009, it is, however, then a condition that the parties have cohabited for at least two years prior to the interruption.

As long as one or both parties are married to another person, they may generally not accumulate time as cohabitants, cf. IR Section 9-2, second paragraph. An exception applies if the spouses have been separated by a final decision pursuant to Section 20 of the Marriage Act. Separation decisions obtained outside Norway must be recognised in accordance with Act No. 38 of 2 June 1978 relating to the Recognition of Foreign Divorces and Separations.

The cohabitation period is calculated without regard to where the cohabitation took place. However, IR Section 9-2, first paragraph lays down an important additional rule on accumulation in cases where the parties have lived together in Norway. The provision states:

If all or parts of the prior cohabitation took place in Norway, *both parties must have had lawful residence in the realm* in order for the period of cohabitation to be taken into account under section 41, first paragraph, of the Act. The Directorate of Immigration may establish further guidelines in this respect.⁷⁹⁶

In Circular No. 2010-025, UDI indicates that the condition of lawful residence does not apply to family members that fall within the scope of the EEA rules, due to the judgment of the CJEU in *Metock*:

Pursuant to the Regulations section 9-2 first paragraph, it is a condition that the person who is applying for family immigration with a cohabitant has lawful residence in Norway if parts of the cohabitation took place in Norway. *This condition is not deemed to apply to a cohabitant of an EEA national with whom the applicant wished to take up residence in Norway, cf. the Metock judgment, see 2.1.1 above.*⁷⁹⁷

At the same time, the Ministry of Labour and Social Affairs states the following in Circular No. AI-1/2014:

It is pointed out that that cohabitation requires that *the cohabitants have lawful residence in Norway* in order for the cohabitation period to be taken into account pursuant to section 41.⁷⁹⁸

Administrative practice from UDI indicates that a condition of lawful residence is indeed applied today when calculating cohabitation periods that have taken place in Norway.

Exceptions to the general requirements

According to IA Section 41, second paragraph a person who does not fulfil the requirement of having lived in a permanent and established relationship of cohabitation for two years has nonetheless a right of residence if the cohabitants have joint children. It is a condition that they intend to continue cohabiting.

⁷⁹⁵ UDI Circular No. 2010-025 chapter C. The same is stated in Ministry Circular No. A-63/2009 annex 19. See also on the general provision in IA section 41 UDI Circular No. 2010-034

⁷⁹⁶ Emphasis added

⁷⁹⁷ Section 2.1.2. Emphasis added

⁷⁹⁸ Emphasis added

A right of residence may also be granted regardless of the cohabitation period if the cohabitants are expecting a child together, cf. IA Section 41, third paragraph. The basis for residence in these cases is the best interest of the child.⁷⁹⁹

For cohabitants who are married to another person, the rules provide for two possible exceptions. First, a residence permit may be granted if there have been permanent impediments to the dissolution of the marriage, cf. IA Section 41, fourth paragraph, second sentence. The exception covers situations where it is not possible for the married party to obtain a divorce or to annul the marriage in the country in which it was entered into. In accordance with current practice, it is not sufficient that it is difficult, expensive or culturally unacceptable to obtain a divorce.⁸⁰⁰

Secondly, a right of residence may be granted even though a cohabitant is married if the cohabitants have or are expecting a child and the married party is separated by final decision pursuant to Section 20 of the Marriage Act. Separation decisions obtained outside Norway must be recognised in accordance with the Act relating to the Recognition of Foreign Divorces and Separations, cf. IR Section 9-2, third paragraph.

Documentation

Documentation requirements are, in accordance with IR Section 19-6, second paragraph, stipulated in guidelines. It is also worth mentioning that a proposal that would make it possible to substitute the two-year requirement in IA Section 41 by formalising the relationship, for example, through a cohabitation agreement or by establishing a ‘registered relationship’, was explicitly rejected in the preparatory works.⁸⁰¹

UDI Circular No. 2010-025 provides a non-exhaustive list of documentation that may be submitted in order to document a two-year relationship. This includes tax information, transcripts from the National Registry, birth certificates for joint children, leases, purchase contracts, documentation of insurance and joint loans as well as letters delivered to a joint address over a sufficiently long period of time.⁸⁰²

Objections raised by the Authority

The EFTA Surveillance Authority (hereinafter the ‘Authority’) has criticised the application of a two-year period and the conditions for accumulation, stating that the durability of a relationship ‘cannot be determined solely on the basis of fixed criteria’ and that there also ‘should be a possibility under the national law to take into account other circumstances’ than joint children or pregnancy.⁸⁰³ In the opinion of the Norwegian Government, it is not contrary to the Commission guidelines⁸⁰⁴ ‘to maintain – as a main rule – a provision that refers to two years as a minimum amount of time for the relationship to be considered durable’.⁸⁰⁵ Nevertheless, the government plans to amend IR Section

⁷⁹⁹ UDI Circular No. 2010-025 section 2.1.2

⁸⁰⁰ Ot.prp. No. 75 (2006-2007) page 207 and UDI Circular No. 2010-025 section 2.1.2

⁸⁰¹ Ot.prp. No. 75 (2006-2007) page 207

⁸⁰² UDI Circular No. 2010-025 chapter C

⁸⁰³ Reasoned opinion of 8 July 2015 para 58. The letter is available at <http://www.eftasurv.int/media/esa-docs/physical/759684.pdf>

⁸⁰⁴ COM (2009) 313 final

⁸⁰⁵ Reply to letter of formal notice of 11 March 2015, item 3. The letter is available at <http://www.eftasurv.int/media/public-documents/710101.pdf>

19-6 by early 2016, so that an exception may be made if other special reasons indicate a permanent connection between the cohabitants.⁸⁰⁶

3.1.2.5 Direct descendants below the age of 21

Direct descendants of an EEA national or of a spouse, partner or cohabitant as defined in IA Section 110, third paragraph, letters a and b are automatically regarded as family members if they are under the age of 21. This includes children, grandchildren and so forth. The relationship shall be documented by submitting a birth certificate.⁸⁰⁷ Since the provision does not differentiate between children of the reference person and children of spouses, partners or cohabitants, stepchildren of the reference person are equally regarded as family members.

According to UDI Circular No. 2010-002, adopted children enjoy the same right of residence as biological children ‘if the adoption is recognized both in the child’s country of origin and in the recipient country (the country in which the adoptive parents lived when the adoption was finalized) and at least one of the parents is an EEA citizen’.⁸⁰⁸

The position of foster children is regulated in IR Section 19-7 (‘other family members’), cf. 3.1.2.8.

3.1.2.6 Dependent direct descendants above the age of 21

A direct descendant above the age of 21 is a family member within the meaning of IA Chapter 13 if he or she is ‘dependent upon the EEA national’.

The wording of IA Section 110, third paragraph, letter c indicates that the descendant must be dependent upon the EEA national (i.e. that a descendant would not be covered by the provision if he is supported by the spouse, partner, cohabitant or other persons). The provision corresponds to the Danish version of Article 2(2) c of the directive. However, as pointed out by Vevstad, in other language versions of the directive, the dependency criterion is not linked to the EEA national in the same way. This includes the English, French, German as well as the Norwegian versions.⁸⁰⁹

In the case of differing authentic language versions of an act referred to in the annexes to the EEA Agreement⁸¹⁰, the preferred starting point for the interpretation is, as established by the EFTA Court, to choose one that has the broadest basis in the various versions. Furthermore, unless the provision in question makes express reference to the law of the EEA States for the purpose of determining its content, it must normally be given an autonomous and uniform interpretation throughout the EEA having regard to the context of the provision and the objective pursued by the legislation in question.⁸¹¹ In the present context, this could mean that IA Section 110, third paragraph, letter c should not be interpreted in accordance with its wording.⁸¹²

⁸⁰⁶ Reply to reasoned opinion of 8 October 2015, item 2 (not yet published)

⁸⁰⁷ UDI Circular No. 2010-025 chapter C

⁸⁰⁸ UDI Circular No. 2010-002 chapter 2.4 (our translation)

⁸⁰⁹ Vevstad (2012) commentary to section 110, para 11. The French version states: ‘les descendants directs qui sont âgés de moins de vingt-et-un ans ou qui sont à charge, et les descendants directs du conjoint ou du partenaire tel que visé au point b)’; the English version states: ‘the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)’; the German version states: ‘die Verwandten in gerader absteigender Linie des Unionsbürgers und des Ehegatten oder des Lebenspartners im Sinne von Buchstabe b, die das 21. Lebensjahr noch nicht vollendet haben oder denen von diesen Unterhalt gewährt wird’

⁸¹⁰ Authentic language versions include all official languages of the EU as well as Norwegian and Icelandic

⁸¹¹ Case E-18/11 *Irish Bank Resolution Corporation Ltd* [2012] EFTA Ct. Rep. 592, paras 86-90 and Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, para 28

⁸¹² Vevstad (2012) commentary to section 110, para 11

Concerning the dependency criterion, UDI Circular No. 2010-025 states that the immigration authorities shall ‘consider the bond to the EEA national, as well as his/her physical or financial dependence on the person in question’. The concept of dependency is described more precisely under the term ‘provider’:

It must be documented that the family member has been provided for by the EEA national in the home country and that the person in question will have a genuine need for such provision in future. As a rule, the support must be financial, continue over time and be of a certain size. Persons who have received financial support of a more casual nature are not covered by the term ‘provider’.

It must also be documented that it has been necessary to provide for the family member and meet his/her fundamental needs in his/her home country. It is the person’s need for provision and not the sponsor’s ability to provide it that is decisive in relation to the assessment. On this basis, it will be necessary to consider the individual applicant’s situation and needs in his/her home country. Documentation can be provided in the form of regular money transfers to the person in question over time. As a rule, the support must not have been provided on a sporadic basis. Fundamental needs will not include any needs for medical treatment.

Another element in the assessment may be whether the family member is *physically dependent* on provision from the EEA national. There may be special health reasons that require the EEA national to provide personal care for the person in question. An example of this could be a disabled child over the age of 21 who receives financial support from the authorities in his/her home country, but who needs to be taken care of by the EEA national.

It is the family member’s responsibility to document and substantiate that such provision is necessary and of a nature covered by this provision.⁸¹³

First, it may be noted that the assessment of whether a person is dependent as described in the circular is based on factual circumstances and not whether there is a formal obligation to support the family member in question. Furthermore, a distinction is drawn between financial dependency and physical dependency. Hence, even though a family member is not financially supported by the EEA national, he or she may be dependent on his or her physical presence and care.

In order to be regarded as financially dependent, it must be demonstrated that the EEA national has previously supported the family member and that this support has been necessary to meet his or hers fundamental needs. The support shall, as a rule, be of a financial character, but the circular does not as such exclude other forms of support. Regular money transfers may be provided as documentation. Beyond that, the circular provides for an individual assessment of the family member's needs and situation in his or her home country. It is also stipulated that the family member must continue to have a ‘genuine need’ for support in the future and that this must be documented.

3.1.2.7 Dependent direct relatives in the ascending line

A relative in direct line of ascent from an EEA national or from a spouse, partner or cohabitant is, similar to direct descendants above the age of 21, regarded as a family member if he or she is ‘dependent upon the EEA national’, cf. IA Section 110, third paragraph, letter d. As explained above,

⁸¹³ Section 2.3. Emphasis added

the provision may have to be interpreted to the effect that a relative can be regarded as a dependent even though it is not the EEA national who supports the relative in question.

The definition includes parents, grandparents and so forth. Since the provision does not differentiate between relatives of the reference person and relatives of spouses, partners or cohabitants, the reference persons' parents-in-law are equally regarded as family members. The relationship shall be documented by the submission of the reference person's or his spouse's, partner's or cohabitant's birth certificate.⁸¹⁴ The dependency criterion must be assessed on the same basis as for relatives in the descending line.

It may be noted that UDI Circular No. 2010-025 states the following concerning the scope of application of the term 'family member' to this group of relatives:

The family member must be *guaranteed subsistence and accommodation*. This means that the EEA national must have *sufficient funds* to provide for the family member during his/her stay in Norway. *Reference is made to 2.3 concerning the term 'provider'*. See the UDI's circular 2011-037 for a more detailed interpretation of the term 'sufficient funds'.⁸¹⁵

The statement may give the impression that the threshold to be regarded as a family member is higher for dependent direct relatives in the ascending line. However, the IA does not give any reason to treat relatives in the descending and the ascending line differently in order to establish whether they fall within the key concept of 'family member' as defined in the third paragraph of IA Section 110. Any further requirements are, at least for those persons mentioned in Section 110, to be determined in connection with the individual rights that follow from being a family member. See, however, the rules on 'other family members' below, according to which some of these additional conditions have to be fulfilled in order to be caught by the definition in the first place.

3.1.2.8 Other family members

IR Section 19-7 also includes some other family members than those mentioned in IA Section 110, third paragraph in the scope of IA Chapter 13. The provision is given pursuant to IA 110, fifth paragraph, which explicitly provides for this possibility. It follows from the preparatory works that this legal basis was provided due to the obligation in Article 3(2) of the directive to facilitate entry and residence for other family member in order to maintain the unity of the family in a broader sense, cf. also recital 6 of the directive. In that connection, it is pointed out that the family member's relationship with the EEA national and his or her physical or financial dependence on the EEA national should be taken into consideration in accordance with recital 6 of the directive.⁸¹⁶

According to IR Section 19-7, foster children, full brothers and sisters, persons who intend to contract marriage and persons in need of care are considered to be family members under certain conditions. Common for all these groups of persons is that they must be 'assured means of subsistence' and be covered by a health insurance policy that covers 'all risks during the residence', cf. Section 19-7, second paragraph.

In Circular No. A-63/2009, the former Ministry of Labour and Inclusion stresses that the documentation requirements should be especially strict for these groups of persons, and a right of

⁸¹⁴ UDI Circular No. 2010-025 chapter C

⁸¹⁵ Section 2.1.5 (emphasis added)

⁸¹⁶ Ot.prp. No. 72 (2007-2008) pages 27 and 62

residence may, as a general rule, not be granted if proper documentation is not produced. It may nevertheless ‘be relevant to carry out a concrete assessment pursuant to IA Section 38 (‘strong humanitarian considerations’).⁸¹⁷

UDI may establish further guidelines, inter alia, concerning documentation, cf. IR Section 19-7, fourth paragraph. According to UDI Circular No. 2010-025, the health insurance policy requirement comprises coverage of ‘all expenses in connection with travelling home for medical reasons, necessary medical treatment and hospitalisation’. The requirement is met if the person concerned submits a European health insurance card from his or her home country or documentation of private health insurance.⁸¹⁸

Foster children

Foster children are family members if they are under the age of 18, their identity is known and they are established members of the household. In addition, the authorities in the home country must confirm that the child may settle in Norway, cf. IR Section 19-7, first paragraph, letter a.

The term ‘foster child’ refers, according to UDI Circular No. 2010-025, to a child who applies to be reunited with care providers other than his/her own biological parents. In order to be an ‘established member of the household’, the child must have lived with the foster parents before they moved to Norway. The circular also requires that the Norwegian Child Welfare Services have or will approve the foster home, as this is considered to be in the best interest of the child.⁸¹⁹

UDI Circular No. 2010-025 stresses that stringent requirements concerning the probability that the child is a genuine foster child are necessary due to the ‘risk of children being unlawfully removed from their biological parents or care persons and their home country’. Hence, the applicant should submit documentation on when the foster relationship was established, the background for the transfer of care and whether the foster relationship is of a permanent character. The Authority must also be provided with information concerning the identity of the biological parents or care persons and whether they are alive. Other documentation requirements include information on the identity of those who have exercised parental responsibility and those who have had the daily care of the child in the home country and a confirmation that the arrangement is in accordance with the laws of the home country.

Full brothers and sisters

Like foster children, full brothers and sisters are family members if they are under the age of 18 and their identity is known. The applicant must also be without parents or other care persons and the reference person shall, as a general rule, be approved as a care person by the Norwegian Child Welfare Authorities, cf. IR Section 19-7, first paragraph, letter b.

The term ‘full brothers and sisters’ refers, according to UDI Circular No. 2010-025, to siblings who have the same biological parents. It is not a requirement that the care person in the home country is a family member, and the siblings do not have to have lived together in the home country.⁸²⁰

Persons who are to contract marriage

⁸¹⁷ Annex 19 concerning section 110

⁸¹⁸ Sections 2.1-2.4

⁸¹⁹ Section 2.2.1

⁸²⁰ Section 2.2.2

Persons who are to marry an EEA national, who has a right of residence, are regarded as family members if it is made probable that the marriage will in fact be contracted after entering Norway. It may already here be noted that the right of residence for this group of persons applies for a period of up to six months from the date of entry, cf. IR Section 19-7, first paragraph, letter c and third paragraph and UDI Circular No. 2010-025.⁸²¹

In order to fall within the scope of the provision, both parties also need to be over the age of 18 and unmarried. It is not sufficient that they are separated from their former spouse or in the process of annulment, cf. UDI Circular No. 2010-025.⁸²²

Persons in need of care

IR Section 19-7, first paragraph, letter d includes ‘persons in need of care’ in the scope of IA Chapter 13. In order to be regarded as a person in need of care, the applicant must provide evidence that he or she has ‘serious, health-related problems’ and that the presence of the reference person is ‘absolutely necessary in order to care for the person concerned. It is also a condition that the person who is in need of care does not have other family members in the home country or in the country of residence to care for him or her adequately.’⁸²³

Objections raised by the Authority

The Authority has taken the view that neither IA Section 110 nor IR Section 19-7 ensures satisfactory transposition of Article 3(2) a of the directive, according to which the entry and residence for any other family members who are dependents or members of the household of an EEA national, or require the personal care of an EEA national, shall be facilitated.⁸²⁴ In its reply, the Norwegian government acknowledges that the definition of family members in IR Section 19-7 ‘can be understood as too restrictive compared to article 3(2) (a)’.⁸²⁵ As a consequence, a proposal for a new letter e to IR Section 19-7 to the regulation is currently under consideration, which includes dependent relatives and members of the household in the circle of persons who may derive rights from IA Chapter 13 as family members of EEA nationals. The government expects to be able to implement these changes by early 2016.⁸²⁶

3.1.2.9 ‘Actual and genuine stay’ as a requirement for family reunification

Ministry Circular No. AI-1/2014 requires that the reference person must be able to document an ‘actual and genuine stay’ in Norway (for EEA nationals who are not Norwegian nationals) or in another EEA country (for returning Norwegian nationals) when applying for family reunification with TCN family members for a period exceeding three months. The relevant factors to be assessed in this regard are largely the same for EEA nationals and returning Norwegian nationals, although there are some differences relating, *inter alia*, to the required temporal connection between the entry of the reference person into Norway and the application for family reunification. Relevant factors applying to both groups of persons include:

- Length of the EEA nationals’ stay in Norway/another EEA country

⁸²¹ Section 2.2.3

⁸²² Section 2.2.3

⁸²³ See also UDI Circular No. 2010-025 section 2.2.4

⁸²⁴ Reasoned opinion of 8 July 2015, paras 34 et seqq.

⁸²⁵ Reply to reasoned opinion of 8 October 2015, item 2 (not yet published)

⁸²⁶ Reply to reasoned opinion of 8 October 2015, item 2 (not yet published)

- Duration of marriage (cohabitation)
- Working conditions
- Living conditions

The position of returning Norwegian nationals is assessed further under 3.2.2.1. With regard to TCN family members of EEA nationals other than Norwegian nationals, Ministry Circular No. AI-1/2014 emphasises that it must be taken into consideration whether the reference person has exercised his or her free movement rights in Norway for a certain period of time before applying for family reunification. If the family, on the other hand, enters Norway at the same time, this may, according to the circular, indicate that the EEA national has not had the required actual and genuine stay in Norway.

Objections raised by the Authority

The Authority is of the opinion that the above criteria do not find support in the directive and that Norway fails to fulfil its obligations under Article 7 of the directive by maintaining them. The Authority calls attention to the fact that the list of conditions and administrative formalities for the issuing of residence cards to TCN family members of EEA nationals provided in the directive are exhaustive. Consequently, a TCN family member's right of residence may not be 'restricted or revoked, unless on public policy grounds and in compliance with the relevant procedural guarantees' pursuant to Articles 27–33 of the directive. Furthermore, the Authority 'does not see why an application for a residence card by a TCN family member of an EEA national could not be submitted at the same time as the registration by the EEA national'.⁸²⁷

The Norwegian government has in its previous reply pointed out that an EEA national may not be able to document a right of residence for more than three months when first entering Norway. The circular is, according to the government, 'referring to the need to meet the conditions listed in article 7 before the EEA national may register in Norway and before a residence card can be issued to the accompanying TCN family member'.⁸²⁸

3.1.3 *Economically active persons*

Economically active persons are first and foremost workers, self-employed persons and providers of services within the meaning of Articles 28, 31 and 36 EEA Agreement. The concepts are interpreted in accordance with the relevant case law of the CJEU relating to Articles 45, 49 and 56 TFEU.⁸²⁹

3.1.3.1 *Workers*

In order to be regarded as a worker, a person must perform or seek to perform activities that are effective and genuine and that are not on such a small scale as to be regarded as purely marginal or ancillary. Apart from this, there are no general minimum requirements relating to the extent or nature of the work or the amount of income. The essential feature of an employment relationship is that the person in question for a certain period of time performs services for and under the direction of another person for remuneration. If the activity is not carried out in the context of a relationship of subordination, the person will be treated as either a self-employed person or a provider of services.⁸³⁰

⁸²⁷ Reasoned opinion of 8 July 2015, para 161

⁸²⁸ Reply to letter of formal notice of 11 March 2015 item 10

⁸²⁹ Ot.prp. No. 72 (2007-2008) page 63

⁸³⁰ Ot.prp. No. 72 (2007-2008) page 61. See also Vevstad (2012) commentary to section 112, para 4

In Circular No. 2011-037, UDI refers to the judgment of the CJEU in Case C-14/09 *Genc*⁸³¹, according to which a person may be regarded as a worker even though their working hours do not exceed ten hours a week. If their working hours amount to less than ten hours a week, the immigration authorities must carry out an individual assessment in each case, taking into account the number of working hours, the amount of remuneration to be paid, whether the person in question has a right to be paid during vacations and sickness and whether the employment contract is subject to applicable tariff agreements.⁸³²

Whether the length of the employment is sufficient must, according to UDI, also be determined in each case. In that connection, the directorate refers to the judgment of the CJEU in Case C-413/01 *Ninni-Orasche*⁸³³, according to which a temporary employment of two and a half months was sufficient to be regarded as genuine.⁸³⁴

UDI further emphasises that a worker may change employers or have several employers at the same time. There are no specific requirements concerning the nature of the work or the qualifications of the worker.⁸³⁵

According to the preparatory works, ‘all groups of persons [in Section 112, first paragraph] must in principle be able to support themselves and not be dependent on economic assistance from Norway’.⁸³⁶ Vevstad, however, points out that a person may be a worker even if he or she is dependent on financial assistance from public funds in the host state according to the judgment of the CJEU in Case C-139/85 *Kempf*.⁸³⁷ Therefore, Vevstad argues, a worker is not required to possess sufficient resources to support him or herself.⁸³⁸

In Circular No. 2011-037, UDI lists various financial supports that may be received from the Norwegian Labour and Welfare Administration (NAV) while being employed and receiving remuneration. Accordingly, the following initiatives establish an employer–employee relationship:

- Temporary wage subsidies and labour market activation measures pursuant to Chapters 9 and 10 of Regulation No. 1320 of 11 December 2008 relating to Employment Promotion Initiatives
- Indefinite wage subsidies pursuant to Regulation No. 495 of 3 May 2007 relating to Indefinite Wage Subsidies
- Work assessment allowance pursuant to Regulation No. 1418 of 21 December 2012 relating to Work Assessment Allowance as Wage Subsidies

Other support from NAV does not – according to UDI – establish an ordinary employer–employee relationship and will consequently not provide a basis for a right of residence as a worker pursuant to IA Section 112, first paragraph, letter a.⁸³⁹

⁸³¹ Case C-14/09 *Genc* [2010] ECR I-931

⁸³² UDI Circular No. 2011-037 section 3.1

⁸³³ Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187

⁸³⁴ UDI Circular No. 2011-037 section 3.1

⁸³⁵ UDI Circular No. 2011-037 section 3.1

⁸³⁶ Ot.prp. No. 72 (2007-2008) page 61 (our translation)

⁸³⁷ Case 139/85 *Kempf* [1986] ECR 1741

⁸³⁸ Vevstad (2012) commentary to section 112, para 4

⁸³⁹ UDI Circular No. 2011-037 section 3.1

3.1.3.2 Self-employed persons

The term ‘self-employed person’ must – according to the preparatory works – be interpreted as widely as the corresponding provisions in the EEA Agreement. The right of establishment applies to both natural persons and legal persons and includes primary establishment as well as secondary establishment (setting up of agencies, branches or subsidiaries). The main requirements are that economic activity is carried out in a lasting and stable way and that the activity is not carried out in the context of a relationship of subordination.⁸⁴⁰

UDI points out that, although various types of economic activity fall within the term, it is a requirement that the person in question has a position that requires him or her to be present in Norway in order to establish and/or carry out the activity (i.e. a vital and executive position). Whether the extent of active contribution is sufficient must be assessed individually. Sole proprietorship will normally be unproblematic. Proprietary interest or investment interests as such will, on the other hand, not suffice.⁸⁴¹

3.1.3.3 Providers and recipients of services

Unlike the directive, the IA makes explicit mention of the providers of services, cf. Section 112, first paragraph, letter b. In this connection, the preparatory works emphasise the fact that Directive 2004/38 ‘unifies, replaces, codifies and continues the previous state of law’, including the repealed Directive 73/148/EEC⁸⁴², which applied to service providers. Reference is also made to a meeting between the Commission, the member states and the EFTA Secretariat concerning the interpretation of the directive, where the Commission is supposed to have declared that Article 7(1), letter a applies to the providers of services.⁸⁴³

UDI Circular No. 2011-037 summarises the requirements that apply to service providers as follows:

- The EEA national must be a worker, sent by a company or staffing enterprise established in another EEA member state. The person in question may also be a self-employed person and be sent to Norway on assignments (independent contractor).
- The assignment must be of a temporary nature.
- The employer must have a place of business in Norway. The employer may also be a staffing enterprise or a private person.⁸⁴⁴

Recipients of services are not mentioned explicitly in the directive or the IA. According to the preparatory works, the rights of recipients of services depend on whether they possess sufficient resources and insurance (see 3.1.4).⁸⁴⁵

⁸⁴⁰ Ot.prp. No. 72 (2007-2008) page 63

⁸⁴¹ UDI Circular No. 2011-037 section 3.2

⁸⁴² Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services

⁸⁴³ Ot.prp. No. 72 (2007-2008) page 31

⁸⁴⁴ UDI Circular No. 2011-037 section 3.2

⁸⁴⁵ Ot.prp. No. 72 (2007-2008) pages 31-32. See also Vevstad (2012) commentary to section 112, para 15, where it is pointed out that anything else undoubtedly would open for circumvention of the sufficiency-requirement

3.1.3.4 Former workers and former self-employed persons

IA Section 112, second paragraph lists the circumstances in which a person retains the status of worker or self-employed, even though he or she is not at present economically active as a worker or self-employed person. This is firstly the case if he or she is temporarily unable to work as the result of an illness or accident, cf. letter a of the provision. Permanent disability falls outside the scope of the provision, with the result that the right of residence, in principle, is discontinued. Still, a former worker or self-employed person who has become permanently unable to work may have a right of permanent residence pursuant to Section 115, cf. second paragraph, letter b and third paragraph (see 3.2.1.4).

Secondly, the status is retained if he or she ‘documents to be involuntarily unemployed’ and ‘has registered as a jobseeker with the Norwegian Labour and Welfare Service’, cf. letters b and c. Hence, former workers and self-employed persons who become active jobseekers retain their status and, consequently, their right of residence.⁸⁴⁶ The rights of other jobseekers are explained under 3.2.1.2. A distinction is drawn between persons who become involuntarily unemployed following the expiry of a fixed-term employment contract of less than one year’s duration or during the course of the first 12 months of their stay on the other hand (letter c) and those who become unemployed after ‘having had paid work for more than one year’ on the other hand (letter b). In the first case, the status of worker or self-employed person is lost after six months, cf. IA Section 112, third paragraph.

Thirdly, the status is retained if the former worker or self-employed person embarks on vocational training, cf. letter d. Unless he or she is involuntarily unemployed, the training must be related to the previous work.

3.1.4 *Economically inactive persons that have sufficient resources*

Economically inactive EEA nationals are given the same rights as workers, self-employed persons and service providers if they have sufficient resources to provide for themselves and their accompanying family members and are covered by a health insurance policy that covers all risks during the stay, cf. Section 112, first paragraph, letter c.

According to IR Section 19-13, first paragraph, the fulfilment of the requirement of sufficient resources depends on whether the EEA national has sufficient means not to ‘become an unreasonable burden on public welfare systems’. Sufficient resources may include fixed periodic benefits or personal funds, including bank deposits.

The personal situation of the EEA national shall be taken into account when assessing whether he or she possesses sufficient resources, including whether accompanying family members are to be provided for as well. Family members need not prove that they themselves have sufficient resources. A fixed amount that is deemed to constitute sufficient resources may not be stipulated, cf. 19-13, second paragraph.

UDI has, pursuant to IR Section 19-13, third paragraph, established further guidelines regarding the terms ‘sufficient resources’ and ‘fixed periodic benefits’. According to UDI Circular No. 2011-037, an annual amount equal to the minimum pension for single persons from the National Insurance (currently 14 645 NOK/monthly) will suffice. Smaller amounts may be accepted after an individual

⁸⁴⁶ Ot.prp. No. 72 (2007-2008) page 64

assessment, taking, inter alia, into account the personal circumstances of the applicant. If the person in question has family, however, the amount must be higher than the minimum pension.⁸⁴⁷

Personal circumstances may, according to the circular, also include the health condition, whether the person has a place to live in Norway and whether he or she must provide for family members or is provided for by family members during the stay in Norway. The decisive factor is whether the person 'may constitute an unreasonable burden on public welfare systems'. The means may be documented by bank statements, insurance certificates and/or evidence of fixed periodic benefits from the person's home country, Norway or another country. The term 'fixed periodic benefits' refers, inter alia, to all types of pensions.⁸⁴⁸

Persons who receive a daily subsistence allowance are, according to UDI Circular No. 2011-037, not regarded as having sufficient resources, but may have a right of residence pursuant to Section 112, second paragraph, i.e. as a former worker or former self-employed person (see 3.1.3.1). Regarding persons who solely depend on begging, it is stated that these 'will not be able to document guaranteed future means, and the amounts will normally be very small and of a highly uncertain nature'. Hence, beggars are in principle not considered to have sufficient resources.⁸⁴⁹

Concerning the health insurance policy requirement, the preparatory works take consideration of the fact that the insurance policies available in the market seldom provide coverage for 'all risks'.⁸⁵⁰ The requirement is therefore met if the person concerned submits a European health insurance card from his or her home country or documentation of private health insurance. 'All risks' in this context means coverage of all expenses in connection with illness, including necessary medical treatment and hospitalisation.⁸⁵¹

3.1.5 *Students*

Students within the meaning of the IA are persons who are 'enrolled at an approved educational institution', cf. Section 112, first paragraph, letter d. The provision generally applies to all types of approved education and includes private and public institutions.⁸⁵²

In its consultation response to the proposed Immigration Act, the Ministry of Education and Research emphasised that it would be an advantage if the term 'approved' was used uniformly by the Ministry of Education and Research and the immigration authorities. It was therefore proposed that Section 112 should refer to 'institutions or educations approved pursuant to an education statute'. As a consequence, IR Section 19-12, first paragraph states that UDI and the Ministry of Education and Research may establish guidelines on which institutions may be considered to be approved 'under the education statute concerned'. Such guidelines have to our knowledge not yet been issued, but the reference to education statutes implies that the Act relating to Universities and Colleges⁸⁵³, the Act

⁸⁴⁷ UDI Circular No. 2011-037 chapter 3.4.1

⁸⁴⁸ UDI Circular No. 2011-037 section 3.4.1 (our translation)

⁸⁴⁹ UDI Circular No. 2011-037 section 3.4 (our translation)

⁸⁵⁰ Ot.prp. No. 72 (2007-2008) page 33. In the preparatory works the issue is specifically considered in relation to students (section 112 first paragraph, letter d, see 3.1.5), but it must be assumed that the same arguments apply with regard to section 112 first paragraph, letter c, cf. also Vevstad (2012) commentary to section 112, paras 20 and 23 and UDI Circular No. 2011-037 section 3.4

⁸⁵¹ Ot.prp. No. 72 (2007-2008) page 33 and UDI Circular No. 2011-037 section 3.4

⁸⁵² Ot.prp. No. 72 (2007-2008) pages 63-64

⁸⁵³ Act of 1 April 2005 No. 15. An English translation of the Act is available at <http://www.ub.uio.no/ujur/ulovdata/lov-20050401-015-eng.pdf>

relating to Folk High Schools⁸⁵⁴ and the Act relating to Vocational Training⁸⁵⁵ are primarily relevant in this respect.⁸⁵⁶

A student does not need to complete his or her education – it is sufficient to follow parts of a study program. It is, however, a condition that the primary objective of the stay is education, which in turn means that the person must be actively studying and achieve progression. Lack of study progression may impact the right of residence.⁸⁵⁷

It is also a condition that the person in question provides a statement that he or she is self-supporting and can provide for any accompanying family members. IR Section 19-12, second paragraph merely states that ‘means of subsistence are considered to be assured where the EEA national makes a declaration to such effect’. Guidelines regarding the form of declaration may be provided by UDI. Circular No. 2011-037 merely refers to a self-declaration from the student that he or she has sufficient resources to cover subsistence for him or herself and any relevant family members.⁸⁵⁸

Students must also be covered by a health insurance policy that covers all risks during the stay. The requirement is met if the person concerned submits a European health insurance card from his or her home country or documentation of private health insurance.⁸⁵⁹

3.2 Material scope: Which rights are covered, to whom do they apply and what do they entail?

3.2.1 Rights against the host state

3.2.1.1 Right of exit and entry

Exit and entry is regulated in the general provisions of the IA Chapter 2, which to a large extent applies correspondingly to persons covered by IA Chapter 13, cf. IR Section 19-2, second paragraph.

According to IA Section 8, first paragraph, foreign nationals who come to Norway must have a passport ‘or other identity document that has been recognized as a travel document’, unless otherwise provided. Annex 4 to the IR contains an overview of valid identity documents issued by EEA and EFTA countries that are recognised as travel documents, cf. IR Section 2-10, first paragraph.

EEA nationals do not need to have a visa, cf. IR Section 3-1, letter b, and may therefore enter the realm with a passport or valid identity document. Cf. also IA Section 111, first paragraph, according to which an EEA national who has ‘a valid identity card or passport’ has a right of residence for up to three months.

Family members of EEA nationals do not need to have a visa ‘when the person concerned holds a residence card in another EEA country in accordance with article 10 and Article 20 of Directive 2004/38/EC’, cf. IR Section 3-1, letter c. If this is not the case, the main rule in IA Section 9 applies,

⁸⁵⁴ Act of 6 December 2002 No. 72

⁸⁵⁵ Act of 20 June 2003 No. 56

⁸⁵⁶ See Ot.prp. No. 72 (2007-2008) page 33

⁸⁵⁷ Ot.prp. No. 72 (2007-2008) page 64

⁸⁵⁸ Section 3.5.1

⁸⁵⁹ UDI Circular No. 2011-037 section 3.5.1. See also Ot.prp. No. 72 (2007-2008) page 33

according to which foreigners must hold a visa to be able to enter the realm. However, IR 3-8 contains a special provision for ‘foreign nationals who require a visa and who are covered by the EEA Agreement or the EFTA Convention’. These persons shall, as a general rule, be granted a Schengen visa, cf. IA Section 10. The requirement that the foreign national is covered by the EEA Agreement or EFTA Convention implies that the reference person of the family member (i.e. the EEA national) must exercise his or her right to free movement.⁸⁶⁰

In the preparatory works, it is pointed out that family members should be required to document their relationship with the EEA national when entering the realm or when applying for a visa.⁸⁶¹

UDI Circular No. 2010-181 provides specific guidelines on visas and documentation requirements for family members of EEA/EFTA nationals. The circular stipulates that:

Family members of EEA/EFTA nationals who are moving to another EEA/EFTA country than their own together with or to be reunited with the EEA/EFTA national and who are subject to a visa requirement (...) must only document:

- family relationship with/bonds of attachment to the EEA/EFTA national
- valid passport
- that the EEA national is exercising his/her right to free movement pursuant to the EEA Agreement or the EFTA Convention, for example a copy of the EEA national’s registration certificate, valid ID or travel document.⁸⁶²

According to the circular, it is also a ‘condition that the family was established before entry to Norway, cf. the Immigration Act section 110 second paragraph’.⁸⁶³

3.2.1.2 Right of residence up to 3 months

EEA nationals and their family members

EEA nationals and their family members have a right of residence for up to three months, cf. IA Section 111, first and second paragraphs. The right is not limited to economically active persons, persons with sufficient resources or students; as long as the nationality condition and the documentary requirements for entry (valid passport/identity card and, if applicable, documentation of the family relationship) are fulfilled, he or she generally has the right to reside in Norway for up to three months.

The period of residence is calculated from the date of entry, cf. IR Section 19-9, first paragraph, first sentence. The ‘date of entry’ is the date that the person enters Norwegian territory by crossing the Schengen border.⁸⁶⁴ If the date of entry cannot be documented, the earliest documentable date after entry shall constitute the basis for calculation, cf. IR Section 19-9, first paragraph, second sentence.⁸⁶⁵

⁸⁶⁰ See also Vevstad (2012) commentary to section 10, para 13

⁸⁶¹ Ot.prp. No. 72 (2007-2008) page 29

⁸⁶² UDI Circular No. 2010-181 section 7.2.18

⁸⁶³ UDI Circular No. 2010-181 section 7.2.18

⁸⁶⁴ Ot.prp. No. 72 (2007-2008) page 62 and Vevstad (2012) commentary to section 111, para 6

⁸⁶⁵ This may for example be the date of registration or of application for a residence card under IA section 117 and section 118, cf. IR section 19-9 first paragraph, second sentence

The residence period is interrupted if the person exits Norway, cf. IR Section 19-9, second paragraph, first sentence. There is no requirement to stay outside Norway for a minimum amount of time before re-entering the realm for a new period of three months, cf. IR Section 19-9, second paragraph, second sentence.⁸⁶⁶ As long as the person in question has a valid identity card or passport, he or she may in principle continuously start a new residence period of three month by exiting and re-entering.⁸⁶⁷

In UDI Circular No. 2011-035, it is pointed out that workers or service providers, who work according to a rotation arrangement for a longer period than three months, will often travel in and out of Norway during the contract term. According to the circular, UDI will in these cases consider ‘how long the EEA national intends to stay in Norway (the existing contractual relationship), and not the actual residence period’. Persons that intend to stay for a longer period than three months will then be assessed according to Section 112 or 113 and shall thus register or apply for a residence card.⁸⁶⁸

The requirement of not becoming an ‘unreasonable burden’

The right is granted under the condition that the person in question ‘does not become an unreasonable burden for public welfare systems’, cf. Section 111, first paragraph, which implements Article 14(1) of the directive. IR Section 19-10, second paragraph contains an important exception in this respect, as it states that the condition of not becoming an unreasonable burden does not apply to:

- (a) EEA nationals who are employees or self-employed persons and their family members,
- (b) EEA nationals who are jobseekers for a period of up to six months and their family members, if the EEA nationals provide documentary evidence that they are still seeking employment and have a genuine possibility of becoming employed, or
- (c) EEA nationals as mentioned in section 112, second paragraph, see third paragraph, of the Act, and their family members, or
- (d) EEA nationals and their family members who have been granted right of permanent residence.

Hence, workers, self-employed persons, former workers or self-employed persons (see 3.1.3), jobseekers for a period of up to six months (see below) and persons who are granted a right of permanent residence (see 3.2.1.4), as well as their family members, may not be rejected or expelled on this basis (see 3.3 and 3.4.1 regarding rejection/expulsion). The exception in the IR does not include service providers.

According to the preparatory works and administrative guidelines, the threshold for withdrawing a right of residence because the person in question has become an unreasonable burden is high. IR Section 19-10, first paragraph states that the condition for withdrawal may be fulfilled ‘if financial social assistance is utilised to an unusually large extent’. Hence, the term ‘unreasonable burden’ does not include the ordinary use of public welfare services, but an ‘unusual, systematic and frequent use of arrangements such as social security benefits pursuant to the Social Services Act’.⁸⁶⁹ Each case must be assessed individually, taking into account personal circumstances, the duration of the stay,

⁸⁶⁶ Cf. also Ot.prp. No. 72 (2007-2008) page 62

⁸⁶⁷ Ot.prp. No. 72 (2007-2008) pages 62-63 and UDI Circular No. 2011-035 section 3.2

⁸⁶⁸ UDI Circular No. 2011-035 section 3.2 (our translation)

⁸⁶⁹ UDI Circular No. 2010-025 section 2.4 and Ot.prp. No. 72 (2007-2008) pages 29 and 63 (our translations)

the size of the granted benefits and whether the difficulties of the person in question are temporary.⁸⁷⁰

Jobseekers

EEA nationals who are jobseekers and their family members are, pursuant to IA Section 111, third paragraph, given ‘a right to stay for up to six months, and in special cases also for more than six months’. It follows from the preparatory works that the provision was introduced in order to comply with the case law of the CJEU, according to which jobseekers are treated more favourably with respect to residence, cf. recital 9 of the directive.⁸⁷¹

‘Special cases’ that may give a jobseeker and his or her family members a residence right beyond six months ‘may be when the jobseeker can provide documentary evidence that there is in the near future a prospect of employment or a possibility of starting a business’, cf. IR Section 19-11, third paragraph. UDI Circular No. 2011-035 also mentions the example that a person has been given an oral promise of employment, but is still waiting for a written offer. The circular reminds that the documentation requirements, according to the CJEU, should be practiced liberally and that the immigration authorities shall base their decision regarding the length of the residence right on a specific assessment.⁸⁷²

The preparatory works seem to indicate that the jobseeker must demonstrate impending job opportunities and, in addition, demonstrate his or her status as a jobseeker by registering as a jobseeker with the Norwegian Labour and Welfare Service.⁸⁷³ Vevstad points out that if a person can provide documentary evidence as stipulated in IR Section 19-11, third paragraph, the person can hardly be required to register with the Norwegian Labour and Welfare Service.⁸⁷⁴

It follows from IR Section 19-11, first and second paragraphs that jobseekers and their family members must report to the police or to a Service Centre for Foreign Workers within three months after entry. Failure to report may lead to the imposition of a fine, cf. IA Section 108, second paragraph, letter b and IR Section 18-13, first paragraph. In Ministry Circular No. A-63/2009, it is emphasised that the duty to report is important in order for the authorities to know whether the person in question has a basis for residence and in order to document his or her status as a jobseeker.⁸⁷⁵

3.2.1.3 Right of residence for more than 3 months

EEA nationals

EEA nationals have a right of residence for more than three months as long as they are workers, self-employed, service providers, self-sufficient or students, cf. 3.1.3–3.1.5 over and IA Section 112, first paragraph.

As explained above, jobseekers’ residence rights also exceed three months. Unlike the groups of persons mentioned explicitly in IA Section 112, the rights of jobseekers are limited to six months,

⁸⁷⁰ Ministry Circular No. A-63/2009 annex 19 and UDI Circular No. 2011-035 section 3.3

⁸⁷¹ Ot.prp. No. 72 (2007-2008) page 29

⁸⁷² UDI Circular No. 2011-035 section 4.1

⁸⁷³ Ot.prp. No. 72 (2007-2008) page 63

⁸⁷⁴ Vevstad (2012) commentary to section 111, para 8

⁸⁷⁵ Ministry Circular No. A-63/2009 annex 19

with the possibility of extension in special cases. It may nevertheless be noted that the directive, according to the preparatory works, is to be interpreted to mean that a person who initially had a right of residence pursuant to Section 112 (for example as a student or person with sufficient resources), but who no longer fulfils these requirements, may reside in Norway as a jobseeker for an additional period of six months pursuant to Section 111.⁸⁷⁶

The right of residence lapses when the conditions for residence are no longer met, cf. IR Section 19-13a.-For persons whose right of residence is based on having sufficient resources, including students, the right also lapses if they become an unreasonable burden on the social welfare system, cf. UDI Circular No. 2011-035. The circular indicates that the latter condition applies to service providers as well, as it refers to persons ‘who are covered by section 112 first paragraph, letter b, c and d of the Immigration Act, cf. Immigration Regulation section 19-10 second paragraph’.⁸⁷⁷

Family members who are themselves EEA nationals

IA Section 113 regulates the rights of family members of EEA nationals who are themselves EEA nationals. The provision is relevant where the family member does not have an independent right of residence pursuant to Section 112; his or her residence right is then derived from the reference person.

If the reference person is a worker, self-employed person, service provider or person with sufficient resources, he or she may be accompanied or reunited with all family members listed in IA Section 110, third paragraph. Students, on the other hand, only have the right to be accompanied or reunited with a spouse, cohabitant or dependent children under the age of 21, cf. Section 113, first and second paragraphs.

The family member has the right to stay in Norway ‘for as long as the EEA national’s right of residence lasts’ (i.e. for as long as the reference person fulfils the requirements laid down in Section 112, cf. Section 113, first paragraph).

If the reference person departs from Norway, or in the event of his or her death, the family member’s right of residence pursuant to Section 113 generally lapses, cf. the provision’s third paragraph, first sentence. A divorce or cessation of cohabitation has the same consequence for the respective spouse/cohabitant, cf. the fourth paragraph.

In any event, a family member who is an EEA national may retain his or her residence right by establishing an independent right as a worker, self-employed person, service provider, person with sufficient resources or student pursuant to Section 112, first paragraph. This follows both from Section 112, first paragraph itself and is explicitly stated in Section 113, cf. third paragraph, first sentence and fourth paragraph.

An exception also applies if the reference person has children and the reference person departs from the realm or in the event of his or her death; both the child and the person who has parental responsibility retain a right of residence for as long as the child is enrolled at an approved educational institution, cf. Section 113, third paragraph. The purpose of this provision is to allow children who are integrated in the Norwegian education system to continue their studies without

⁸⁷⁶ Ot.prp. No. 72 (2007-2008) page 30. See also Vevstad (2012) commentary to section 112, para 1

⁸⁷⁷ Section 3.3 (our translation)

interruption.⁸⁷⁸ According to IR Section 19-14, it is a requirement that the child actually attends the educational lessons.

The provision relating to children who are enrolled at an educational institution implements Article 12(3) of the directive. According to the preparatory works, the wording of the directive and CJEU case law indicates that the child's right to reside in the host country applies to the entire education (i.e. not only to the completion of the level of education commenced at the time of the reference person's death or departure). It is nevertheless emphasised that the provision applies to 'children' and that its purpose therefore is to make it easier for 'younger' persons to complete their education.⁸⁷⁹ At first glance, this could indicate that the right does not apply to educational levels above upper secondary school and children who have reached the age of majority. However, UDI Circular No. 2010-025 clearly states that the right pursuant to CJEU case law is maintained 'until the whole education has been completed, including any university studies'.⁸⁸⁰

Concerning the person who has the parental responsibility, the preparatory works state that the right of residence is granted until the child reaches the age of majority, which in Norway is generally the age of 18.⁸⁸¹ However, IR Section 19-15, third paragraph states that the right may be granted until the child reaches the age of 21. The latter provision actually applies to TCN family members, but as Vevstad points out, there is no reason to treat EEA nationals less favourably in this respect.⁸⁸² UDI takes the same view in Circular No. 2010-025, stating that the age of 21 constitutes the upper limit:

Persons with parental responsibility only have right of residence until the child reaches the age of 21, even if his/her education has not been concluded.⁸⁸³

UDI also clarifies that the right to reside pursuant to IA Section 113, third paragraph, second sentence applies regardless of whether the person with parental responsibility is an EEA national or not.⁸⁸⁴

TCN family members

IA Section 114 regulates the rights of family members of EEA nationals, who are TCNs. The rights are similar to those regulated in Section 113; EEA nationals who are workers, self-employed, service providers or persons with sufficient resources may be accompanied or reunited with all (TCN) family members listed in IA Section 110, third paragraph, while students only have the right to be accompanied or reunited with a TCN spouse, cohabitant or dependent children under the age of 21, cf. Section 114, first paragraph.

TCN family members generally have a right to stay in the realm for as long as the EEA national's right of residence lasts. Departure or death of the reference person, as well as divorce/cessation of cohabitation, generally lead to the loss of residence rights. Departure is dealt with in connection with the right of permanent residence, see 3.2.1.4.

⁸⁷⁸ Ot.prp. No. 72 (2007-2008) page 36

⁸⁷⁹ Ot.prp. No. 72 (2007-2008) page 36

⁸⁸⁰ UDI Circular No. 2010-025 section 4.1.1

⁸⁸¹ Ot.prp. No. 72 (2007-2008) page 36. Cf. also section 2 of Act of 26 March 2010 No. 9 relating to Guardianship for Persons who are Legally Incapable

⁸⁸² Vevstad (2012) commentary to section 113, para 15

⁸⁸³ UDI Circular No. 2010-025 section 4.1.1

⁸⁸⁴ UDI Circular No. 2010-025 section 4.1.1

An independent right may be obtained in certain cases, but the requirements are stricter than for family members who are themselves EEA nationals.

In the event of the death of the reference person, an independent residence right is obtained pursuant to Section 114, third paragraph if the TCN has stayed in Norway as a family member for one year prior to the death and, in addition, has the status of a worker, self-employed person, service provider or person with sufficient resources pursuant to Section 112, first paragraph, letters a, b or c (students are not included). The right of residence is also retained if the person in question stays in the realm as a family member of another family member who fulfils the mentioned criteria. This provision is especially relevant for the parents and children of the TCN family member.⁸⁸⁵

In the event of divorce or cessation of cohabitation, an independent residence right is obtained if the TCN family member has the status of a worker, self-employed person, service provider or person with sufficient resources pursuant to Section 112, first paragraph, letter a, b or c (again, this does not apply to students) and one of the following conditions is fulfilled, cf. Section 114, fourth paragraph:

- a) at the time of separation, the marriage had lasted three years, including one year in the realm,
- b) parental responsibility for children of the EEA national has been transferred to the spouse who is not an EEA national under an agreement or a court judgment,
- c) the spouse who is not an EEA national, or any children, have been exposed to violence or other serious abuse in the marriage, or
- d) the spouse who is not an EEA national exercises a right of access to children in the realm under an agreement or a court judgment.

Although the provision only refers to 'marriage', IR Section 19-15 clarifies that it applies correspondingly to cohabitation. The purpose of the three- and one-year requirement in letter a) is, according to the preparatory works, to limit the risk of abuse through marriages of convenience.⁸⁸⁶ Concerning letter d), the preparatory works specify that 'access to children' means access to minor children for as long as the access is deemed to be necessary.⁸⁸⁷

Section 114, fourth paragraph, letter c states that the right of residence may be retained if the spouse, or any children, 'have been exposed to violence or other serious abuse in the marriage'. The preparatory works relating to Section 114, fourth paragraph also indicate that the spouse must have been exposed to violence during the marriage or partnership.

As in the event of death, the right of residence is also retained in the event of divorce/cessation of cohabitation if the person in question stays in the realm as a family member of another family member who fulfils the mentioned criteria, cf. Section 114, fourth paragraph.⁸⁸⁸

In the event of the reference person's departure from the realm or death, children enrolled at an approved educational institution and the person who has parental responsibility retain a right of residence on the same conditions as family members who are EEA nationals, cf. Section 114, third paragraph, second sentence and IR Section 19-15.

⁸⁸⁵ Vevstad (2012) commentary to section 114, para 4

⁸⁸⁶ Ot.prp. No. 72 (2007-2008) page 35

⁸⁸⁷ Ot.prp. No. 72 (2007-2008) page 35

⁸⁸⁸ Vevstad (2012) commentary to section 114, para 4

There seems to be some uncertainty regarding the applicability of Section 114, fourth paragraph in situations where the TCN family member and the reference person are separated from each other without being formally divorced. In essence, the question is whether the provision could apply to cases where the spouses are formally separated or have terminated their cohabitation pursuant to the Marriage Act (see 3.1.2.3).

UDI has previously taken the view that there ‘still [must] be some kind of family life between the married couple’ in order to retain a right of residence. If, on the other hand, the couple has ‘initiated a process to terminate the marriage, this could entail the loss of the right of residence unless they fulfil the requirements as listed in Article 13(2)’. In that regard, UDI ‘considers that the date of the actual termination of family life is relevant’.⁸⁸⁹ The fact that the spouses have not been living together for several years has, it appears, also been taken as confirmation that the actual family life has ceased.⁸⁹⁰

The Authority has criticised UDI’s position, stating, inter alia, that ‘it is not permissible to make the right to free movement subject to the manner in which the spouses wish to conduct their married life, by requiring them to live together under the same roof’.⁸⁹¹ The Norwegian position could, according to the Authority, ‘be maintained only with respect to third country national family members of EEA nationals who have definitely departed from Norway and do not anymore enjoy their rights of residence in Norway’, since considering a factual termination as a divorce then would be in favour of the TCN in question.⁸⁹²

Whether a formal separation would be sufficient for Section 114, fourth paragraph to apply is not considered in the abovementioned case. In Case TOSLO-2014-147627, Oslo District Court calculated the independent right of residence pursuant to letter a of the provision based on the time of formal divorce.

3.2.1.4 Right of permanent residence

EEA nationals and family members who are themselves EEA nationals

According to IA Section 115, first paragraph, EEA nationals and family members who are themselves EEA nationals are granted a right of permanent residence if they have ‘had a continuous lawful stay in the realm under sections 112 and 113 of five years’.

In order to fulfil the requirement of a ‘lawful’ stay, the material requirements in Sections 112 and 113 must be met during the entire five-year period. Whether the EEA national has had an independent right of residence or a derived right as a family member is irrelevant; in both cases, the stay is equally lawful. The basis for residence may also vary during the stay – for example, if a student becomes a worker after completion of his or her studies.⁸⁹³ Lawful residence that is not based on the EEA rules of the Immigration Act is not taken into consideration when calculating the residence period pursuant to Section 115.⁸⁹⁴

⁸⁸⁹ Letter from ASD to the Authority in case nr. 74864 of 3 March 2014, item 1. The letter is available at <http://www.eftasurv.int/media/public-documents/701210.pdf>

⁸⁹⁰ Letter from ASD to the Authority in case no. 74864 of 3 March 2014, item 1 and 2

⁸⁹¹ Letter from the Authority to ASD in case no. 74864 of 17 July 2014, item 3

⁸⁹² Letter from the Authority to ASD in case no. 74864 of 17 July 2014, item 3

⁸⁹³ UDI Circular No. 2011-016 section 4.2

⁸⁹⁴ UDI Circular No. 2011-016 chapter 3 and Vevstad (2012) commentary to section 115, para 6A

The requirement of a ‘continuous’ stay does not prevent the person in question from having temporary stays outside Norway, cf. Section 115, first paragraph, second sentence. More detailed provisions are found in IR Section 19-17, second paragraph, according to which temporary stays abroad do not interrupt a continuous stay:

[W]here the absence

- a) is less than six months in the course of a twelve-month period, or
- b) is due to reasons such as pregnancy, childbirth, serious illness, research stays, studies or vocational training, or stationing in another EEA country or third country, and does not exceed twelve months, or
- c) is due to compulsory military or civilian service.

Regarding letter a, UDI Circular No. 2011-016 specifies that a person may have several periods of absence not exceeding a total of six months a year.⁸⁹⁵ As soon as the person stays outside Norway for more than six months within one year, however, the continuity of the residence period in Norway is generally interrupted.⁸⁹⁶ ‘Serious illness’ in letter b refers, according to UDI, to acute, diagnosed illness that requires continual medical follow-up and treatment. Absence due to military or civilian service may exceed twelve months.⁸⁹⁷

If the requirement of continuity is not met, the residence period is calculated anew, cf. IR Section 19-17, third paragraph.

Section 115 contains some special provisions for workers and self-employed persons. According to the provision’s second paragraph, a worker or self-employed person is granted a right of permanent residence even though the requirement of a continuous stay of five years is not met:

[I]f the person in question

- a) upon cessation of labour force participation takes up an early retirement pension or has reached the statutory age for entitlement to a retirement pension, and has had a continuous stay in the realm of more than three years and employment in the realm for at least the 12 preceding months,
- b) has stayed in the realm continuously for more than two years and becomes permanently incapable of work, or
- c) after having worked and stayed in the realm continuously for three years, works in another EEA country, but continues to stay in the realm and returns to the place of residence daily, or at least once a week.

If a person becomes incapable of work (letter b) due to an occupational accident or occupational illness, no condition as to length of residence is imposed, cf. Section 115, third paragraph. A right of permanent residence may thus in principle be obtained quite shortly after entering Norway.⁸⁹⁸

UDI Circular No. 2011-016 lists the documentation to be submitted in relation to each of the above alternatives. In case of retirement (letter a), a letter from NAV shall be submitted, stating that the

⁸⁹⁵ UDI Circular No. 2011-016 section 4.3.1

⁸⁹⁶ Cf. also the judgment of Oslo District Court in case TOSLO-2014-147627

⁸⁹⁷ UDI Circular No. 2011-016 section 4.3.1

⁸⁹⁸ Vevstad (2012) commentary to section 115, para 8

person in question receives a retirement pension or early retirement pension. For cases of permanent incapability to work (b), the circular mentions medical certificates and letters from NAV, stating that the person in question receives disablement benefits. Commuters who work in another EEA country (letter c) shall provide an employment contract or a confirmation from the company he or she works for, as well as documentary evidence that shows that the person in question is a resident in Norway.⁸⁹⁹

According to IR Section 19-19, first paragraph, periods of ‘documented involuntary unemployment, involuntary interruption of employment and absence from, or cessation of, employment because of illness or accident’ shall be regarded as accrued working time or periods of employment if a person is covered by one of the abovementioned three alternatives. Involuntary interruption shall be documented by NAV or by an employment office in another EEA or EFTA state, cf. the provision's second paragraph. Examples of documentation are laid down in UDI Circular No. 2011-016. According to the circular, the following documentation may be provided:

- In the case of illness or accident, a medical certificate or a self-certified sick leave form from the employer or any social insurance benefits may be submitted.
- In the case of involuntary unemployment, a confirmation from NAV stating that the person is involuntarily unemployed and has a right to receive a daily subsistence allowance may be submitted.
- In the case of redundancy, a confirmation from NAV or the employer stating that the redundancy is lawful may be submitted.⁹⁰⁰

EEA nationals who are family members and who live together with a person covered by Section 115, second paragraph (i.e. retired workers or self-employed persons, former workers or self-employed persons who become permanently incapable of work and commuters, see above) obtain a right of permanent residence at the same time as the reference person, cf. Section 115, fourth paragraph.

EEA nationals who are family members and who live together with a worker or self-employed person pursuant to Section 112, first paragraph, letter a, may also obtain a right of permanent residence in the event of the reference person's death, even though the reference person did not him or herself have a right of permanent residence, cf. Section 115, fifth paragraph. The right of permanent residence of family members in the event of death is granted in two situations; firstly, if the deceased before his or her death resided in Norway for a period of two consecutive years and, secondly, if the death was caused by an occupational accident or occupational illness.

In order for the requirement of ‘living together’ to be fulfilled, the persons in question must, as a general rule, ‘live together in a shared dwelling and return to the dwelling every day or at least one day a week’, cf. IR Section 19-10, first paragraph. In view of the Authority's position regarding the applicability of Section 114, fourth paragraph, it may be asked whether this condition is consistent with the directive.

If a right of permanent residence is obtained, the right continues to exist regardless of whether the conditions for residence in IA Sections 112 and 113 are met. The right of permanent residence is lost if the holder of the right is absent from Norway for more than two consecutive years. Absence caused by the circumstances stipulated in IR Section 19-17, second paragraph are not taken into

⁸⁹⁹ UDI Circular No. 2011-016 chapter 6

⁹⁰⁰ UDI Circular No. 2011-016 section 6.3

account (see above), cf. IA Section 115, first paragraph, third and fourth sentences and IR Section 19-21.

TCN family members

According to IA Section 116, first paragraph, a family member who is not an EEA national ‘and who under section 114, first paragraph, has lived with an EEA national and has had a continuous lawful stay in the realm of five years’ is granted a right of permanent residence.

The wording indicates that the TCN family member and the EEA national actually must have cohabited during the five-year period. In the preparatory works, it is, however, emphasised that a wide interpretation must be applied. Accordingly, the requirement will generally be met if a spouse or partner is commuting on a weekly basis because the couple has their respective places of work in different parts of the host state. Furthermore, children who move out from their parents’ home, for example, in connection with their studies, will still be regarded as ‘having lived with an EEA national’ during this period of time.⁹⁰¹

Still, the requirement of living ‘in a shared dwelling and return to the dwelling every day or at least one day a week’ according to IR Section 19-10, first paragraph also seems applicable in this respect, and UDI will normally require tenancy agreements, mail that has been sent to a shared address, joint household/home insurance and similar evidence on shared housing as documentary evidence.⁹⁰² As for family members who are EEA nationals, it may be asked whether this condition is consistent with the directive, considering, *inter alia*, the Authority’s position regarding the applicability of Section 114, fourth paragraph (3.2.1.3).

For the content of the requirement of a ‘continuous lawful stay’ in Norway, reference may be made to the explanations above relating to family members who are EEA nationals. If the stay of the reference person is interrupted (for example, because he or she has been staying outside Norway for more than six months during the course of one year), the derived right of residence of the family member also generally ceases.⁹⁰³

TCN family members who earlier have obtained an independent right of residence in the event of the death of the reference person or divorce/cessation of cohabitation are also granted a right of permanent residence after five years of lawful residence, cf. Section 116, first paragraph, second sentence and 3.2.1.3. The basis for residence may thus vary during the stay, and it is irrelevant whether the TCN has had an independent right of residence or a derived right as a family member. For example, a TCN will have a right of permanent residence if he or she has had a derived right as a spouse for three years and an individual right for two years upon divorce.⁹⁰⁴

Furthermore, the provisions of Section 115 regarding the position of family members of workers and self-employed persons, as well as the implications in the event of the reference person’s death, apply correspondingly to TCN family members, cf. Section 116, second paragraph. Hence, they may obtain a right of permanent residence even though the five-year period has not been completed in the circumstances explained above.

⁹⁰¹ Ot.prp. No. 72 (2007-2008) page 39

⁹⁰² UDI Circular No. 2011-016 section 5.1

⁹⁰³ Cf. also TOSLO-2014-147627

⁹⁰⁴ Ot.prp. No. 72 (2007-2008) page 39

3.2.1.5 Equal treatment

Persons who have a residence right pursuant to Chapter 13 shall enjoy equal treatment with Norwegian nationals in accordance with the EEA agreement and secondary law, including the directive itself. When determining the specific rights resulting from the latter obligation, the particular national implementing legislation relating to labour, social services and welfare as well education will be of importance.

The IA itself confers a right to take up employment and self-employment in the realm. IA Section 109, second paragraph states:

Right of residence under this chapter *confers the right to stay and to accept employment or engage in business activity anywhere in the realm unless limitations have been imposed in accordance with provisions laid down in or under this Act.*⁹⁰⁵

Persons with a right of residence according to IA Chapter 13 also have a right not to be treated less favourably than other foreigners. Therefore, although a person is in principle covered by Chapter 13, this does not generally prevent him or her from obtaining a residence permit pursuant to the general provisions if this would be more convenient or favourable, cf. Section 109, third paragraph.

3.2.2 *Rights against the home state*

3.2.2.1 The position of returning Norwegian nationals and their family members

Norwegian nationals are, in principle, not subject to IA Chapter 13. An exception applies for Norwegian nationals who are returning to the realm ‘after having exercised the right to free movement under the EEA Agreement or the EFTA Convention in another EEA country or EFTA country’. In these cases, a family member of the returning Norwegian national would have a derived right of residence pursuant to Chapter 13, cf. IA Section 110, second paragraph, second sentence.

UDI Circular No. 2011-035 sets out two principal conditions that must be fulfilled in order for the rules to apply. Firstly, the Norwegian national must have exercised his or her free movement rights as a worker, self-employed person, service provider, person with sufficient resources or student. Secondly, the family relation must have been established before returning to Norway.⁹⁰⁶

Some additional guidance on the position of TCN family members who apply for residence cards for more than three months is laid down in Ministry Circular No. AI-1/2014. The circular especially deals with the question of whether the stay of the reference person (i.e. the Norwegian national) abroad has been ‘actual and genuine’, which is a condition for the rules to apply. Relevant factors concerning this requirement include the same as those listed under 3.1.2.9. In addition, the circular states that ‘a great emphasis is placed on whether the EEA national has been economically active in the host state’. Several reasons for including economic activity as a specific factor in the assessment of whether the stay has been actual and genuine are highlighted, including the fact that ‘[t]he right to free movement in the EEA Agreement has as a background principle a principle of economic activity’ and that the ‘EEA national shall not constitute an unreasonable burden on the public welfare programs’. Another concern relates to the risk that ‘the importance of the general requirements

⁹⁰⁵ Emphasis added

⁹⁰⁶ UDI Circular No. 2011-035 section 2.2.2

regarding subsistence in cases of family reunification and expulsion might be undermined' if family members of returning Norwegian nationals who have not been economically active are covered.⁹⁰⁷

Ministry Circular No. AI-1/2014 also provides that 'a certain temporal relation between the return of the Norwegian national to Norway and the time for the family member's application for a residence card is required'. Generally, the application 'must be submitted within three months after the entry of the family member'. In case the application is submitted later, 'emphasis is placed on whether the application has been delayed for example by work or educational circumstances, and on the duration of the delay'.⁹⁰⁸

The requirement of submitting an application for a residence card within three months is currently considered by the Authority, along with several other issues relating to Circular No. AI-1/2014.⁹⁰⁹ In reply to the Authority's request for information, the Ministry of Labour and Social Affairs has explained that the three-month period applies from the time the Norwegian national returns to Norway and that the reason for this rule is that it 'shows the degree of relationship between the family member and the returning Norwegian national'. If the amount of time is substantial one may, according to the Ministry, 'ask how genuine the connection is'.⁹¹⁰ This may, as submitted by the Authority, indicate that the sole status of being a spouse or registered partner is not enough in order for family members of returning Norwegian nationals to be covered by IA Chapter 13.

Lastly, Ministry Circular No. AI-1/2014 provides that an earlier rejection of an application for residence in Norway would be a factor against issuing a residence card.⁹¹¹

3.2.2.2 The position of commuters and their family members

The position of EEA nationals (including Norwegian nationals) who stay in their own EEA state of nationality while exercising their free movement rights by providing services to other EEA states, or travel to other EEA states as part of their employment, is not as such regulated in IA Chapter 13 (although the position of commuters is taken into account when calculating the five-year residence requirement for obtaining permanent residence). Also, we are not aware of any national court decisions or circular guidelines that deal with this group of persons specifically.

The Authority points out the lack of provisions in this respect and is critical to Ministry Circular No. AI-1/2014, which requires that Norwegian nationals and EEA nationals must have moved to the host state in order to be reunited with third-country family members pursuant to IA Chapter 13.⁹¹² In its previous reply, the Norwegian government has expressed a wish to enter into a discussion with the Authority on the position of commuters, as the government has limited experience in this respect.⁹¹³

3.2.2.3 The position of TCN caretakers of children who are EEA nationals in cross-border and non-cross-border situations

TCN caretakers of children who are EEA nationals may be divided into two main categories:

⁹⁰⁷ Ministry Circular No. AI-1/2014 Norwegian reference person

⁹⁰⁸ Ministry Circular No. AI-1/2014 Norwegian reference person

⁹⁰⁹ Reasoned opinion of 8 July 2015, paras 112 et seqq.

⁹¹⁰ Reply to Pre-31 letter of 28 May 2014, item 2

⁹¹¹ Ministry Circular No. AI-1/2014 Norwegian reference person

⁹¹² Reasoned opinion of 8 July 2015, para 134 et seqq. and Ministry Circular No. AI-1/2014

⁹¹³ Reply to letter of formal notice of 11 March, item 9

- TCN caretakers of children who are EEA nationals and who are exercising free movement rights. Typical for these cases is that the child has the nationality of one EEA country, but lives in another EEA country. Consequently, there is a cross-border element. However, while the child surely would be subject to IA Chapter 13, the caretaker does not fit precisely into the definition of family members in Section 110, third paragraph, since relatives in the ascending line need to be dependent on the EEA national – not the other way around.
- TCN caretakers of children who are EEA nationals, but who have not exercised free movement rights. Typical for these cases is that the child lives in his or her state of nationality and that there consequently is no cross-border element at all.

Neither of these situations is explicitly regulated by the implementing legislation. The latter situation was dealt with by the Norwegian Supreme Court in January this year, cf. Rt. 2015, page 93. The case concerned a Kenyan mother who resided in Norway unlawfully and whose child was a five-year-old girl of Norwegian nationality. There was no contact between the child and her Norwegian father, who had renounced his parental responsibility. The critical question was whether the expulsion of the mother would entail a de facto expulsion of the child, contrary to her rights as a Norwegian national.

The Court first concluded that a de facto expulsion could not as such be regarded as a decision to expel Norway's own citizens contrary to the relevant national or international provisions. In that connection, the Court also considered the implications of the case law of the CJEU concerning Union citizenship, in particular the judgments in Case C-34/09 *Zambrano*⁹¹⁴ and Case C-86/12 *Alokpa*⁹¹⁵. According to the Court, this case law 'does not have implications for EEA nationals', due to Decision No. 158/2007 by the EEA Joint Committee and the Joint Declaration according to which Union citizenship is not part of the EEA.⁹¹⁶

Still, not to allow the mother – and consequently the child – to stay in the realm would in this case entail a breach of the child's human rights (cf. Section 102 and Section 104 of the Norwegian Constitution and Article 8 of the European Convention on Human Rights).⁹¹⁷

3.3 Restrictions on grounds of non-fulfilment of the conditions for entry and/or residence

Norwegian law has traditionally drawn a basic distinction between two different types of measures: 'Rejection' and 'expulsion'. While rejection only leads to the denial of entry or a duty to leave the country, expulsion in addition leads to a future ban on entry. This distinction has been maintained in the Immigration Act 2008, cf. 3.6 regarding re-entry bans.⁹¹⁸

Non-fulfilment of the conditions for entry and/or residence may only lead to rejection, not expulsion. The reason for this is that an entry ban, according to Article 15(3) of the directive, may only be imposed on the grounds of public policy, public security or public health (see 3.4.1).⁹¹⁹

The legal basis for rejection is IA Section 121, which in the first paragraph states:

⁹¹⁴ Case C-34/09 *Zambrano* [2011] ECR I-1177

⁹¹⁵ Case C-86/12 *Alokpa* ECLI:EU:C:2013:645

⁹¹⁶ Rt. 2015 page 93, para 51 (our translation)

⁹¹⁷ Rt. 2015 page 93

⁹¹⁸ Ot.prp. No. 72 (2007-2008) pages 40 and 67

⁹¹⁹ Cf. Ot.prp. No. 72 (2007-2008) page 40

EEA nationals and their family members may be rejected when:

- a) They do not show a valid passport or other recognised travel document or visa when this is necessary,
- b) they enter into or stay in the realm without a right of entry, right of residence or right of permanent residence under sections 111, 112, 113, 114, 115 or 116 and, moreover, they do not have a right of entry or a residence permit under the general provisions of the Act, or
- c) there are circumstances that provide a basis for expulsion.

The basis for rejection in letter a (rejection due to lack of necessary documents at the time of entry) and b (rejection due to lack of entry and/or residence right) must be read in conjunction with the specific requirements stipulated in Sections 111-116, respectively. Rejection proceedings pursuant to letter a must be instigated (but not decided) at the time of entry or, at the latest, within seven days. This shall give the person in question the opportunity to obtain the documentation required.⁹²⁰ For rejection based on letter b, there is no specific time limit.

According to letter c, a person may also be rejected if the conditions for expulsion (i.e. on the grounds of public policy, public security or public health) are fulfilled; see below.

3.4 Restrictions on grounds of public policy or public security

The rules on expulsion on the grounds of public policy or public security are laid down in IA Section 122. As already mentioned above, expulsion is not the only measure that may be applied in the interest of public order or security; the authorities may instead decide to reject the person in question, cf. Section 121, first paragraph, letter c.

3.4.1 'Public policy' and 'public security'

According to the preparatory works relating to IA Chapter 13, the notion of 'public policy' covers more serious disruptions of the social order. In the preparatory works relating to the general provisions of the IA, public policy is described as 'covering, broadly speaking, the combatting of crime and other behaviour that is considered to be in conflict with traditional moral norms'.⁹²¹ UDI describes the term as 'behaviour that qualifies for penalties or special sanctions pursuant to the Penal Code and/or other sanctions that are suitable to combat crime, as well as other disruptions of the social order'.⁹²² Typical examples are criminal acts, such as drug crime, crime for profit and crime of violence.⁹²³

The notion 'public security' is not elaborated in the preparatory works. UDI notes that the term has limited individual significance, as circumstances that concern public security will also be covered by the notion of 'public policy'. The directorate also refers to the judgments of the CJEU in Case C-

⁹²⁰ Cf. Ot.prp. No. 72 (2007-2008) page 68 and Vevstad (2012) commentary to section 121, para 8

⁹²¹ NOU 2004: 20 page 305 (our translation). The statement is made in relation to section 58 of the Immigration Act from 1988, which again was based on the corresponding provisions in Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. The phrase 'combatting of crime and other behaviour that is considered to be in conflict with traditional moral norms' is also applied by the Norwegian Supreme Court in Rt. 2009 page 705, para 42, and by UDI in Circular of 20 July 2011 (last modified 13 August 2013) No. 2010-022, Rejection and expulsion of EEA nationals on grounds of public order or security, section 3.3.1.

⁹²² UDI Circular No. 2010-022 section 3.3.1 (our translation). Cf. Norwegian Penal Code of 22 May 1902 No. 10

⁹²³ Ot.prp. No. 72 (2007-2008) page 68

423/98 *Albore*⁹²⁴ and Case C-285/98 *Kreil*⁹²⁵, pointing out the distinction between internal and external security.⁹²⁶

IA Section 122, third paragraph contains a special provision regarding terrorism. Accordingly, a person who has breached Sections 147 a or 147 b of the Penal Code, or ‘has provided a safe haven for someone whom the foreign national knows has committed such a crime, may be expelled (...)’. The exceptions in Section 122, second paragraph (see 3.4.5) do not apply in these cases.

IR Section 19-29 provides further examples of circumstances that may lead to expulsion or rejection on the grounds of public policy or public security, namely:

(...) if the foreign national

- a) is dependent on narcotic substances or other toxic substances, and the dependence arose before the foreign national was granted right of residence, or
- b) according to competent health service personnel obviously suffers from a serious mental disorder, a manifest psychosis involving states of agitation, delusions or hallucinations with states of bewilderment, and the condition arose before the foreign national was granted right of residence.

In Circular No. 2010-022, UDI provides guidelines on the lower limits for instigating rejection or expulsion procedures. As pointed out by UDI, the list is not exhaustive, but provides an overview of circumstances where rejection or expulsion typically is considered. Offences that are dealt with include, inter alia, theft, receiving stolen property, robbery, fraud, document forgery and perjury, assault and threats, different types of drug crimes as well as circumstances covered by the Road Traffic Act⁹²⁷ and the Customs Act.⁹²⁸ Affiliations with criminal entities may, according to UDI, indicate that the person in question poses a ‘more real, immediate and serious threat’ and will also be relevant for the length of the re-entry ban.⁹²⁹

UDI Circular No. 2010-022 is supplemented by Ministry Circular GI-02/2013, whereby UDI is instructed to consider expulsion if the person in question has accepted a penalty writ for ordinary theft or pilfering⁹³⁰, indicating that the threshold for instigating expulsion procedures may be quite low.

A particular question is whether, and to what extent, a person may be expelled because he or she has an ‘adverse immigration history’, e.g. has previously attempted to obtain residence by deliberate

⁹²⁴ Case C-423/98 *Albore* [2000] ECR I-5965

⁹²⁵ Case C-285/98 *Kreil* [2000] ECR I-69

⁹²⁶ UDI Circular No. 2010-022 section 3.3.2

⁹²⁷ Act of 18 June 1965 No. 4 relating to Road Traffic

⁹²⁸ Act of 21 December 2007 No. 119 on Customs Duties and Movement of Goods. An English translation of the Customs Act, updated as of 18 August 2014, is available at http://toll.no/PageFiles/6413/Customs_Duty_and_Movement_of_Goods_Act.pdf

⁹²⁹ UDI Circular No. 2010-022 chapter 10. Concerning the issue of affiliation with criminal societies, reference may also be made to the opinion of the Parliamentary Ombudsman in case SOM-2012-1045. The case concerned the validity of a decision by UDI to reject 22 EEA nationals and two TCNs who had affiliations with Hells Angels motorcycle club, and who intended to participate at an event organised by Hells Angels Stavanger. The EEA nationals were rejected on grounds of public policy and security. The decision was to a large extent based on various danger assessments relating to motorcycle clubs in general and Hells Angels in particular. The Parliamentary Ombudsman was of the opinion that – although affiliation with an organisation like Hells Angels in principle may call for rejection on grounds of public policy – UDI and the police had in this case failed to make a sufficiently specific and individual assessment of the EEA national’s personal circumstances, and whether the persons in question each could be suspected of committing acts that would constitute a danger to society

⁹³⁰ Cf. sections 257 and 391 letter a of the Norwegian Penal Code

deception, false representation (including the use of a false ID), illegal entrance, ‘overstaying’ and so on. According to the preparatory works, ‘serious or constantly recurring infringements of the Immigration Act’ may in principle constitute a basis for expulsion.⁹³¹ Possible penalties for infringements of the IA are regulated in Section 108 of the act. UDI Circular No. 2010-022 clarifies that breach of the duty to register⁹³² cannot as such constitute a basis for expulsion pursuant to Section 122 or rejection pursuant to Section 121, first paragraph, letter c.⁹³³ In relation to other infringements, the situation is more uncertain. Vevstad is of the opinion that the use of false identities or ‘abuse of the asylum system’ probably does not qualify for the expulsion of persons who under their true identity still meet the conditions for residence.⁹³⁴

3.4.2 *Personal circumstances*

According to IA Section 122, first paragraph, second sentence, it is a condition for expulsion that the ‘personal circumstances of the foreign national pose, or must be assumed to pose, a real, immediate and sufficiently serious threat to fundamental societal interests’. Correspondingly, IR Section 19-29, first paragraph requires that rejection or expulsion on the grounds of public order or security may ‘only be grounded in the foreign national’s personal circumstances’ and that ‘previous convictions cannot alone form the basis for rejection or expulsion’.

Consequently, expulsion or rejection on the grounds of public policy or public security may not be used as a mere tool to limit immigration and may not be based on considerations of general prevention as such. Furthermore, the personal circumstances of the person in question must indicate that he or she will commit crimes or other qualified offences in the future.⁹³⁵

The Norwegian Supreme Court (hereinafter ‘NSC’) has in Rt. 2009, page 705 stated that the required degree of probability of repetition will depend on the seriousness of the offence. For offences that pose a direct threat to the social order, there is generally no need to establish whether there is a risk of repetition.⁹³⁶ Conversely, some offences may be regarded not to pose a threat to the social order, even though it is assumed that the person in question is certain to commit similar offences in the future.⁹³⁷

Since the assessment is relative, it is, according to the Court, difficult to determine in general the precise requirements relating to the degree of probability. The Court reiterates that it is not necessary to establish that repetition is more likely than not for the more serious cases. The reason is that such a degree of probability may only be established in exceptional cases if the crime in question is of a more serious nature.⁹³⁸

⁹³¹ Ot.prp. No. 72 (2007-2008) page 43. Our translation

⁹³² IA section 117

⁹³³ UDI Circular No. 2010-022 section 3.3.5

⁹³⁴ Vevstad (2012) commentary to section 122, para 4

⁹³⁵ Rt. 2009 page 705, paras 39 et seqq. and UDI Circular No. 2010-022 section 3.3.3, with references to the judgments of the CJEU in case 30/77 *Bouchereau* [1977] ECR 1999, case 67/74 *Bonsignore* [1975] ECR 297, case C-33/07 *Jipa* [2008] ECR I-5157, case C-503/03 *Commission v Spain* [2006] ECR I-1097 and case C-348/96 *Calfa* [1999] ECR I-11

⁹³⁶ Rt. 2009 page 705, para 46. An example would be terrorism pursuant to sections 147 a or 147 b of the Penal Code, cf. IA section 122 third paragraph

⁹³⁷ The case concerned the corresponding provisions in the Immigration Act 1988 (cf. section 58), which was based Directive 64/221 Article 3, but the NSC specifically noted that Directive 2004/38 would not change the state of law, cf. Rt. 2009 page 705, para 53. The criteria drawn up by the NSC have subsequently been applied by other courts in cases regulated by IA chapter 13, see for example Borgarting Court of Appeal’s judgment in case LB-2013-116383, case LB-2011-77536, case LB-2011-25337 and case LB-2010-23574. Cf. also Oslo District Court’s judgment in case TOSLO-2011-123742

⁹³⁸ Rt. 2009 page 705, paras 47 et seqq.

The assessment must thus be based on the circumstances in each case, taking into account all relevant factors. Although primarily relevant in connection with the proportionality test (see 3.4.4), factors such as the relationship to the spouse and children, as well as the need for medical assistance, may also be of significance for the assessment of the risk of repetition. In a particular case, the NSC also found that the entire criminal past, which was considered to be ‘extensive’, was a relevant factor, even though a risk of repetition of these offences alone would not constitute a sufficient basis for expulsion.⁹³⁹

In Circular No. 2010-022, UDI confirms that the preponderance of evidence is not required concerning the risk of repetition. Regarding the significance of previous offences, the directorate refers to the judgment of the CJEU in Case 30/77 *Bouchereau* and notes that the risk of repetition as a general rule shall be assessed against the same type of criminal behaviour and that a lower threshold may be applied for more serious crimes. Accordingly, if a rigorous penalty has been imposed for previous crimes, this may indicate that the person in question will commit other offences in the future.⁹⁴⁰ With reference to the judgment of the NSC in Rt. 2009, page 705, UDI also notes that previous criminal offences may be relevant even though they are of another nature than the offence for which the risk of repetition is considered.⁹⁴¹

Regarding the risk of repetition of ordinary theft and pilfering, Ministry Circular GI-2013-2 indicates the following factors are relevant for the assessment:

- The person is without a place of residence and does not have other connections to Norway
- The person does not have sufficient resources to support him or herself
- The person does not have a documented purpose for the stay that indicates that he or she shall be working or in Norway as a tourist
- The legal offence has been committed shortly after entry
- The legal offence has been committed together with others
- It has been registered that the person has been encountered in criminal societies or together with others who have been convicted for criminal behaviour
- Other information indicates a risk of repetition of similar crimes⁹⁴²

3.4.3 *Real, immediate and sufficiently serious threat*

According to IA Section 122, first paragraph, second sentence, the personal circumstances must ‘pose, or must be assumed to pose, a real, immediate and sufficiently serious threat’ to fundamental societal interests. IR Section 19-29, first paragraph states that rejection or expulsion pursuant to IA Section 122 may only be imposed ‘where there is provision for sanctions against Norwegian nationals for corresponding offences’. Where rejection or expulsion is based on public policy, personal circumstances must pose a threat ‘beyond the disturbance of social order entailed by any breach of the law’, cf. the second paragraph of the provision.

When assessing whether a threat is sufficiently serious, a foreign national must thus be treated equally to Norwegian nationals in the sense that he or she may not be rejected or expelled for behaviour that would not be sanctioned if committed by a Norwegian national. This view is also

⁹³⁹ Rt. 2009 page 705, paras 49 and 52

⁹⁴⁰ UDI Circular No. 2010-022 section 3.3.3

⁹⁴¹ UDI Circular No. 2010-022 section 3.3.3

⁹⁴² Ministry Circular GI-2013-2 chapter 5

expressed by UDI.⁹⁴³ An exception must be made to the extent infringements of the Immigration Act itself qualify for expulsion, as the provision of the immigration legislation generally does not apply to Norwegian nationals.

Referring to the judgment of the CJEU in the joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*⁹⁴⁴, the directorate also notes that the threat must be real and immediate ‘at the time of assessment’. This condition must, according to UDI, be seen in conjunction with the risk of repetition (see above).⁹⁴⁵

Crimes that are committed repeatedly may constitute a sufficient threat even though the crime as such is less serious. The fact that several crimes have been committed in the past is, however, not as such sufficient; the nature and seriousness of the criminal behaviour, the frequency of the acts and the resulting damage will be relevant factors in this respect.⁹⁴⁶

3.4.4 *The principle of proportionality*

As explained in the report on the directive, the principle of proportionality consists of several elements; there must be a legitimate aim for the measure in question, the measure must be both suitable and necessary to achieve this aim and, lastly, there must be a fair balance between the interest of the individual concerned and the interest of the member state.

The first three elements (i.e. the requirement of a legitimate aim, suitability and necessity) are essentially covered by the conditions in IA Section 122, first paragraph, according to which a person may only be expelled when this is in the interests of the public order or security and only if personal circumstances must be assumed to pose a ‘real, immediate and sufficiently serious threat to fundamental societal interests’ (see above).⁹⁴⁷

The last element is elaborated in IA Section 122, fourth paragraph:

No decision is made for expulsion under the provisions of this paragraph if, *in view of the seriousness of the offence and the foreign national’s connection with the realm, it would constitute a disproportionate measure* against the foreign national or against the foreign national’s family members. In the assessment of whether expulsion constitutes a disproportionate measure, *emphasis shall be given to, among other things, how long the person concerned has stayed in the realm, age, state of health, family situation, financial situation, social and cultural integration in the realm, and connection with the country of origin*. In cases concerning children, the child’s best interests shall be a fundamental consideration.⁹⁴⁸

In the already-mentioned Supreme Court Case Rt. 2009, page 705, the NSC considered whether the proportionality assessment relating to EEA nationals pursuant to the Immigration Act 1988 (Section 58) differed from the proportionality assessment laid down in the general rules of the same act

⁹⁴³ UDI Circular No. 2010-022 section 3.3.4, with references to inter alia the judgments of the CJEU in case 41/47 *Van Duyn* [1974] ECR 1337, joined cases C-115 and C-116/81 *Adoui and Cornuaille* [1982] ECR 1665, case C-348/96 *Calfa* and case C-268/99 *Jany* [2001] ECR I-8615

⁹⁴⁴ Joined cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257

⁹⁴⁵ UDI Circular No. 2010-022 section 3.3.4

⁹⁴⁶ UDI Circular No. 2010-022 section 3.3.4, with reference to the judgment of the CJEU in case C-349/06 *Polat* [2007] ECR I-8167

⁹⁴⁷ UDI Circular No. 2010-022 section 5.1 and Vevstad (2012) commentary to section 122, para 15

⁹⁴⁸ Emphasis added

(Sections 29 and 30). The NSC concluded that neither the preparatory works nor CJEU case law implied that EEA nationals should be given special treatment in this respect.⁹⁴⁹ In that connection, the Court specifically noted that the case law from the CJEU seemed to be closely related to the European Convention on Human Rights, which in turn must be interpreted uniformly and without regard to whether the person in question is from the EEA.⁹⁵⁰

Based on the conclusions of the NSC, UDI refers to Circular No. 2010-024 – which relates to expulsion pursuant to the general rules of the Immigration Act – for further guidance on the proportionality principle.⁹⁵¹

UDI considers the seriousness of the offence as such objectively, taking into account society's view on how deserving of punishment the offence is and the particulars of the individual case.⁹⁵² Relevant factors, inter alia, include:

- minimum and maximum penalties
- the grievousness of the offence
- the sentence actually issued
- previous crimes
- new crimes
- the risk of repetition
- aggravating circumstances
- mitigating circumstances⁹⁵³

When assessing the foreign national's connection with the realm, inter alia, the following factors are taken into account:

- the age of the person at arrival in Norway
- the connection established during residence with a permit
- the type of permit – limited permits are attributed less importance
- how many years the person in question has resided in Norway with a permit
- how integrated the person in question is into Norwegian society, e.g. whether he or she speaks Norwegian, participation in the working life and to what extent he or she has arranged matters in accordance with Norwegian laws and regulations
- whether the foreign national has a spouse or cohabiting partner and/or minor children in Norway for which he or she has parental responsibility
- whether the foreign national has access to children with whom he or she does not live, including the extent of such access
- whether family life was established before or after the foreign national should have understood that expulsion was a possibility
- the possibility to continue family life in the home country⁹⁵⁴

UDI also assesses the foreign national's connection with their home country, including:

⁹⁴⁹ Rt. 2009 page 705, paras 54 and 55

⁹⁵⁰ Rt. 2009 page 705, para 55

⁹⁵¹ UDI Circular No. 2010-022 section 5.2

⁹⁵² UDI Circular No. 2010-024 section 8.3

⁹⁵³ UDI Circular No. 2010-024 section 8.3

⁹⁵⁴ UDI Circular No. 2010-024 section 8.4.1

- whether he or she was an adult when arriving in Norway
- subsequent visits to the home country
- whether he or she knows their home country's language and culture
- whether he or she has family in their home country⁹⁵⁵

The fact that a family is split up does, according to UDI, not as such imply that an expulsion measure is disproportionate.⁹⁵⁶ Referring to case law from the NSC, UDI notes that if the foreigner has committed very serious crimes, the family must be exposed to extraordinary burdens before a measure is regarded as disproportionate.⁹⁵⁷

When assessing the implications of an expulsion for the foreigner's family, inter alia, the following factors are taken into account:

- whether their family life actually exists
- whether children with whom the foreigner does not live have access to him or her as well as the extent of such access
- whether family life was established before or after the spouse should have understood that expulsion was a possibility
- the possibility to continue family life in the home country of the foreigner
- the health condition of their family members and possible consequences of expulsion
- the connection of the family to their home country

3.4.5 *Enhanced protection against expulsion*

IA Section 122, second paragraph, letters a–c provides enhanced protection against expulsion for persons with permanent residence rights, persons who have stayed in Norway for 10 years and minors. The provision states:

A foreign national who may be expelled under the first paragraph may nevertheless not be expelled if the foreign national

- a) has a right of permanent residence under sections 115 or 116, unless weighty public order or security considerations indicate that it is necessary,
- b) is an EEA national who has stayed in the realm for 10 years, unless it is compellingly necessary in the interests of public security, or
- c) is an EEA national who is a minor, unless it is compellingly necessary in the interests of public security. However, this does not apply to minors if expulsion of the minor is necessary in order to safeguard the minor's best interests.

UDI notes that the directive does not provide further guidance on the conditions for expulsion of these groups of persons, but that there must be a 'clear difference' between 'ordinary grounds' and 'serious grounds' of public policy and public security as laid down in Section 122, first paragraph and second paragraph, letter a, respectively.⁹⁵⁸ The condition in letters b and c that expulsion must be 'compellingly necessary in the interest of public security' implies, according to the directorate, that the threshold for accepting expulsion as a proportional measure is very high. Hence, EEA nationals

⁹⁵⁵ UDI Circular No. 2010-024 section 8.4.1

⁹⁵⁶ UDI Circular No. 2010-024 section 8.5.1

⁹⁵⁷ Cf. Rt. 2005 page 238, para 32 and Rt. 2009 page 1432, para 41, which are also referred to in LB-2011-77536

⁹⁵⁸ UDI Circular No. 2010-022 chapter 4

who fall within IA Section 122, second paragraph, letter b or c must ‘constitute a sufficiently serious threat against society as such, or parts of this, and expulsion must be imperative in order to protect society against this threat’.⁹⁵⁹ When assessing whether the conditions for expulsion are present, a decisive question for UDI is whether ‘the character of the threat, for example the scope of the criminality and injuries, is so extensive that expulsion is necessary’.

When calculating the residence period pursuant to letters a and b of the provision, UDI will as a main rule not take time spent in jail into consideration if the EEA national has not ‘build up a relevant connection to Norway’.⁹⁶⁰

3.5 Abuse of rights and fraud

According to IA Section 120, first paragraph, cf. Section 120, second paragraph, registration certificates, residence cards, permanent residence certificates and permanent residence cards may be revoked on the following grounds:

*A foreign national who otherwise satisfies the conditions for a right of residence under this chapter does not have such a right if there are circumstances that provide grounds for refusing the foreign national entry into or a stay in the realm under other provisions in the Act. The same applies if the foreign national has knowingly provided incorrect information or kept secret matters of material importance.*⁹⁶¹

The provision’s first sentence implies that even though an EEA national or a family member in principle fulfils the conditions for a right of residence as set out in Sections 111–114 or permanent residence pursuant to Sections 115–116, such a right does not exist if the person in question may be refused entry or residence according to ‘other provisions of the Act’.

The wording of Section 120, first paragraph, first sentence is not entirely clear regarding the exact basis for refusal. The preparatory works provide little clarification, as it is merely stated that the provision covers situations where there are grounds to reject or expel a person in accordance with Chapter 13 or ‘the general rules of the 2008-act’.⁹⁶² As pointed out by Vevstad, however, if a person falls within the scope of the directive, only those provisions of the general rules that implement the rules of the directive regarding entry and residence⁹⁶³, or that regulate matters not regulated by the directive⁹⁶⁴, or that fall within Article 35 of the directive concerning abuse of rights may be relied on in this connection.⁹⁶⁵

Examples of situations covered by the second sentence of the provision include, according to the preparatory works, marriages of convenience (see also below) or the use of false identities and/or a false nationality.⁹⁶⁶

⁹⁵⁹ UDI Circular No. 2010-022 chapter 4

⁹⁶⁰ UDI Circular No. 2010-022 section 4.1

⁹⁶¹ Emphasis added

⁹⁶² Ot.prp. No. 72 (2007-2008) page 67

⁹⁶³ Reference is especially made to the provisions in IA chapter 2 on entry

⁹⁶⁴ However, Vevstad notes that this is not very practical as IA section 121-123 regulate rejection and expulsion exhaustively

⁹⁶⁵ Vevstad (2012) commentary to section 120, para 1. See also paras 2-3 for a critical analysis of IA section 120 first paragraph, first sentence

⁹⁶⁶ Ot.prp. No. 72 (2007-2008) page 67 and Prop. 30 L (2009-2010) page 10

IA section 120, third paragraph, furthermore, states that registration certificates and residence cards may be revoked:

[W]hen the *registration is deemed to be invalid for other reasons*. Section 35 of the Public Administration Act applies to decisions to revoke documents under this paragraph insofar as it is relevant.⁹⁶⁷

According to the preparatory works and UDI's practice, the third paragraph of Section 120 covers situations where the registration has been erroneously made by the immigration authorities (i.e. without the provision of incorrect information by the foreigner).⁹⁶⁸ The provision also applies to 'cases where an application for a residence card has been processed and a residence card has been issued by mistake, not because the family member has provided incorrect information but because a foreign national from a country outside the EEA area has been registered as a family member of an EEA national by mistake'.⁹⁶⁹

The sixth paragraph of Section 120 states that the authorities may refuse to issue a residence card (cf. Sections 118 and 119):

[I]f, when asked, the sponsor, see section 39, does not consent to the applicant being granted a right of residence, or if it is *likely* that the marriage was entered into against the will of one of the parties, or that the *main purpose of the marriage was to obtain legal residence in the realm* for the applicant.⁹⁷⁰

The provision, inter alia, applies to marriages of convenience and is in this respect clearly based on the general provision in IA Section 40, fourth paragraph, according to which a residence permit 'may be refused if it appears most likely that the main purpose of contracting the marriage has been to establish a basis for residence in the realm for the applicant'.⁹⁷¹ As a consequence, case law as well as guidelines relating to Section 40, fourth paragraph are considered relevant for the interpretation of Section 120, sixth paragraph.⁹⁷²

In Case TOSLO-2012-112718, Oslo District Court considered the validity of a decision made by UNE to revoke a residence permit. UNE had in its decision referred to Section 40, fourth paragraph through Section 120, sixth paragraph.⁹⁷³ According to the court, the term 'main purpose' implies that establishing residence must have been 'a bit more important' for the person in question than other purposes of the marriage.⁹⁷⁴ The burden of proof falls on the state. Based on a decision by the NSC concerning a marriage of convenience pursuant to the general rules,⁹⁷⁵ the court concludes that if

⁹⁶⁷ Emphasis added

⁹⁶⁸ Prop. 30 L (2009-2010) pages 7-8 and UDI Circular No. 2010-025 chapter 8

⁹⁶⁹ UDI Circular No. 2010-025 chapter 8 and Prop. 30 L (2009-2010) page 8

⁹⁷⁰ Emphasis added

⁹⁷¹ Cf. also Prop. 30 L (2009-2010) page 11, where it is stated: 'As in section 40 fourth paragraph, this provision will simplify the evidence as it will be sufficient that the acquisition of a residence right has been the *main purpose* of the marriage in order to reject the application' (our translation). See also Vevstad (2012) commentary to section 120, para 11 et seq., who is of the opinion that section 120 sixth paragraph hardly can be taken literally.

⁹⁷² Cf. inter alia UDI Circular No. 2010-025 section 2.1.1, where the directorate refers to the preparatory works and Ministry guidelines relating to IA section 40, namely Ot.prp. No. 75 (2006-2007) pages 190 and 187 and Ministry Circular No. GI-2010-1. Cf. also Oslo District Court's judgment in case TOSLO-2012-112718.

⁹⁷³ Note that the court is of the opinion that section 120 first paragraph would be a more adequate way to use section 40 fourth paragraph.

⁹⁷⁴ Our translation

both spouses claim that the marriage is genuine, the proof that indicates the opposite must be of ‘a certain weight’.⁹⁷⁶

Based on the preparatory works and ministry guidelines relating to Section 40, UDI provides the following list of factors to be taken into account when assessing whether the marriage of an EEA national is genuine:

The factors are not ranked, and the list is not intended to be exhaustive:

- Contact between the parties – e.g. how long they have known each other and the nature and extent of the contact, whether the parties are familiar with each other’s everyday lives. What they know about each other.
- Concurring information from the parties – for example about how they met, got married and the contact between them.
- Whether the parties are able to communicate in a common language.
- The age difference between the parties.
- Whether the marriage was paid for without this being possible to explain on the basis of dowry traditions in the home country.
- Whether the marriage is clearly atypical in relation to marriage traditions in the home country.
- Whether circumstances exist to indicate that the marriage was entered into as a result of coercion or exploitation, for example that the parties are clearly unequal in their psychological development.
- Whether the sponsor or close family members of the applicant has a marriage history that gives grounds for suspecting a marriage of convenience.
- Whether the person applying for residence on the basis of the marriage has attempted to gain right of residence on other grounds, for example by applying for asylum, and whether the marriage was entered into shortly after the applicant received a rejection of another application.
- Whether the parties have former spouses/cohabitants/partners who are going to live with the couple.
- The immigration authorities shall make a concrete assessment of each case.⁹⁷⁷

3.6 Re-entry bans and conditions for lifting them

IA Section 124, first paragraph maintains the basic distinction between expulsion and rejection by stating that ‘[e]xpulsion precludes subsequent entry’. The re-entry ban may be made either permanent or time-limited, but must at least be for two years. The individual assessment under Section 122 (see 3.4.1) shall be taken into account when determining its length. IR Section 19-30 provides that a re-entry ban shall ‘be limited to what is necessary in the interest of public order or security’. According to UDI Circular No. 2010-022, ‘the longer imposed re-entry ban, the more real, immediate and serious must the threat be’. For ‘very serious crimes’, a permanent re-entry ban may be necessary.⁹⁷⁸

⁹⁷⁵ Rt. 2006 page 1657

⁹⁷⁶ Our translation

⁹⁷⁷ UDI Circular No. 2010-025 section 2.1.1

The lifting of re-entry bans is regulated in Section 124, second paragraph, according to which a ban may 'be annulled upon application if new circumstances indicate that this should be done'. The decision will, pursuant to UDI's guidelines, be based on an assessment of whether expulsion is still necessary on the grounds of public policy or security. As a main rule, lifting shall not be considered before one year has passed.⁹⁷⁹

If a person has been expelled pursuant to the general rules of the IA, but at the time of the application lifting is covered by the EEA rules, the authorities shall consider whether the conditions for expulsion pursuant to Chapter 13 are met.⁹⁸⁰

ESA has commented on some specific issues relating to TCNs for whom an entry ban has previously been issued pursuant to the general provisions of the IA and who subsequently become a family member of an EEA national or Norwegian national (typically through marriage). The Authority, inter alia, refers to the following situations:⁹⁸¹

1. If the TCN applies in Norway for a residence card as a family member pursuant to IA Chapter 13
2. If the TCN travels to Norway on the basis of a residence card issued by another EEA State pursuant to the implementing legislation in that state

According to Norwegian practice, the TCN must in both situations first apply for the lifting of the previous entry ban. The examination may take up to six months. In the first situation, the Norwegian immigration authorities will simultaneously assess whether the TCN shall be provided with a residence card.

ESA is of the opinion that national practice is problematic in this respect:

- Concerning the first situation, i.e. where a TCN applies in Norway for a residence card, ESA is of the opinion that the requirement to apply for the lifting of the entry ban and the entailed six-month period of assessment is not in accordance with the directive. According to the Authority, even though the directive provides for EEA States a six-month term to reach a decision regarding the lifting of an exclusion order, this only applies to exclusion orders adopted in accordance with the directive. Where an entry ban is decided pursuant to the general provisions of the IA, which contains more grounds for exclusion than the directive, such a term is not justified.
- The second situation concerns the issue of the recognition of residence cards issued by other EEA countries. According to ESA, a residence card must be recognised for the purpose of entering Norway, 'unless doubt is cast on the authenticity of that card and the correctness of the data appearing on it ... and justifies the conclusion that there is an abuse of rights or fraud'. The issue in particular raises the question if, and to what extent, national authorities may rely on information regarding the person in question, which the authorities in the EEA state, in which the residence card was issued, may not have had access to.

⁹⁸¹ Letter of 6 February 2015

- ESA also in this connection in particular raises the issue of returning Norwegian nationals (which, according to the Authority, is relevant in the first situation) and Norwegian nationals who exercise their free movement rights in another EEA state (which, according to the Authority, is relevant in the second situation) and the lack of distinction and protection provided by national law for these groups of persons.

Part V: Comparative analysis of country studies

Legal Analysis of Norway's obligations under EU Directive 2004/38/EC and the EEA Agreement

Comparative Analysis of the Implementation of Directive 2004/38/EC in Belgium, Denmark, the Netherlands, Sweden, the United Kingdom and Iceland

1 Introduction

This paper has been drawn up as part of a research project commissioned by the Norwegian Directorate for Immigration, UDI, with the purpose to undertake a legal analysis of Norway's obligations under EU Directive 2004/38/EC (hereafter: "the directive") and the EEA Agreement.

It aims to provide a comparative overview of how the directive is implemented in five selected EU member states: Belgium, Denmark, Sweden, the Netherlands, the United Kingdom, and in one EFTA State, Iceland, examining legislative, administrative and judicial practice.⁹⁸² This comparative analysis is based on individual studies for each of the selected countries, the results of which are presented in separate country studies.

1.1 Methodology

The methodology applied for this analysis was the following:

First, information per country was gathered through:

- *Review of existing literature* (both general literature on EU law on free movement and on the directive, country-specific studies, including the publication of the FIDE Conference of 2014,⁹⁸³ and academic articles on recent cases of the CJEU);
- *Review of official documents* from the Commission, the EFTA Surveillance Authority and of relevant Judgments of the CJEU;
- *Interviews* with government representatives and academic experts in the different countries;
- *Review of recent national case law and legislative developments.*

Second, individual country reports were drawn up, following an identical structure, in order to facilitate a comparison between them on each point of interest. The same structure is followed in this comparative analysis. Considering the broad scope of issues covered by the directive, and the complexity of some of the administrative requirements included in that instrument, not all elements

⁹⁸² The choice of countries was decided in consultation with the Norwegian Directorate for Immigration, UDI

⁹⁸³ U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds.), *Union Citizenship: Development, Impact and Challenges*, The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications Vol. 2

are covered in the analysis. The choice of the points that were ultimately included in the country studies was based on the following aims, while keeping with the requirements stipulated in the Tender Document:

- (i) To provide a *general overview* of the implementation of the directive in the selected countries;
- (ii) To *highlight some 'salient' issues* that came up in an individual country and which led to specific legislative, administrative and/or judicial developments which might be of interest for Norway and other countries as well, and
- (iii) To *respond to specific requests from UDI*, as communicated to the research team by UDI after oral presentations of the first results at meetings with the Reference Group held on 9 March, 16 June, and 24 September 2015, and in its written comments to the draft reports sent to UDI in June 2015.

Third, the findings of the individual country studies were compared, by considering, for each of the main elements of the directive, the main points of convergence and divergence between the practices at the legislative, administrative and judicial levels, in the selected countries.

1.2 Country Visits

The purpose of the country studies was to gather information and insights from experts in each selected country. Therefore, it was envisaged to have meetings with government representatives (legal experts), and academic experts in the field of EU free movement law. This allowed for the effective gathering of:

- Information on the factual implementation of the directive and of primary EU law provisions in national law and practice, and
- Insights from an independent, analytical perspective, also regarding the national case law

These meetings proved to be extremely useful. Government representatives were very helpful by organizing meetings with several experts with competence on various aspects of the implementation of the directive; providing information and documentation, including legislative texts, policy documents and court cases; and by reading and commenting on the draft reports. Also the academic experts who agreed to meet the author of this paper and of the Country Studies provided invaluable information and shared their analysis of current developments, which helped identifying the main points of interest for each country.

Where government representatives expressed their preference not be cited by their names, only their function/department within the administration has been mentioned in the country studies. In each Country Study, a disclaimer was included stating that the full responsibility for the content of the study remains with the author. The same is true for this Comparative analysis.

Country visits were undertaken as follows:

Denmark – 26, 27 February 2015

- Meeting with Dr. Catherine Jacqueson, Ass. Professor, University of Copenhagen

- Meeting with Government representatives: Chief consultant, Ministry of Justice, a legal expert from the Ministry of Justice and a representative from the Danish Immigration Service

The Netherlands – 2, 3 March 2015

- Meeting with Prof. Annette Schrauwen, University of Amsterdam
- Meeting with Government representatives: a migration policy expert and a legal expert at the Ministry of Justice, and two representatives from the Dutch Naturalisation and Immigration Service (IND)

United Kingdom – 4-6, and 30 March 2015; November 2015

- Meeting with Dr. Thomas Horsley and Ms. Stephanie Reynolds, University of Liverpool
- Meeting with Prof. Jo Shaw, University of Edinburgh
- Meeting with Ms. Alison Hunter, partner with Wesley Gryk Solicitors LLP, specialised in immigration cases
- Telephone conference with representatives from the Home Office, responsible for Immigration

Sweden – 12, 13 May 2015

- Meeting with Dr. Jaan Paju, PhD Candidate and lecturer at the University of Stockholm
- Meeting with Government representatives: experts from the Legal Department of the Swedish Migration Agency

Brussels – 2, 3 and 23 June 2015

- Meeting with Prof. Hervig Verschueren, University of Antwerp
- Meeting with representatives of the Legal Department and of the *Bureau d'études* of the Belgian Immigration Office
- Meeting with representatives of other operational departments of the Belgian Immigration Office

Iceland – 2 June, and 14-15 September 2015

- Meeting with a representative of the EFTA Surveillance Authority
- Meetings with a Senior Legal Expert at the Icelandic Ministry of the Interior, and representatives of Registry Iceland, and the Directorate of Immigration

2 Overview of the Main Findings of the Country Studies in a Comparative Perspective

2.1 Introduction

In this comparative overview, the same structure will be followed as that of the individual country studies. Reference will be made to the relevant sections in these country studies when further details are provided there which cannot be integrated in this comparison considering the need to focus on the main points, and to keep it within a reasonable length.

2.2 General public attitude towards immigration and free movement

In most of the six EU member states included in this study, migration is considered in the public opinion as one of the main national problem areas. This opinion is most widely spread in the *United Kingdom* where voters rank immigration as the single most important issue facing the United

Kingdom, according to data from Ipsos Mori polling in March 2015.⁹⁸⁴ Following the steady rise of the United Kingdom Independence Party (UKIP) and the recent Conservatives' general election victory, efforts to renegotiate the terms of the UK's EU membership ahead of a referendum by the end of 2017 will certainly include the UK's wish for more leeway to adopt stricter policies on free movement.

In *Denmark*, according to a survey performed by Cevea in 2014,⁹⁸⁵ 55 percent of the population fear that citizens from other European countries will migrate to Denmark with the sole purpose of getting a share of the Danish welfare benefits. Moreover, general Euro-scepticism has increased within the population in recent years, as evidenced by the significant rise of the party *Dansk Folkeparti* in the last European elections, which received 26,6% of the votes.

However, in *the Netherlands*, the negative attitude towards migrants has lessened over the last decade. While in 2002, the year of the assassination of the Dutch politician Pim Fortuyn, about half the population thought that there were too many immigrants in the Netherlands, this percentage is much lower in recent years (31% in 2014).⁹⁸⁶ In 2014 there was more concern about immigrants from outside the EU (56%) than from within the Union (49%).⁹⁸⁷ Nevertheless, immigration is still considered as one of the main national concerns, after the economic crisis and public healthcare.⁹⁸⁸ Support for the *Partij voor de Vrijheid (PVV)*, which strongly favors reductions in migration flows and limitation of rights for migrants, especially TCNs, has also decreased in recent years.

In *Belgium*, according to the Eurobarometer of 2014, 16% of the population considers immigration as one of the two most pressing national concerns. An opinion poll by Ipsos More published in August 2015,⁹⁸⁹ revealed that 61 per cent of the Belgian respondents find that immigrant numbers are far too high, and 58% think that immigration has a negative impact on their country. Reducing immigration flows and reforming the Belgian migration policies has been a major theme of the separatist political party *Nieuwe Vlaamse Alliantie, NVA*, (New Flemish Alliance), which won 32 % of the vote in the 2014 federal elections, and is part of the current government coalition.

Only in *Sweden*, immigration is not considered as a major concern. According to a 2014 survey, 82 % of Swedes responded that they were not concerned by immigration from within the EU; 68% of the respondents described immigration as more of an opportunity than a problem, while only 28% said it was more of a problem.⁹⁹⁰ The only political party that has made immigration a major theme is the party Sweden Democrats. Even though it won 12,9 per cent of the vote in the 2014 general elections, its influence on public discourse remains limited.

⁹⁸⁴ W. Somerville, Migration Policy Institute, *Assessing the Political Impact of Immigration as the United Kingdom Heads to the Polls*, 2 April 2015, at <http://www.migrationpolicy.org/article/assessing-political-impact-immigration-united-kingdom-heads-polls>

⁹⁸⁵ Cited by Kristian Weise, *The Danish People's Party takes stable centre-left voters*, Policy Network, 27 May 2014, http://www.policy-network.net/pno_detail.aspx?ID=4651&title=The-Danish-Peoples-Party-takes-stable-centre-left-voters

⁹⁸⁶ German Marshall Fund, *Transatlantic Trends: Mobility, Migration and Integration, Key Findings of 2014 and Selected Highlights from Transatlantic Trends: Migration 2008-13*, http://trends.gmfus.org/files/2014/09/Trends_Immigration_2014_web.pdf

⁹⁸⁷ *Idem*

⁹⁸⁸ Sociaal en Cultureel Planbureau, *Continu Onderzoek Burgerperspectieven*, 2015/1.

⁹⁸⁹ <http://deredactie.be/cm/vrtnieuws.english/News/1.2410731>. The poll involved 17,533 citizens from 24 different developed countries

⁹⁹⁰ *Transatlantic trends: Mobility, Migration and Integration, Key findings from 2014 and selected highlights from Transatlantic Trends: Immigration 2008-13*, German Marshall Fund of the United States, http://trends.gmfus.org/files/2014/09/Trends_Immigration_2014_web.pdf, p.7

Finally, in *Iceland*, attitudes to immigration depend to a considerable extent on the geographical origin of the immigrants in question, according to an opinion poll conducted by Maskína published in September 2015.⁹⁹¹ While 72% of Icelanders are actively ‘in favour’ of immigration from countries in Western and Northern Europe, just 43% take the same view when it comes to immigrants from the Middle East.

2.3 Summary of Main Conclusions

Based on this comparative analysis, the following main conclusions can be drawn. A more comprehensive presentation of these conclusions is included in section 5, below.

Firstly, all countries considered have, for the most part, incorporated the terms of the directive into their national law. In some countries, legislative amendments have been made in recent years or are currently underway to complete the transposition of the directive.

Secondly, most of the studied countries have gone beyond the terms of the directive, using the room for maneuver provided. This is especially so with regard to the definition of family members. In particular, most countries have adopted a broad definition of partners in a ‘durable relationship, duly attested’ as foreseen in art. 3(2)b of the directive, granting them the same rights as spouses.⁹⁹²

Thirdly, all the studied countries have adopted a rather cautious attitude towards granting residence rights in situations that do not fall within the scope of the directive, but in which, according to the case law of the CJEU, a right of residence may be granted by virtue of the free movement provisions of the TFEU, in particular Article 21. However, some countries have been even more restrictive than others. For example, with regard to family reunification with a EU/EEA citizen who returns to his/her home state (so-called *Surinder Singh* cases), the *United Kingdom* has recently adopted the so-called ‘centre of life’ test, which includes conditions that are clearly stricter than those formulated in the jurisprudence of the CJEU. In most of the other studied countries, national authorities strictly apply the criteria developed by the European Court. However, *Belgium* has adopted a broader approach with regard to so-called ‘*Zambrano* cases’.⁹⁹³

Fourthly, the comparative examination has also shown that states sometimes apply a restrictive interpretation to the directive, by applying additional conditions on points where the directive itself did not actually leave any margin for maneuver for states. Examples include the ‘right to reside’ test, and the requirement for TCN family members to obtain a so-called ‘EEA family permit’ before they can even enter the country, both adopted by the *United Kingdom*. This attitude also seems to have been adopted in some countries with regard to the application of the principle of proportionality as included in Article 27 of the directive. Even though the directive itself, and the relevant case law of the CJEU explicitly lay down the criteria that must be fulfilled before a state can expel a EU/EEA citizen on the ground of public order or public security, these are not always followed at the national level, thereby restricting the rights of EU/EEA migrants beyond the limitations set by the directive and the CJEU. In the same way, in cases of termination of the right of residence on the ground that the person concerned no longer fulfills the conditions of Article 7, in particular the condition of

⁹⁹¹ http://icelandmonitor.mbl.is/news/politics_and_society/2015/09/18/immigrant_origin_an_issue_for_icelanders/. Maskína is an Icelandic organization specialised in public opinion and market research, member of ESOMAR, <http://www.maskina.is/en>

⁹⁹² Only the United Kingdom has not followed this approach and has remained strictly within the terms of the directive

⁹⁹³ Case C-34/09 *Zambrano* [2011] ECR I-01177

having sufficient resources, the safeguards required by the directive are not always sufficiently applied.

While there are still many issues to be resolved to guarantee the full enjoyment of EU/EEA citizens of their rights under this directive and under primary EU law, it is clear that the concept of EU citizenship is gradually being integrated into the legal order and administrative practice of the states considered.

3 Implementation of Directive 2004/38/EC: General Assessment

3.1 National Implementing Legislation

In all the EU member states considered, the directive has -with some minor exceptions regarding specific provisions-, been incorporated into national legislation. The main relevant legislative acts in the five studied countries are the following:

Belgium:

- *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, lastly amended on 19 March 2014*
- *Arrêté Royal du 5 octobre 1981 concernant l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, lastly amended on 19 March 2014*

Denmark:

- Executive Order No. 358 on Residence in Denmark for Aliens Falling within the Rules of EU law of 21/4/2006 (*EU Opholdsbekendtgørelsen*), with further amendments. The Executive Order currently in force is No. 474 of 12 May 2011
- Aliens (Consolidation) Act, No. 1021, lastly amended in September 2014

The Netherlands:

- Aliens Act 2000 (*Vreemdelingenwet 2000*), last amended on 19 June 2013
- Aliens Decree 2000 (*Vreemdelingenbesluit 2000*), last amended 9 November 2011
- Aliens Circular (*Vreemdelingencirculaire*), last amended on 10 December 2014⁹⁹⁴

The United Kingdom:

- Immigration (European Economic Area) Regulations 2006, with further amendments, last amended on 6 April 2015

Sweden:

- Aliens Act (2005:716) (*Utlänningslagen, 2005:716*), last amended in 2014
- Aliens Decree (2006/97) (*Utlänningsförrordningen, 2006:97*), last amended in 2014

Iceland:

- Act No.96/2002 on Foreigners of 1 January 2003, lastly amended by Act No. 64/2014 of 6 June 2014

⁹⁹⁴ Aliens Act (*Vreemdelingenwet*) 23.11.2000, BWBR0011823; Aliens Decree (*Vreemdelingenbesluit*) BWBR0011825), and Aliens Circular (*Vreemdelingencirculaire*), BWBR0012287. Dutch versions available at www.overheid.nl. An English version is only available of the original Aliens Act, without amendments

- Regulation on Foreigners No. 53/2003 of 23 January 2003, amended in December 2014

3.2 Institutional context and complaint procedures

The institutions that have responsibilities related to the implementation of the directive vary among the studied countries. The agencies that decide on individual applications for residence rights fall within the competence of different Ministers.

In *Belgium*, the Immigration Office (*Office des étrangers*) is part of the Ministry of the Interior, but institutionally reports to the Secretary of State for Asylum and Migration, a deputy to the Minister for Security and the Interior. In *Denmark*, the competent agency to take decisions concerning the right of residence pursuant to EU-rules is the State Administration, which has nine local offices and is part of the Ministry for Economic Affairs and the Interior. Complaints against its decisions can be made to the Danish Immigration Service, an agency of the Ministry of Justice, which also deals with asylum and migration from third countries.⁹⁹⁵ In *the Netherlands*, the competent agency is the Immigration and Naturalisation Service (IND), falling under the responsibility of the Minister for Security and Justice. Whithinn the *United Kingdom's Home Office*, UK Visa and Immigration (UKVI) is competent to decide on individual applications for residence, both under EU rules, and under general immigration rules. Furthermore, in *Sweden* the Migration Agency exercises these functions through its regional offices (30 in total, of which around 12 are dealing with free movement matters).

Finally, in *Iceland*, the implementation of the directive falls under the competence of the Ministry of the Interior and the Ministry of Welfare. The Ministry of Welfare is responsible for the implementation of all aspects of the directive related to work and social security. The agency 'Registers Iceland' has the task to register EU/EEA nationals who have a right to stay in Iceland. The Icelandic Directorate of Immigration is responsible for issuing residence cards to TCN family members, and for establishing the right of permanent residence of EU/EEA nationals. The Directorate of Immigration also handles all matters related to the restriction of the right to free movement. Both the Directorate, and Registers Iceland fall under the authority of the Ministry of the Interior.

Also the complaint mechanisms against decisions taken by the immigration agencies vary from one country to another. Whereas in some countries specific administrative appeals bodies were created with exclusive competence in asylum and migration cases (*Belgium: Conseil des contentieux des étrangers*, with further appeal before the Council of State; *Sweden: a Migration Court can hear complaints, and further appeals can be launched to the Migration Appeals Court; and Iceland, where a Migration Appeals Board has been created in January 2015*⁹⁹⁶). In other countries such appeals are brought before general courts (such as in *The Netherlands*, with the possibility of further appeal before the highest appeals body in administrative cases, the Council of State and in *Denmark*, where after a first appeal before the Immigration Service, further complaints can be brought before the Regional Appeals Courts; and *the United Kingdom*, where a first appeal is possible to the Home Office and further appeals can be brought before the regular courts: First-tier Tribunal (Immigration and Asylum Chamber), then before the Upper Tribunal (Immigration and Asylum Chamber), and finally before the Court of Appeal.

⁹⁹⁵ https://www.nyidanmark.dk/en-us/authorities/the_danish_immigration_service/

⁹⁹⁶ However, appeals against decisions on expulsion based on a threat to the public order or public security can only be referred to the Ministry of the Interior

3.3 Administrative policies and guidelines

In all countries considered, administrative guidelines are issued to the responsible agency and its individual case handlers on how to apply the national law in which the various provisions of the directive are transposed. These guidelines are regularly updated to take account of legislative amendments, new judgments from the CJEU, and national case law. In *Iceland*, updated guidelines still need to be drawn up following the most recent legislative amendments of June and December 2014.

An interesting practice has been adopted in *Denmark*, where the Ministry of Justice and (until 2011) the Ministry of Integration have regularly issued Briefing Notes clarifying, in a detailed manner, specific points of the EU Residence Order and the Aliens Act, and the way certain provisions of these Acts must be implemented in the light of Judgments from the CJEU. This practice contributes to enhanced transparency of government policies, and provides clarity for both administrative services responsible for individual decisions, and for the public at large. This is an example of ‘best practice,’ which may be of interest for Norway and other countries.⁹⁹⁷

4 Specific Assessment: Interpretation of the Individual Provisions of the Directive

4.1 Personal Scope - To whom does it apply?

4.1.1 EU/EEA Citizens

In all countries considered, the national legislation explicitly states that the rules applicable to EU citizens also apply in the same way to citizens from EFTA States and Switzerland. With regard to terminology, it should be noted that in the *United Kingdom*, the implementing legislation uses some definitions that differ from definitions used in other countries. For example: ‘EEA national’ means a national of an EEA State who is not also a British citizen; and ‘EEA State’ means—(a) a member State, other than the United Kingdom; (b) Norway, Iceland or Liechtenstein; or (c) Switzerland.⁹⁹⁸ Even though in terms of substance this does not entail a different approach than in other countries, this should be taken into account when consulting UK legislation where these terms are used.

4.1.2 Definition of family members

In all EU member states considered, to date, all persons included in the directive as ‘family members’ (Article 2(2))⁹⁹⁹ or ‘other family members’ (Article 3(2) a)¹⁰⁰⁰ are incorporated into national law. In *Belgium*, the categories of ‘other family members’ and ‘partners in a durable relationship, duly attested’ were incorporated into national law only in 2014, after a notification from the Commission of February 2013.

⁹⁹⁷ For more details, see the country study on Denmark, Section 2.3 and subsequent sections.

⁹⁹⁸ Immigration (EEA) Regulations 2006, Section 2. Another example is: “EEA decision” means a decision under these Regulations that concerns—(a) a person’s entitlement to be admitted to the United Kingdom; (b) a person’s entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card; (c) a person’s removal from the United Kingdom; or (d) the cancellation, pursuant to regulation 20A, of a person’s right to reside in the United Kingdom (...)

⁹⁹⁹ These are, as enumerated in Article 2(2) of the directive: (a) the spouse; (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State; (c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b); (d) the dependent direct relatives in the ascending line and those of the spouse or partner as defined in point (b)

¹⁰⁰⁰ These are, as enumerated in Article 3(2) a of the directive: (a) any other family members, irrespective of their nationality, not falling under the definition in point 2 of Article 2 who, in the country from which they have come, are dependents or members of the household of the Union citizen having the primary right of residence, or where serious health grounds strictly require the personal care of the family member by the Union citizen

With respect to *Iceland*, the lack of inclusion of ‘other family members’ in national law has been the subject of a Reasoned Opinion by the EFTA Surveillance Authority (hereafter ‘the Authority’) of 2012.¹⁰⁰¹ This point has recently been addressed and all ‘other family members’ mentioned in Article 3(2) a of the directive are now covered.¹⁰⁰²

In all studied countries a broad interpretation of ‘spouse’ has been adopted, since it also includes same-sex marriages, and the rights of spouses also apply to registered partners. There are some slight differences with regard to ‘partnerships, duly attested’, as mentioned in Article 3(2) b of the directive, as follows:

In *Denmark*, the rights of spouses are also granted to cohabitants, who are defined as persons of at least 18 years of age, who live together at a shared residence in regular cohabitation of prolonged duration with a principal person who is also at least 18 years old. It is a pre-condition for the right of residence of a cohabitant that the principal person undertakes to support the applicant.

The Netherlands goes even further than Denmark, since the same rights as spouses are granted to *de facto* partners as well. Also going beyond the directive, direct descendants of a *de facto* partner who are younger than 18 years are recognised as ‘other family members’.

In *Sweden*, cohabiting partners are considered as family members with equal rights as spouses. They are defined as ‘two people who live together on a permanent basis as a couple and who have a joint household.’

In *Belgium*, three different forms of ‘partners’ are recognised, the first two of which fall within the scope of ‘family members’ based on Article 2(2), whereas the third incorporates the ‘durable partnership, duly attested’ of Article 3(2) b, directive:

- Registered partnerships that are recognised as equal to marriage under Belgian law.
- Registered partnerships in accordance with ‘a law’, (which may be the law of another State), when the following conditions are met:
 - a. The partners must prove that they have a duly attested, durable and stable relationship. The durable and stable nature of the relationship is demonstrated when:
 - The partners prove to have lived together, either in Belgium or in another country, for at least one year before the application; or
 - They prove that they have known each other for at least two years before the application, and that they had regular contacts, either by telephone, through exchanges of letters or electronic messages, and that during those two years they have met three times for at least 45 days in total; or
 - They have a child together;
 - b. The partners will come to live together in Belgium;

¹⁰⁰¹ EFTA Surveillance Authority, Reasoned Opinion delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland's failure to correctly transpose the Residence Directive, Case No. 67839, 19 December 2012

¹⁰⁰² Regulation on Foreigners, as amended in December 2014, Article 70

- c. They are both older than 21 years old;
 - d. They are not married and they do not have a durable and stable partnership with another person;
 - e. They are not persons as meant in Articles 161-163 of the Civil Code;
 - f. Regarding neither of them a decision was taken based on Article 167 of the Civil Code.
- Partners having a ‘durable relationship, duly attested’ (as meant in Article 3(2)b, directive). They must prove the existence and the durable nature of their relationship, with any suitable means. Regarding the durable nature, factors that will be taken into account are especially the duration, the intensity and the stability of the relationship.

The *United Kingdom* has adopted a more restrictive approach, whereby partners in a ‘durable relationship, duly attested’ are considered as ‘extended family members’, as opposed to ‘family members’, and the two categories have a different legal status. Indeed, the ‘family members’ are considered to automatically enjoy a right of entry into and residence within the UK as host State, whereas ‘UK courts understand that, by contrast, extended family members benefit only from a more limited procedural right; specifically: a right to have UK authorities consider fully their personal circumstances with a view to ‘facilitating’ their entry and residence.’¹⁰⁰³ In practice, this distinction does not lead to any notable differences between these two groups,¹⁰⁰⁴ although some implications have been highlighted.¹⁰⁰⁵

In *Iceland*, the category of partners mentioned in Article 3(2) b are considered to fall within the scope of cohabitants.

In sum, while all the categories of family members and extended family members mentioned in the directive are now incorporated into national law in all studied countries, most of them have adopted a broad definition of partners in a ‘durable relationship, duly attested’ as foreseen in Article 3(2) b of the directive, granting them the same rights as spouses.

4.1.3 *Definition of economically active persons*

In all countries considered, for the application of the directive, economically active persons include workers, self-employed persons and students. In some countries, more detailed criteria are laid down in the implementing legislation of the directive. For example, in the *United Kingdom*, Reg 4 EEA Regulations (2006), provides the following definitions:

- (i) ‘worker’ means a worker within the meaning of Article 39 of the Treaty establishing the European Community;
- (ii) ‘self-employed person’ means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 43 of the Treaty establishing the European Community.
- (iii) a ‘student’ means a person who: (i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is (a) financed from public funds; or (b) otherwise recognised by the Secretary of State as an

¹⁰⁰³ T. Horsley and S.Reynolds, ‘The United Kingdom’, in U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds.), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen, 2014*, Congress Publications Vol. 2, pp. 453-479 (hereafter: ‘FIDE Report on the UK’), at p. 840

¹⁰⁰⁴ Interview with Alison Hunter, Partner with Wesley Gryk Solicitors LLP, specialised in EU migration and free movement rights, held in London on 4 March 2015

¹⁰⁰⁵ For further details, see the country study on the UK, Section 3.1.2

establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located; (ii) has comprehensive sickness insurance cover in the United Kingdom; and (iii) assures the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence.

In *the Netherlands*, workers, self-employed persons, jobseekers and students are considered as economic active persons. In its administrative practice, the Dutch IND considers a EU citizen as a worker or a self-employed person, if he/she performs real (*reële en daadwerkelijke*) work. The condition of ‘real work’ is fulfilled, in any case, when (i) the income from work constitute more than 50% of the applicable amount of eligibility for social assistance (*Bijstandnorm*); or (ii) the EU citizen works at least 40% of a habitual full time occupation.

According to *Danish* legislation, the category of ‘economically active persons’ includes, besides workers and self-employed persons, also former workers, jobseekers, providers of services (‘seconded persons’) and students.¹⁰⁰⁶ In *Belgium, Sweden and Iceland*, no such definitions are included in the implementing legislation of the directive. In *Iceland*, there is no specific definition of economically active persons in the sense of the directive.

4.1.4 *The criterion of ‘self-sufficiency’ and the link with social benefits*

The question under which conditions a person is considered to be self-sufficient, and thus has ‘sufficient resources’ in the sense of Article 7(1)b of the directive, has been answered in various ways in the countries considered. Considering the link between the criterion of self-sufficiency and access to social benefits, it continues to be the subject of discussions among policy makers, practitioners and academics, and has led to a substantial body of national case law. Therefore, only the main convergences and divergences among the studied countries will be presented here; further details are provided in each individual country study (Section 3.1.4.).

a) Link between ‘sufficient resources’ and the amount, giving rise to a minimum social allowance

In most countries, the threshold for ‘sufficient resources’ is linked to the level of resources that gives rise to a right to social benefits. In other words, if a migrant has fewer resources at his/her disposal than the amount under which a person is entitled to receive the minimum social allowance, he/she will not comply with the criterion of ‘self-sufficiency’. For example, in *Denmark*, this amount is fixed at the level that gives a right to *Danish Start Help*,¹⁰⁰⁷ and also in *Iceland* and *Belgium*, the relevant amount is set at the level of income that gives rise to social assistance, taking account of the individual and family situation of the person concerned. Similarly, in *Sweden*, the amount is compared with the norm that gives a right to social assistance, but the exact amount will be calculated on an individual basis, taking account also of the actual costs of living of the person concerned.¹⁰⁰⁸ In the *United Kingdom*, the instructions for caseworkers state: ‘When deciding if an EEA national and their family members have sufficient resources you must first check if they exceed the maximum level of resources which a British citizen and their family members can have *before*

¹⁰⁰⁶ EU Residence Order, Sections 3, 4 and 5

¹⁰⁰⁷ Briefing Note of the Ministry for Refugees, Immigration and Integration of 17 March 2009 on "sufficient resources" – Directive 2004/38/EC Article 7 (1) letter b, c, and d (*Summary and English translation by the research team*)

¹⁰⁰⁸ Information received during a meeting with representatives of the Swedish Migration Agency, Legal Department, on 13 May 2015

they no longer qualify for social assistance under the UK benefit system.’¹⁰⁰⁹ This same criterion is applied in *Belgium*.

However, the *Netherlands* has adopted a different approach, since the criterion of having ‘sufficient resources’ for non-economically active persons is interpreted as the amount equivalent to that of the legal minimum wage.¹⁰¹⁰ This amount is higher than the amount of the minimum subsistence allowance (*Bijstand*), and also higher than the maximum amount that would give rise to a right to this social allowance.

b) Which resources are taken into account when assessing ‘self-sufficiency’?

In most countries, the assessment of self-sufficiency also takes into account of whether a person receives any social benefits in the host state. Generally the relevant amounts received will *not* be considered in the calculation of the person’s resources. In other words, the person needs to prove that he/she has sufficient resources at his/her disposal, *in addition* to such benefits. On the other hand, a pension or other benefit that the person is allowed to ‘export’ from his/her home state, are considered as part of the resources that the person has at his/her disposal.

In the *Netherlands*, *Denmark* and the *United Kingdom*, in the assessment of self-sufficiency any resources that the EU citizen receives in the form of social benefits from the host state are not taken into account. The same approach is adopted in *Belgium*, where some discussion is ongoing with regard to the fact that unemployment benefits (e.g. of a former worker who lost his job) are not taken into account when evaluating if a person has sufficient resources, also because there are different types of unemployment allocations. The Commission has carried out a ‘pilot investigation’ on this issue.¹⁰¹¹ In *Sweden*, only assistance based on the Social Assistance Law will *not* be considered when evaluating self-sufficiency. Any other benefits that the person may receive will be taken into account in this assessment. In *Iceland*, unemployment benefits that the person may receive in Iceland after losing a job (after having worked in Iceland for a minimum period) are included in this calculation. In all studied countries, pensions or other benefits that the person may receive from the home state, will be taken into consideration when calculating the resources that he/she has at his/her disposal.

c) Access to social benefits for EU citizens making use of their free movement rights

In all studied countries, an indexed amount is used to determine eligibility for social assistance, which depends on the family situation of the person concerned.

In *Denmark*, in accordance with the Act on Active Social Policy, all persons lawfully residing in Denmark are entitled to public support if the conditions for obtaining the benefit are fulfilled. The central question is whether the Union citizen is lawfully residing in Denmark. A delicate issue concerns homeless people; since they do not have sufficient resources, they are not lawful residents, so they are not eligible for social benefits, including state-financed shelter.¹⁰¹²

In the *Netherlands*, generally, the eligibility for receiving social benefits only arises when it becomes apparent that the available resources of the person concerned would otherwise fall below the

¹⁰⁰⁹ EEA Casework Instructions, EEA nationals qualified persons, p.35, referring to Reg 4(4) EEA Regulations

¹⁰¹⁰ Information received during a meeting with representatives of the Dutch Ministry of Security and Justice and from the Dutch Immigration Service (IND), held on 3 March 2015

¹⁰¹¹ Information received during a meeting with representatives of the Immigration Office (*Office des étrangers*) on 3 June 2015

¹⁰¹² See the country study on Denmark for further details (Section 3.1.4.)

minimum level of subsistence. It is not excluded that persons who have a right of residence are eligible for additional social benefits.

In the *United Kingdom*, a controversial point is the introduction of the ‘right to reside’ as a prior requirement for entitlement to any social benefits. EEA nationals need to prove that they have acquired a right of residence under Article 7 (residence for a period between 3 months and five years), or Article 16 (permanent residence) of the directive. In 2013 the European Commission initiated infringement proceedings against the UK with regard to the right to reside test to govern entitlement to social benefits, stating that this test is indirectly discriminatory and cannot be justified under EU law.¹⁰¹³ When the case was eventually issued in June 2014, the proceedings, which are still pending, have been confined to Child Benefits and Tax Credits.¹⁰¹⁴ However, in his recently published Conclusion in this case, Advocate General Cruz Villalón concludes that:

(It) does not constitute discrimination prohibited by Article 4 of Regulation No 883/2004 if national legislation provides that, when examining claims for social benefits such as child benefit or child tax credit, the Member State’s authorities may carry out the checks necessary to ensure that nationals of other Member States claiming those benefits are lawfully resident in its territory.¹⁰¹⁵

The Advocate General considers that for that purpose, the authorities responsible for carrying out these checks will have to observe a number of principles as outlined in his Conclusions, ‘in particular the principle of proportionality, as well as the provisions of the second paragraph of Article 14(2), Article 15(1) and Articles 30 and 31 of directive 2004/38.’¹⁰¹⁶ In his opinion, the Commission has not demonstrated that the United Kingdom is failing to comply with the conditions as to substance and form as he has described in his Conclusion, and concludes that this action for failure to fulfil obligations should be dismissed.¹⁰¹⁷

d) Exchange of information between government agencies

Regarding the exchange of information between the government agencies responsible for immigration, and those responsible granting for social assistance, the country studies have identified that in the *Netherlands*, this exchange of information is currently subject to improvement.. Only if there are indications that a EU/EEA citizen does not fulfill the conditions of the directive, or there will be an unreasonable burden on the social assistance system, the agencies inform the Dutch Immigration Service (IND).¹⁰¹⁸

In *Sweden*, despite the strict Swedish privacy laws, some information can still be exchanged between government agencies. For example, during the evaluation of the income situation of the migrant, information cannot be exchanged, but when this evaluation is finished, such exchange of information

¹⁰¹³ http://europa.eu/rapid/press-release_IP-13-475_en.htm

¹⁰¹⁴ Action brought on 27 June 2014, *European Commission v United Kingdom of Great Britain and Northern Ireland*, Case C-308/14, OJ. 2014/C-329/03)

¹⁰¹⁵ Opinion of Advocate General Cruz Villalón, delivered on 6 October 2015, Case C-308/14, paragraph 99, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=169143&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=85658>

¹⁰¹⁶ *Idem*

¹⁰¹⁷ *Idem*, at paragraph 98

¹⁰¹⁸ Information received during a meeting held on 3 March 2015, see above note 1011. For further details, see the country study on the Netherlands, Section 3.1.4

is allowed.¹⁰¹⁹ Another example can be seen in the Aliens Act Chapter 17 section 1, which states that the Swedish Migration Agency could request the social welfare committee to provide information under certain conditions.

In *Belgium*, a system has been set up whereby every month, the agency responsible for social assistance, the *Service Publique de Programmation Intégration Sociales, SPPIIS* provides to the Immigration Service, a list of all EU/EEA citizens and their family members who have received social allowances for three consecutive months over the last twelve months. This list is used as a source of information, which can be used as part of a more thorough investigation regarding compliance with the criterion of self-sufficiency. It does not have any automatic consequences.¹⁰²⁰ Nevertheless, it has been an effective mechanism to identify situations in which, after further examination, the criterion of sufficient resources turned out not to be satisfied any longer.¹⁰²¹ In *Iceland*, the exchange of information between government agencies is currently being strengthened.

e) Termination of the right to residence when a person is no longer 'self-sufficient'

If the criterion of self-sufficiency is no longer fulfilled, in all countries the person's right to residence may be terminated, in order to prevent that he/she becomes a burden on the social assistance system. This has occurred in all studied EU member states, and it has led to considerable national case law. In most countries, however, the termination of the right to residence has not led to regular *enforced* expulsion; this occurs only in exceptional cases. Generally, the migrant remains in the country and is subject to regular control by the immigration authorities. In such cases, no re-entry ban can be imposed (this is only allowed in the case of expulsion based on grounds of public order, public security or public health, see below, Section 4.2.3).

Notable trends in relevant national practice and case law occurred especially in *Belgium* and *Sweden*. In *Belgium*, the possibility for the authorities to terminate the right of residence of a EU/EEA citizen who no longer satisfies the conditions of being a worker, a self-employed person, or a student, or if he/she no longer has 'sufficient resources', is included in Article 42bis of the Aliens Act (1980, with further amendments). There have been several appeals before the *Conseil des contentieux des étrangers* against decisions of the migration authorities based on this provision. It should be noted that since 2014, there has been a clear change in the approach adopted by this administrative appeals body. Whereas in several earlier decisions, the *Conseil des contentieux des étrangers* emphasised that the burden of proof that a migrant still complies with the conditions to have a continued right of residence was placed on the migrant him/herself, in the last few years more importance is being attached to the need for the migration authorities to duly motivate its decisions to terminate a right of residence, and to ensure the right of the migrant to be heard before a final decision is taken.¹⁰²²

In *Sweden*, in decisions regarding expulsion, based on non-compliance with the criterion of self-sufficiency, the grounds for expulsion have not always been clearly discussed from a EU perspective. For example, Union citizens have been expelled because of begging or prostitution, which were considered as dishonest self-support. According to the official position of the Swedish

¹⁰¹⁹ *Idem*

¹⁰²⁰ A separate mechanism, the *Cellule fraude*, was created to identify identity fraud; it has no direct competence to look into social security fraud. Information received during a meeting with representatives of the Belgian Immigration Office on 23 June 2015.

¹⁰²¹ For more details, see the country study on Belgium, Section 3.1.4. See also the following sub-section below (e), for information on recent national case law in Belgium on decisions in which the right of residence has been terminated on this ground

¹⁰²² Judgments stating that the burden of proof lies with the migrant, e.g. *X v. Belgium*, Case no. 92 621 (30 November 2012), *X v. Belgium* (19 July 2012); judgments emphasizing the need for the authorities to duly motivate their decisions and to ensure the migrant's right to be heard: *X v Belgium*, No. 144652 (30 April 2015), *X v Belgium*, No. 146740 (21 May 2015), *X v Belgium*, No. 148537, (25 June 2015)

Migration Agency, neither begging nor prostitution are crimes or otherwise prohibited according to Swedish law. As confirmed by representatives from this Swedish agency, a person should therefore not be rejected solely because of this. Begging and prostitution may however be punishable in conjunction with other circumstances. However, (g)rounds for rejection may be present if the assessment shows that the EEA national actually constitutes a burden on the social welfare system. The burden shall be regarded as a utilization of the support system to a more than insignificant degree, taking into consideration personal circumstances, the duration of the stay, the size of the granted benefits and whether the difficulties of the person in question are temporary.¹⁰²³

4.1.5 *Establishing 'dependency'*

In all studied countries, compliance with the criterion of dependency, as mentioned in Articles 2(2) c and d, and 3(2) a of the directive, will be considered in accordance with the specific circumstances of each case. In some countries detailed criteria are established, such as in *Denmark*, where they are set out in a specific Briefing Note,¹⁰²⁴ and in the *Netherlands*. In other countries, especially *Sweden* and *Belgium*, these criteria are formulated more broadly. A comparison of the main conditions applied in the different countries is presented in the Table below. These conditions apply to situations in which a family member joins or accompanies the EU/EEA citizen who makes use of his free movement rights, with a view to residing in another EEA state. Other conditions may apply in situations where the EEA citizen is returning to his home state after a stay in another EEA state, and his/her family member(s) apply for a derived right of residence, based on primary EU law.

¹⁰²³ Information provided by representatives of the Swedish Migration Agency

¹⁰²⁴ Briefing Note of the Ministry of Integration of 17/3/2009, on the condition of dependency, formulated in light of the judgments of the CJEU in cases C-200/02 *Zhu and Chen*, and C-1/05 *Jia*. (Summary and English translation by the research team)

Table 1 - Criterion of ‘dependency’

Conditions: <i>1) For family members (art. 2(2), directive)</i>	DK	NL	UK	B	SE	IS
The family member is not in a position to support him- or herself and cover his/ her basic (or ‘essential’) needs, taking into consideration his or her financial and social conditions.	X	X	X	X	X	X
The material needs of the family member were already covered by the EU/EEA citizen in the home country, or in the country where he/she came from.	X	X	X	X	X	X
The need for material support also existed in the home country or the country where he/ she came from when he/she applied to join the EU/EEA citizen	X	X	X	X	X	X
The mere fact that the EU/EEA citizen supports the family member does not prove that there is a genuine relationship of dependency.	X	X				
The financial support, already provided in the home country or the country where the person came from, must be <i>necessary</i> and <i>real</i> .		X				
The material support is considered <i>necessary</i> when the family member, due to his economic and social situation does not (fully) cover his own basic needs.		X			X	
The family member would not be able (or ‘would have difficulty’) to meet his/her essential living needs without the financial support of the EU/EEA citizen			X		X	
The financial support is considered <i>real</i> when the EU citizen has paid to the family member for <i>at least one year</i> without interruption, a sum which is necessary for the family member to provide for his basic needs in the home country/ country of prior residence.		X				X
Proof of regular financial transfers is required covering a period of <i>at least 6 months</i>				X		
There is no need to establish the reason for recourse to the financial support provided by the EU/EEA citizen.		X	X			
Any documentation may be provided in order to show that there is a need for material support	X				X	
A document, issued by an authority in the home country/ country where he/she came from, confirming a relationship of dependency, may be required					X	
The family member does not need to be living/ have lived in the same EEA state where the EEA citizen also lives/has lived			X			

Conditions: <i>2) For other family members (art. 3(2)a, directive)</i>	DK	NL	UK	B	SE	IS
One of the following conditions must be met: <ul style="list-style-type: none"> • The person in question received support from the Union citizen in the country where he/ she came from, • The person in question was included in the household of the Union citizen in the country where he/she came from, or • Serious conditions relating to health make it absolutely necessary that the Union citizen personally cares for the person in question 	X	X	X	X	X	X
Economic dependency must in principle have existed already in the country of origin, but it is also possible that such dependency only arises upon arrival in the host state.		X				
The dependency/household relationship must have existed immediately before or very recently before the EEA national came to the host country			X			
The applicant must show very recent evidence of the dependency or membership of the EEA national's household.			X			
The EEA national and the extended family member must have been present in the same country and that country must be the one the EEA national has most recently come from when moving to the host country.			X			

For more details about the criteria in each country, and for the specific case law from which these criteria were derived, see the individual Country Studies, Section 3.1.5.

4.2 Material scope - Which rights are covered, to whom do they apply and what do they entail?

4.2.1 Rights against the host state

4.2.1.1 Right of entry, right of residence for up to 3 months: Arts 5 and 6, directive¹⁰²⁵

In all the countries considered, the right of entry and the right of residence for up to three months is incorporated into the national implementing legislation. The main issues highlighted in the country studies in relation to this initial right of residence are the following:

– Proof of identity required

In accordance with Article 5(1) of the directive, in all countries considered, proof of a EU citizen's identity and nationality can be provided either by a passport, or by an identity card. In *the Netherlands* and *Belgium*, such proof can also be provided – for EU/EEA citizens – by other means than a passport or an identity card. This is based on judgments of the CJEU such as *C-215/03 Oulane*¹⁰²⁶ and *C-459/99 MRAX*.¹⁰²⁷

For TCN family members, as foreseen in Article 5(2) of the directive, in all studied countries a valid passport is required, as well as a visa, unless the person concerned possesses a EU residence permit issued by another EU/EEA state in accordance with Article 10 of the directive. In the *United Kingdom*, until a recent legislative amendment of April 2015 following a preliminary Judgment from the CJEU in *C-202/13 McCarthy*,¹⁰²⁸ a controversial point was that the EEA Regulations required from non-EEA national family members that upon entry in the UK, they present, besides a valid passport, also a so-called 'EEA family permit' to be obtained prior to their entry. According to a notification by the Commission of 2011, the requirement of this EEA family permit was in conflict with Article 5(2) of the directive, which requires member states to exempt non-EEA family members from visa requirements otherwise applicable under national law where such persons hold a valid EU residence card issued by the authorities of another Member State in accordance with art. 10 of the directive.¹⁰²⁹ In November 2012, the High Court referred the question to the CJEU on a preliminary reference. In its judgment of December 2014, the CJEU confirmed the Commission's standpoint. The relevant provision in the EEA Regulations was subsequently amended, and the requirement of an EEA family permit has been abolished.

– Registration with national authorities

In *Belgium*, EU/EEA citizens and their family members should register in the *commune* (communal administration) within ten days after their arrival. However, this formality does not apply to EU/EEA citizens and their family members who stay in a hotel, youth hostel or any other house that is subject to the regulation concerning the control of travellers.

¹⁰²⁵ The implementation of the right of exit, laid down in Article 4 of the directive, is not considered here since the focus of this study is on the rights to entry and residence

¹⁰²⁶ Case C-215/03 *Oulane* [2005] ECR I-01215

¹⁰²⁷ Case C-459/99 *MRAX* [2002] ECR I-06591

¹⁰²⁸ Case C-434/09 *McCarthy* [2011] ECR I-03375

¹⁰²⁹ http://europa.eu/rapid/press-release_IP-12-417_en.htm

However, in *the Netherlands* the obligation to register with the *Immigratie en Naturalisatie Dienst* (IND) within the first 3 months of their stay was abolished for EU citizens in 2014. There is still an obligation for third country nationals to obtain a EU residence permit within the first three months of their stay.

In *Iceland*, there is an obligation to register with Registers Iceland, both for a stay up to three months and for a stay exceeding that period.

4.2.1.2 Right of residence between 3 months and 5 years: Art 7, directive

In all studied countries, the right of residence for a period between three months and five years has been incorporated into national law in accordance with Article 7 of the directive. On the following points, some variations in national practice have been identified:

– *Obligation to register with the national authorities*

In all countries considered, there is an obligation to register with the local or national authorities for persons who intend to stay for a period exceeding three months. However, the exact scope of this obligation to register varies.

In *the Netherlands*, all persons, EU citizens and TCN's alike, need to register with the authorities (*Basis Registratie Personen*) after 3 months.¹⁰³⁰ In *Belgium*, EU/EEA citizens intending to stay for a period exceeding three months should register with the local authorities within the first three months following their arrival in the country.

In *Sweden*, with the 2014 amendments of the Aliens Act, there is no longer a registration requirement for EU/EEA citizens and their family members at the Swedish Migration Agency. However, EU/EEA citizens who intend to stay in Sweden for more than one year need to apply to be registered in the Swedish Population Registration at the Swedish Tax Agency.¹⁰³¹

In *Iceland*, after the first three months (and after registration with Registers Iceland within this period), the Directorate of Immigration will monitor compliance with the criteria required for a continued stay.

– *Requirement to have comprehensive sickness insurance*

Regarding the criterion included in Article 7(1) b of the directive, requiring EU/EEA citizens and their family members to have comprehensive sickness insurance, some developments should be mentioned in *Sweden* and the *United Kingdom*.

In *Sweden*, before the legislative amendments of 2014, any person who was registered with the Tax Authority, which is responsible for registration of all citizens in Sweden, was automatically entitled to Swedish State health insurance. The granting of this same right to all EU/EEA migrants would obviously have significant financial consequences for the state, which the Tax Authority may want to avoid by requiring proof from migrants that they have their own sickness insurance as foreseen in the directive. Indeed, the assessment of this criterion has become stricter in the last few years, in comparison to the period prior to 2014.

¹⁰³⁰ Information provided during interview with representatives of the Ministry of Security and Justice and of the IND, see above, note 1010

¹⁰³¹ Interview with representatives from the Swedish Migration Agency

In the *United Kingdom*, the case of *W (China) and Anor v Secretary of State for the Home Department* (2006) EWCA Civ 1494 should be mentioned. In this judgment the Court of Appeal stated that: (i) EEA nationals who need to have medical insurance cannot rely on the National Health Service (NHS) as providing medical insurance; and (ii) EEA nationals and their family members must show they will not place an unreasonable burden on the public finances of the UK. This judgment has been further supported by the recent Court of Appeal judgment in *Ahmad*,¹⁰³² which confirmed that an EEA national who is exercising Treaty rights as a student or self-sufficient person in the UK cannot rely on an entitlement to treatment on the NHS in order to meet the requirement to hold comprehensive sickness insurance.

On the other element of Article 7(1) b, the requirement of self-sufficiency, and the possibilities to terminate the person's stay on the ground that this condition is not, or no longer fulfilled, see above, Section 3.1.4.

– *Retention of residence after divorce, annulment of marriage - Article 13, directive*

At the request of UDI, it was examined how the studied countries deal with the situation in which spouses or registered partners are *de facto* separated, even though no divorce proceedings have been initiated, or the registered partnership is still in force. Does this situation fall within the scope of Article 13 of the directive, and especially, would a TCN spouse or partner of a EU/EEA national then retain his/her right of residence?

The situation varies among the different countries, as follows:

Table 2 - Art. 13, directive and *de facto* separation

	B	DK	NL	SE	UK	IS
Art. 13(2), directive: <i>Retention of the right of residence of TCN family members in the case of divorce, annulment of marriage or termination of a registered partnership</i>						
<ul style="list-style-type: none"> – <i>De facto</i> separation will lead to a termination of the right of residence of a TCN spouse or registered partner, and – The factual situation will be considered. 			X			No practice, but probably X
<ul style="list-style-type: none"> – <i>De facto</i> separation does <i>not</i> have any impact on the right of residence of a spouse or registered partner, and 	X ¹⁰³³	X		X	X	

¹⁰³² *Ahmad* [2014] EWCA Civ 988, cited in EEA Case law and Appeals, at p. 46-47, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf

¹⁰³³ Following the judgment of the Constitutional Court 121/2013 of 26 September 2013; for details see the country study on Belgium, section 3.2.1.2

– As long as the spouses are married or the registered partnership is in force, their right of residence will continue; Article 13 does not apply to such a situation.	X	X		X	X	
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4.2.1.3 Right of permanent residence: Art 16, directive

In all countries considered in this study, the right of permanent residence is incorporated into national law, as required by Article 16 of the directive, and this right is acquired after the EU/EEA citizen has legally resided in the host state for a period of five years.

Until a few years ago, in *Belgium*, a permanent residence right was acquired already after three years, but this was modified in a legislative amendment in 2013.¹⁰³⁴ In the country studies, a few points of interest regarding permanent residence were brought to the fore:

– *Rights of family members to permanently live with the EU/EEA citizen*

In *Denmark*, until mid- 2012, the right of residence of *family members* was restrictively interpreted and enforced in Denmark. Until then, the EU citizen had to document being a worker or having sufficient resources to provide for his/her family, also after having acquired a permanent right of residence. Following the judgment of the EFTA Court in the *Clauder* Case E 4/11,¹⁰³⁵ the legislation was changed, and *family members, including TCN family members*, now have an unconditional right to reside with the permanently settled EU citizen. However, this only applies to family members (regardless of their nationality) of EU citizens. The ‘old’ practice still applies to *Third Country Nationals who are family members of another TCN* who has a permanent right of residence because of his/her relationship to a EU citizen. This difference is justified by the argument that

The EFTA Court does not decide on the possibility for family reunification with a reference person who is a third country national family member of an EU/EEA national, and who has obtained a right of permanent residence pursuant to Article 16 (2).¹⁰³⁶

– *Is time spent in prison considered as legal residence?*

The question whether time spent in prison in the host state is considered as legal residence – and therefore contributes to the accumulation of legal residence required for acquiring a permanent residence right – is answered differently among the studied countries. The same question was examined for a stay in a psychiatric hospital as an alternative to a prison sentence. The situation is as follows:

¹⁰³⁴ Information received during a meeting with representatives of the Belgian Immigration Office on 3 June 2015

¹⁰³⁵ *Clauder*, Case E-4/11 [2011] EFTA Ct. Rep. 216

¹⁰³⁶ Legal Interpretative Note of the Ministry of Justice of 14/8/2012 on the EFTA Court's judgment in the *Clauder* case (*English translation by the research team*)

Table 3 - Time spent in prison: legal residence?

	B	DK	NL	SE	UK	IS
1) Time spent in prison in the host state:						
– Time spent in prison is <i>not</i> considered as lawful residence		X	X	X	X	X
– Time spent in prison is considered as lawful residence	X					
2) Time spent in a psychiatric hospital as an alternative to a prison sentence						
– There is no practice, and no specific rule regarding this situation				X		X
– Time spent in a psychiatric hospital as an alternative to a prison sentence is <i>not</i> considered as lawful residence		X	X		X	
– Time spent in a psychiatric hospital as an alternative to a prison sentence is considered as legal residence	X					

Thus, only in *Belgium* time spent in prison or in a psychiatric hospital as an alternative to a prison sentence, are considered as lawful residence.

4.2.2 *Rights against the home state*

4.2.2.1 Rights of persons returning to the home State after a stay in another EU/EEA state and their family members - family reunification

In all studied countries, the rights of EU/EEA states' own citizens who have exercised their free movement rights and their family members, who are returning to the home state after a stay in another EU/EEA (host) state, are interpreted restrictively. National authorities adopt a cautious approach in order to avoid abuse (referred to as 'Europe-routes' in *the Netherlands*), and tend to be even more critical with regard to TCN family members. Indeed, especially in *the Netherlands, Denmark and the United Kingdom*, a restrictive interpretation is given to the CJEU's case law on family reunification, and the condition of a 'genuine and effective' residence in another EU/EEA state has been strictly applied, in particular following *Metock*, but also based on the recent judgments in *C-456/12 O. and B.*¹⁰³⁷ and *C-457/12 S. and G.*¹⁰³⁸

In all countries considered, there is a substantial national case law on family members of EU/EEA citizens being denied a derived right of residence in such situations. In *the Netherlands*, courts have denied analogous application of Directive 2004/38/EC in several cases¹⁰³⁹ because:

¹⁰³⁷ *C-456/12 O. and B.* ECLI:EU:C:2014:135

¹⁰³⁸ *C-457/12 S. and G.* ECLI:EU:C:2013:837

¹⁰³⁹ Raad van State, 17 December 2012, ECLI:NL:RVS:2012:BY7401; Rechtbank 's Gravenhage, zittingsplaats Amsterdam, 13 September 2010; Raad van State, 5 October 2012, ECLI:NL:RVS:2012:BX9567. For more details, see the country study on the Netherlands, Section 3.2.2.1

- (i) The stay in the host state was considered too short (less than 3 months); or
- (ii) There was insufficient proof of ‘genuine and effective residence’ in the host state

Similar conclusions were reached in several *Danish* court cases.¹⁰⁴⁰ Following the CJEU’s ruling in *C-456/12 O. and B.*, the Council of State in *the Netherlands* has adopted the approach that (i) a stay in the host Member State must have a duration of at least three months; (ii) the stay, together with the family member concerned, must have been continuous (a stay only during weekends was not considered sufficient), and (iii) during the stay, the reference person must have created or strengthened family life with the family member concerned.¹⁰⁴¹ In some recent cases, the Council of State confirmed these criteria,¹⁰⁴² adding that the EU citizen must also provide both administrative and factual evidence that he/she and the family member in question had not only lived in the host state, but also that they had moved their ‘centre of interests’ to the host state.¹⁰⁴³ This latter condition was not fulfilled when the EU citizen had worked for several employers, or for a Dutch employment agency in the Netherlands during the stay abroad.

In the *United Kingdom*, in January 2014 an additional test has been introduced, the ‘centre of life’ test, through which the British citizen must demonstrate that he/she has moved his/her ‘centre of life’ to another EU/EEA state before qualifying to rely on EU rules in order to bring his or her family members to the UK. Regulation 9(3) specifies the factors to be considered when deciding whether a British citizen has transferred the centre of their life to another member state. These include, but are not limited to:

- a. The period of residence in another EEA member state as a worker or self-employed person;
- b. The location of the British citizen’s principal residence; and
- c. The degree of integration of the British citizen in the host member state.

The Guidance mentions that ‘these criteria are indicative and it is not necessary to meet all three’. More specific criteria are formulated for each of these factors.¹⁰⁴⁴ To date, no cases have been reported on the application of the ‘centre of life’ test that have reached the courts or the Upper Tribunal. The Commission has reportedly criticised this test and has launched an investigation into its compatibility with the recent case law of the CJEU.¹⁰⁴⁵ However, it should be noted that the Upper Tribunal affirmed in October 2014, in the case *SSHD v Kamila Santos Campelo Cain*,¹⁰⁴⁶ that Regulation 9, as the provision that implements the CJEU’s judgment in case *C-370/90 Surinder Singh*¹⁰⁴⁷ (referring to the first CJEU judgment in which derived rights of residence for family

¹⁰⁴⁰ Western Appeal Court, judgment of 27/3/2012, B-1173-11, U.2012.2187V; District Court of Lyngby, judgment of 21 October 2013, see <http://www.domstol.dk/lyngby/nyheder/domsresumeer/Pages/ÆgtefællesammenføringefterEU-reglerneafvist.aspx>. For further details, see the country study on Denmark, Section 3.2.2.1

¹⁰⁴¹ Raad van State, 20 August 2014, 201011889/1/V2 and 201108529/1/V2

¹⁰⁴² Raad van State, 4 November 2014, 201400005/1/V3

¹⁰⁴³ Raad van State, 201209532/1/V2.19 February 2015; Raad van State, 201306220/1/V2.19, February 2015

¹⁰⁴⁴ Notice of the Home Office, European Operational Team, on Regulation 9 (*Surinder Singh* cases), issue number 02/2014, available at: <http://www.kadmosimmigration.com/news/home-office-guidance-centre-life-test-surinder-singh-cases#sthash.2drbaTm7.dpuf>, at para 7

¹⁰⁴⁵ Colin Yeo, *Surinder Singh: EU Free Movement for British Citizens*, 2014, ebook, version 3, updated (2015), available through <https://www.freemovement.org.uk/about/>, a blog launched and edited by Colin Yeo, barrister at Garden Court Chambers, London

¹⁰⁴⁶ *SSHD v Kamila Santos Campelo Cain* (IA/40868/2014) promulgated 17 October 2014

¹⁰⁴⁷ C-370/90 ECR [1992] I-04265

members of EU citizens returning to the home state were recognised), also applies to unmarried partners.¹⁰⁴⁸

In *Denmark*, with respect to the CJEU's Judgment in Case C-456/12 *O. and B.*, the Ministry of Justice has declared in a specific Briefing Note, to be of the opinion that the Danish requirement of 'becoming established' is in accordance with the conclusions of the judgment, and that it therefore is not necessary to make adjustments in this respect.¹⁰⁴⁹ However, Danish practice was adjusted with regard to a specific point of C-456/12 *O. and Others*, included in paragraph 50 of that judgment. According to the relevant Danish Briefing Note:

According to the Directive a requirement of having sufficient resources may not be applied regarding core family members of a worker in Denmark who is a national of another Member State. It is therefore considered that there is a need to adjust the practice concerning the resources-requirement in those situations where the Danish national has stayed in another EU country as a non-economically active person, and where the person in question at his or her return changes status from economically inactive to economically active as a worker or self-employed person.¹⁰⁵⁰

The adjustment means that there is no longer a requirement of sufficient resources to provide for core family members in such a situation – as is the case for EU nationals who have the status of workers in Denmark. However, the requirement of sufficient resources may still be applied where the Danish national at his or her return has not changed status from economically inactive to economically active.

In *Sweden*, since the latest amendments of the Aliens Act in 2014, essentially the approach in C-456/12 *O. and B. S.* and C-457/12 *S. and G.* is being followed.

Finally, in *Belgium*, several legislative amendments have been made with respect to family reunification, including in situations where EU citizens return to Belgium after a stay in another EU/EEA state, following a landmark judgment of the Constitutional Court of 26 September 2013. The Constitutional Court has considered the provisions of the Law of 15 December 1980 regarding the possibilities for Third Country Nationals to acquire a right of residence in Belgium as a result of family reunification (121/2013). The Court has annulled several provisions of this law and has given a detailed interpretation of the applicable articles, including:

- Art. 40*bis*, para 2(1), 2, sub c of the abovementioned law was annulled, which imposed a minimum age of 21 years for both partners as a condition for family reunification;
- The Court has interpreted several other provisions of this same law, *inter alia*, with respect to the condition of sufficient resources in the case of family reunification, and the different treatment between Belgian nationals and TCNs who apply for family reunification.¹⁰⁵¹

¹⁰⁴⁸ Another relevant British case is *MM, R (On the Application Of) v The Secretary of State for the Home Department [2013] EWHC 1900 (Admin)*. The appeal concerned the lawfulness of the UK immigration rules introduced in 2012 setting minimum income levels for the sponsorship of non-EEA family members. The minimum income requirement does not apply to persons who return to the UK after having resided in another EEA State. However, the judgment is of relevance in the context of this analysis precisely because it may lead to an increased use of the '*Surinder Singh* route' in order to circumvent the minimum income requirement, now that its lawfulness has been confirmed. For further details, see the country study on the United Kingdom, Section 3.2.2.1

¹⁰⁴⁹ Briefing Note from the Ministry of Justice of 26 May 2014 on the interpretation of case C-456/12, *O. and Others* and case C-457/12, *S. and Others*

¹⁰⁵⁰ *Idem*

¹⁰⁵¹ For further details, see the country study on Belgium, Section 3.2.2.1

In *Iceland*, there is no specific legislation or practice on this point.

On the whole, a trend can be seen whereby the considered EU member states are careful to adapt their legislation and administrative practice to the jurisprudence of the CJEU on family reunification for EU citizens who are returning to the home state after a stay in a host member state, while at the same time strictly interpreting the criteria put forward by the European Court. In some countries, in particular the *United Kingdom* (with the ‘centre of life’ test), and to a lesser extent *the Netherlands* (by strictly interpreting the criteria of *O. and B.* and *S. and G.* and introducing the condition that the ‘centre of interest’ must have been moved to the host state), conditions are formulated which go beyond the CJEU’s case law, thereby further restricting its application.

4.2.2.2 Rights of caretakers of minor citizens (involving cross-border element; *Zhu and Chen, Alokpa*)

In most countries considered, caretakers of minor EU citizens can acquire a derived right of residence, based on primary EU law and an analogous application of the directive, following the CJEU’s case law in C-200/02 *Zhu & Chen*,¹⁰⁵² and C-86/12 *Alokpa*.¹⁰⁵³ Whereas some of the considered countries adopt a rather cautious approach, in particular *the Netherlands, Denmark* and *Sweden*, in other states such derived rights seem to be granted more often. Indeed, in the *United Kingdom* and *Belgium*, this possibility has explicitly been included in the national legislation.

In *Sweden*, there have been several judicial cases with regard to the rights of caretakers of minor citizens. For example, in 2009, the Migration Court of Appeal found that the child of a Japanese mother and a migrating EU citizen, could have a residency permit on her own, thereby providing the mother with a residency permit, even though she was now divorced. On the other hand, in MIG 2012:15 the Migration Court of Appeal found that a family (mother and minor daughter) irrespective of sufficient resources could not be found having a right of residence since they were lacking sickness insurance. The Migration Court of Appeal therefore held that the family was to be expelled. Referring to C- 34/09, *Zambrano*,¹⁰⁵⁴ the court held that eviction was not possible to the mother’s state Colombia, since the daughter had become a Spanish citizen by birth. Therefore, the family was to be evicted to Spain in order not to deprive the daughter of her Union citizen’s rights.¹⁰⁵⁵

In the *United Kingdom*, national courts are increasingly addressing EU citizenship rights beyond the scope of the directive. For instance, as noted by academic experts in the UK, ‘with respect to the *Chen* ruling, UK courts and tribunals were quick to recognize that that decision establishes, in primary EU law, a derived right of residence for TCN family members in their capacity as primary carers of dependent minor EU citizens.’¹⁰⁵⁶ On 16 July 2012, *Zhu and Chen* was incorporated into the Immigration (EEA) Regulations 2006 and primary carers of EEA self-sufficient children can now be issued a derivative residence card up until the child’s 18th birthday.¹⁰⁵⁷

¹⁰⁵² Case C-200/02 *Zhu and Chen* [2004] ECR I-09925

¹⁰⁵³ Case C-86/12 *Alokpa* ECLI:EU:C:2013:645

¹⁰⁵⁴ Case C-34/09 *Zambrano*

¹⁰⁵⁵ *Idem*

¹⁰⁵⁶ FIDE Report on the UK, see above note 1004, at p. 868, citing the following cases: *M-T v T* [2005] EWHC 79 (Fam); *W (China) v Secretary of State for the Home Department* [2006] EWCA Civ 1494; and *Bassey v Secretary of State for the Home Department* [2011] NICA 67.

¹⁰⁵⁷ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf, p.33

Moreover, the CJEU judgments in *Ibrahim and Teixeira*, Cases C-310/08 and C-480/08, in which the Court confirmed that (i) the right of access to education also applies to the children of former EEA national workers even if the parents cease to be workers at the start of the education of the child, and (ii) that this right necessarily entails the right of residence within the territory of the host member state, not only for the children concerned, but also for the parents who have custody of them, were given effect into the Immigration (EEA) (Amendment) Regulations 2012 at regulation 15A(3) for the child, and at regulation 14A(4) for the primary carer of that child.¹⁰⁵⁸

In *the Netherlands*, the courts generally affirm that EU citizens are only deprived of the genuine enjoyment of the substance of rights if they have no ‘real’ other possibility to stay within the territory of the EU. However, according to Dutch policy, the choice of parents regarding the division of guardianship cannot force the government to grant residence, if another choice had also been possible.¹⁰⁵⁹ The interpretation of the CJEU’s judgment in C-86/12 *Alokpa* leads to follow up questions that will need to be answered in national courts.¹⁰⁶⁰

In *Belgium*, the jurisprudence of the CJEU in C-200/02 *Zhu and Chen* and C-86/12 *Alokpa* has been incorporated in the Law of 15 December 1980 with the inclusion of Article 40bis, paragraph 2, letter 5, as part of the legislative revision of 2014. This new provision stipulates that the following person is considered as a family member of a EU citizen:

The father or the mother of a minor citizen of the European Union who has at his/her disposal sufficient resources not to become a burden on the social security system, and a sickness insurance (...).

The provision provides the possibility for TCN parents of a minor EU citizen to acquire a derived right of residence, so that their minor child can exercise his/her rights as a EU citizen. A condition is that they have ‘sufficient resources’ and comprehensive sickness insurance not only for themselves, but also for the child. The Commission has started a pilot investigation into the Belgian practice on this point.¹⁰⁶¹

In sum, in *Belgium* and the *United Kingdom*, the legislator has, so far, been more forthcoming to incorporate the relevant CJEU’s case law than the other studied countries. In *Iceland*, there is no specific legislation or practice on this point.

4.2.2.3 Cases with no cross-border element (*Zambrano* case)

Most of the studied countries have adopted a restrictive approach with regard to the granting of citizenship rights based on EU primary law in situations covered by the CJEU’s judgment in C-34/09 *Zambrano*. The European Court ruled in this decision that Article 20 of the TFEU precludes a member state from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen. In previous cases, such as the 2004 judgment in *Zhu and Chen*, the Court had linked similar rights of a parent to the exercise of the right of free movement and residence by the child, who is a EU citizen.

¹⁰⁵⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf, p.34

¹⁰⁵⁹ Information provided during interview with representatives of the Ministry of Security and Justice and of the IND

¹⁰⁶⁰ *Idem*

¹⁰⁶¹ *Idem*

In the *Zambrano* case, the CJEU affirmed that such derivative rights for third country national parents who are primary caregivers for a child who is a EU citizen apply also in the country that has granted citizenship to the child, even if no use has been made of EU free movement rights (*i.e.* there is no cross-border element).

In particular, *Denmark, the Netherlands* and the *United Kingdom* have opted for a narrow interpretation of the *Zambrano* decision, closely orientated around the particular facts at issue in that decision.

In *Denmark*, the EU free movement provisions are, in principle, only applicable if there is a cross-border element. Only in exceptional situations, EU law might apply in purely internal situations (Art 20 TFEU and *Zambrano*). The legal implications of *Zambrano* and subsequent cases are very narrow, and only apply to cases where the decision of the Danish authorities would lead to the departure of the EU citizen child.¹⁰⁶² The following criteria must be fulfilled: (1) the case concerns the right of residence of a parent of a Danish child, (2) the parent is a TCN; (3) the parent lives with the EU citizen and provide for his/her needs; (4) refusing a right of residence to the parent would lead to the departure of the child from the EU (which is most likely when there is no other parent with whom the child can live), (5) the parent does not need to be the biological parent, but can be another adult on whom the child is dependent. In the exceptional situation in which a Danish child is obliged to leave the EU, then the TCN will be granted a right of residence based on Art 20 TFEU. However, since the directive is not applicable to these situations, Denmark will not apply it by analogy, and the authorities are not bound by its provisions.¹⁰⁶³

In *the Netherlands*, the Immigration authorities in several cases have denied *Zambrano* claims. Government officials have confirmed that there must be a ‘factual impossibility’ for the child to remain in the Netherlands, unless the TCN parent is granted residence. At first, only situations in which the facts are directly comparable to those in the *Zambrano* case were considered to give rise to a residence right of the TCN parent. This policy has been amended under pressure of national jurisprudence to the extent that in cases where the decision not to allow a TCN the right of residence will force the Dutch minor to leave the union with that parent also fall within the scope of *Zambrano*. However, if the fact that the minor will follow the TCN parent is a result from a choice of the parents (*e.g.* a choice not to arrange custody with the TCN parent) this choice of the parents will not force the government to legalize the stay of the TCN.¹⁰⁶⁴ Also in situations similar to those in *Dereci*, (concerning the wish to keep the family together), the Dutch authorities will examine if there is a ‘factual impossibility’ for the EU citizen child to remain in the Netherlands, which is line with national case law.¹⁰⁶⁵

In the *United Kingdom*, national legislation has been amended to take account of the CJEU’s case law in *Zambrano* and subsequent cases, in particular C-434/09 *McCarthy*, C-34/09 *Dereci* and C-40/11 *Iida*, through the Immigration (EEA) (Amendment) (No.2) Regulations 2012.¹⁰⁶⁶ This

¹⁰⁶² Briefing Note of the Ministry of Integration of 11/5/2011 on the legal implications of the *Zambrano* ruling. this note was later updated by the Ministry of Justice taking account of the cases *McCarthy*, C 434/09, *Dereci*, C 256/11, and *O and S*, C 356-357/11

¹⁰⁶³ Briefing Note of 11 May 2011 on the interpretation of the *Zambrano* judgment (case 34/09), revised 22 June 2012 and 15 July 2013 due to subsequent case law

¹⁰⁶⁴ See also Aliens Circular, B10/2.2

¹⁰⁶⁵ Information provided during a meeting with representatives of the Ministry of Security and Justice and of the Immigration and Naturalisation Service (IND) held on 3 March 2015. For examples of national case law, see the country study on the Netherlands, Section 3.2.2.4.

¹⁰⁶⁶ SI 2012/2560 (incorporating the CJEU's judgments in *Zambrano*, *McCarthy*, *Dereci* and *Iida*)

amendment confers rights of entry and residence on the ‘primary carer of a British citizen who is residing in the United Kingdom and where the denial of such a right of residence would prevent the British citizen from being able to reside in the United Kingdom or in an EEA State.’¹⁰⁶⁷ When a Union citizen minor has two primary carers, the amended EEA Regulations provide that both primary carers must be required to leave the United Kingdom before a derivative right can be enjoyed.¹⁰⁶⁸ The CJEU’s case law on primary law citizenship rights has also had important consequences for social security benefits. In particular, ‘the UK legal framework has been amended to exclude entitlement to a range of UK social assistance benefits for persons resident in the UK under the terms of the *Zambrano* ruling.’¹⁰⁶⁹ Regarding national jurisprudence, it should be noted that following *Zambrano*, cases with similar facts were decided without making any explicit reference to this judgment, but rather, for example, to the ‘best interest of the child’ included in the UN Convention on the rights of the Child and the UK’s obligations following from that convention.¹⁰⁷⁰ In other cases, UK courts have taken the *Zambrano* case into consideration, but they mostly adopted a restrictive approach to it, rather relying on the CJEU’s later decision in C-256/11 *Dereci*. Two recent cases should be mentioned:

- In a judgment of 10 February 2015 (*Sanneh a.o.*),¹⁰⁷¹ the Court of Appeal considered the claim that denial of social welfare to a TCN parent effectively compels Union citizen children to leave the Union territory. The Court stated that only EU citizens can rely on the nationality non-discrimination principle. Moreover, the Appeals Court held that the UK government has policy reasons for making distinctions between *Zambrano* carers and others, and that the Court cannot say that those reasons are clearly without foundation.¹⁰⁷²
- In *SSHD v AQ (Nigeria) & Ors* (25 March 2015),¹⁰⁷³ the Appeals Court held that where a foreign criminal appealed against a deportation order being made on the basis that the public interest in his deportation was outweighed by his private or family life in the UK, the tribunal needed to examine the factors that would outweigh the public interest in deportation. The appeals Court rejected the government’s argument that the tribunal was only required to consider the ability of others to care for the child in the UK and was bound to ignore questions such as whether a family member would be willing to provide care or was under any familial or other responsibility to do so. It is interesting to note that in this case, the Appeals Court considered that the government’s duty to ensure that a minor EU citizen is not deprived of his rights under EU law is a factor to be weighed against the public interest to expel a convicted criminal if the latter is the primary carer of the EU citizen child.¹⁰⁷⁴

In *Sweden*, there have been only very few cases in which the *Zambrano* judgment and subsequent cases were invoked, and Swedish law has not been amended to take this European jurisprudence into

¹⁰⁶⁷ *Idem*, explanatory notes

¹⁰⁶⁸ *Idem*, see Reg 15A (7(A)) EEA Regulations

¹⁰⁶⁹ FIDE Report on the United Kingdom at p. 867 and note 158, citing the Social Security (Habitual Residence) (Amendment) Regulations, SI 2012/2587, amending, *inter alia*, Income Support (General) Regulations 1987; Jobseeker’s Allowance Regulations 1996; State Pension Credit Regulations 2002, and the Employment Allowance Regulations 2008

¹⁰⁷⁰ *ZH, (Tanzania) v Secretary of State for the Home Department* [2011] UKSC4.

¹⁰⁷¹ *Sanneh a.o. v. Secretary of State for Work and Pensions*, [2015] EWCA Civ 49, (emphasis added), available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/sanneh-others-v-secretary-of-state.pdf>

¹⁰⁷² *Idem*, at para 29

¹⁰⁷³ *SSHD v AQ (Nigeria) & Ors* [2015] EWCA Civ 250 (25 March 2015)

¹⁰⁷⁴ For other examples of national case law see the country study on the United Kingdom, Section 3.2.2.4

account. To the author's knowledge, the only example where a Swedish court referred to *Zambrano*, was the case already mentioned above in Section 3.2.2.3.¹⁰⁷⁵

Finally, *Belgium* has adopted a broad interpretation of *Zambrano*, and similar cases will be considered to give rise to a derived right of residence. The Belgian legislator has incorporated this judgment in the Law of 15 December 1980, in Article 40ter, first paragraph, second sentence. According to representatives of the Belgian Immigration Office, this provision goes beyond the terms of *Zambrano*, since the only conditions to be fulfilled are the establishment of the parental link between the minor EU citizen and the carer, and proof of their identity. The Belgian legislator has not included among these conditions that the carer of the EU citizen child must have sufficient resources. In *Zambrano*, the CJEU indeed establishes a link between the need for the primary carer of the EU citizen child to have sufficient resources on the one hand, and the possibility for this child to enjoy its substantive rights as a Union citizen based on Article 20 TFEU. However, the Court was asked to pronounce itself on the question whether the host state (Belgium) had to *grant a work permit* to the father of the EU citizen child, and answered this question in the affirmative. It does, in the opinion of this author, not directly follow from this judgment that the Court considered that for the granting of a derived right of residence to the primary carer of a EU citizen child, it is an additional condition that the primary carer has 'sufficient resources'.

Finally, in *Iceland*, no specific provision has been included in national law with respect to situations as in *Zambrano*, and no practice has been established, since the authorities have, so far, not been faced with a similar request.

4.2.2.4 Rights against home- and host state of family members of commuters

The studied countries have generally also adopted a restrictive approach with respect to granting residence rights to the family members of commuters. These are situations in which family members of a national of a home state where he/she lives, and who regularly travels to another (host) state to provide services, claim a derived right of residence in either the home, or the host state, depending on the specific circumstances. The main relevant judgments from the CJEU are C-60/00 *Carpenter* and C-456/12 *O. and B.* and C-457/12 *S. and G.*

In *Denmark*, according to a Briefing Note of 2008,¹⁰⁷⁶ the Ministry of Integration is of the opinion that the *Carpenter*-judgment does not mean that Danish nationals who provide services to nationals in other EU countries generally are entitled to be unified with third country family members in Denmark. Considering that the *Carpenter* case is based on a very specific assessment, the Ministry established that the case can only be applied to situations where the circumstances are similar. In particular, the following factors are of importance when assessing cases in light of the *Carpenter*-judgment:

- Whether the spouse (the third country national) has entered legally
- Whether the case concerns partly the provision of services from the home country and partly business travels to the other EU countries to which the services are provided
- Whether the provision of services constitutes a large part of the professional activities of the person in question, partly in the Member State of origin and partly in other Member State
- Whether the purpose of the marriage/registered partnership/cohabitation is not solely to obtain an independent right of residence for the applicant

¹⁰⁷⁵ MIG 2012:15

¹⁰⁷⁶ Briefing Note from the Ministry of Refugees, Immigration and Integration of 2 October 2008 on the interpretation of case C-127/08 *Metock* (English translation by the research team)

- Whether the couple has established a genuine family life in Denmark¹⁰⁷⁷

With respect to situations in which an EU national exercises free movement rights in a member state while living in another Member State, the following situations are considered (1) a Danish national who works in Denmark but lives in Sweden, and (2) a Danish national who lives in Denmark but works in Sweden. Specific guidance for the Immigration Service is provided for these situations, based on the CJEU's judgment in *C-457/12 S. and G.*¹⁰⁷⁸

In *Sweden*, the CJEU's judgments in *Carpenter* and *C-456 O. and B.* and *C-457 S. and G.* are not explicitly implemented into the Swedish law, but they are mentioned in the internal guidelines and in the administrative practice all the judgments from CJEU are taken into account. Whether derived rights of residence for commuters are acceptable, will depend on the specific circumstances of each case.¹⁰⁷⁹ The same is true in *the Netherlands*, where the granting of such derived rights is not excluded, but it is not a very common situation.¹⁰⁸⁰

In the *United Kingdom*, the EEA Regulations do not include any specific rules with regard to the rights of family members of commuters, since commuting is a rather exceptional situation in the United Kingdom. The rights of commuters between Northern Ireland and the Republic of Ireland are set out in a separate legal agreement, which created a Common Travel Area between the United Kingdom and the Republic of Ireland, covering a broad range of issues.

On the other hand, in *Belgium*, residence rights are regularly granted to family members of commuters who live in Belgium and travel to other countries for work purposes. The decision in these situations depends on the specific circumstances of each case.¹⁰⁸¹

Due to its geographic situation, which does not easily allow for commuting to another country, *Iceland* has not adopted any specific legislative provision, and no relevant practice has been developed for family members of commuters.

4.2.3 *Restrictions on the freedom of movement and residence: refusal of entry or residence; expulsion measures; re-entry bans*

4.2.3.1 Refusal of entry or residence

In all the studied countries, entry or residence can be refused, either when the person concerned does not comply with the criteria set out in Articles 5,6 and 7 of the directive, or on grounds of public order, public security or public health (Article 27, directive). All countries considered in this study have included these grounds into their national legislation, as well as the principle of proportionality of Article 27(2). However, there are some differences among the different countries regarding the exact interpretation of these grounds, and the application of the proportionality principle. These will be further discussed below, in Section 4.2.3.2 (Expulsion).

¹⁰⁷⁷ *Idem*

¹⁰⁷⁸ Briefing Note of 26 May 2014 on the interpretation of case C-456/12, O. and others and case C-457/12, S. and others. For further details, see the country study on Denmark, Section 3.2.2.4

¹⁰⁷⁹ *Idem*

¹⁰⁸⁰ *Idem*

¹⁰⁸¹ Information provided during a meeting with representatives from the Belgian Immigration Office on 3 June 2015

As far as national legislation and practice on the refusal of entrance or residence is concerned, the following examples may be mentioned.

In *Denmark*, according to the *Aliens Act*, Section 28, for EU citizens, access and residence for the first three months can be refused by administrative decision if the citizen constitutes a threat against public order, security or health, if they have a prohibition from re-entering the country, or *if they cannot provide for their own needs*. Moreover, the EU Residence Order, Section 23(2), states that an application for a registration certificate (right of residence beyond the initial period of three months) may be refused on grounds of public policy, public security or public health, or in case of abuse of rights or fraud.

In *Sweden*, persons with an adverse immigration history (*e.g.* abuse and/or fraud, deliberate deception, making a false representation, illegal entrance, attempting to obtain asylum or other permits of stay on the basis of deliberate deception) may not qualify for a residence permit under Directive 2004/38/EC, and may therefore be refused entry, depending on the specific circumstances. However, with respect to EU/EEA-citizens and their family members who have already been granted a right of residence, the question will be considered of whether the behavior mentioned above is considered to be such a threat to public order that it justifies expulsion. This must be assessed in every single case, but most likely such behavior, unless it is very grave and/or repeated, would not be considered such a threat to public order.¹⁰⁸²

Finally, with regard to *Iceland*, the EFTA Court's Advisory Opinion on the interpretation of the conditions set for a refusal of entry in Article 27(2) of the directive and the EEA Agreement, in Case E-15/12 *Wahl*¹⁰⁸³ should be mentioned. This case concerned a denial of entrance by the Icelandic authorities of a Norwegian citizen, Mr Wahl, who was detained at the airport of Reykjavik on grounds of public order and security. Based on a risk assessment Mr Wahl was considered as a threat to a fundamental interest of society, because of (i) his membership with the motorcycle organisation Hells Angels, and the connections of this organisation with organised crime, and (ii) his stated intention to engage in social contact with members of the Icelandic motorcycle club MC Iceland, which was in the final stage of joining the Hells Angels as its Icelandic chapter. The EFTA Court concluded, *inter alia*, that:

It is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organised crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In the light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met.¹⁰⁸⁴

¹⁰⁸² Information received from a representative of the Swedish Migration Service, July 2015.

¹⁰⁸³ Case E-15/12, *Wahl* [2013] EFTA Ct. Rep. 534. For a more detailed overview of this case, see Annex 2

¹⁰⁸⁴ *Idem*, at paragraph 92

The EFTA Court also held that it is not required that a state declares such an organisation to be prohibited, in order to refuse entry of a member of this organisation into its territory. However, according to the Court, ‘the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat to public policy and/or public security, it must have taken administrative measures to counteract those activities.’¹⁰⁸⁵ The Supreme Court subsequently decided that Iceland had acted in accordance with the conditions set by the EFTA Court, when refusing entry of Mr Wahl into Iceland.¹⁰⁸⁶

4.2.3.2 Expulsion measures

Expulsion based on grounds of public policy or public security (Art. 27, directive), has led to a substantial national case law in all studied countries. Public health has, to the author’s knowledge, not been invoked as a ground for expulsion.

In some countries, grounds of public policy or public security have been invoked to expel migrants for, in essence, economic considerations. This can be explained by the fact that a re-entry ban can only be imposed when expulsion is based on Art. 27, and not when a person’s residence right is terminated on the ground of non-fulfillment of the conditions of art. 7 of the directive. This has happened more often in *Denmark* and the *United Kingdom*, and in exceptional cases in *the Netherlands* and *Sweden*.¹⁰⁸⁷

The proportionality principle, included in art 27(2) of the directive is incorporated in national law in all studied countries, but in practice it is not always strictly applied in all its elements, as evidenced in the national case law in *Denmark*, the *United Kingdom* and *Sweden*. In particular, the differentiated levels of protection foreseen in Article 28 of the directive, whereby the level of protection against expulsion is higher when a person has longer resided in the host state, are not always guaranteed. This can especially be seen in the case law in *Denmark*, *the United Kingdom*, and in a few cases in *Sweden*.

In *Denmark*, the grounds of ‘public order and public security’ are interpreted relatively broadly. For example, illegal residence (based on false identity papers) has been qualified as a serious threat to the public order and security. The Danish Supreme Court confirmed this in two cases,¹⁰⁸⁸ also confirming that this was in conformity with the directive.

For expulsion of citizens having a permanent right of residence, ‘serious grounds of public order’ are required; and when a person has resided in the home state for ten years or more, he/she can only be expelled for ‘imperative grounds of public security’. Also the definitions of ‘serious’¹⁰⁸⁹ and ‘imperative’¹⁰⁹⁰ grounds have been broadly interpreted in Denmark. In particular, the main consideration seems to have been the nature of the crimes, and the personal circumstances of the persons concerned, especially their integration into Danish society, do not seem to have been given much weight.

¹⁰⁸⁵ *Idem*, at paragraph 108

¹⁰⁸⁶ For further details on this case, see the country study on Iceland, in particular its Annex 2

¹⁰⁸⁷ See above, Section 3.1.4.e (on sufficient resources)

¹⁰⁸⁸ Supreme Court, Case 58/2012; Supreme Court, Case 364/2010

¹⁰⁸⁹ Judgment of the Eastern Appeal Court of 29/1/09, S-3604-08, reported in U.2009. 1137Ø; judgment of the Eastern Appeal Court of 22/5/08, S-1196-08 reported in U.2008. 2079OE

¹⁰⁹⁰ Western Appeal Court, judgment of 13/11/08, S-1421-08, U.2009.581V; Eastern Appeal Court, judgment of 26/8/13, S-4062

In *the Netherlands*, when applying the public order and security exceptions, courts often refer to the 2009 Commission's guidelines on the implementation of the directive.¹⁰⁹¹ They check whether the expulsion is respecting fundamental rights, in particular Article 8 of the European Convention of Human Rights (right to a family life). The judiciary is careful to check whether the behavior of the individual concerned constitutes a 'genuine and sufficiently serious threat' to a fundamental interest of society. In the case of multiple minor offences, the Council of State held that the authorities must duly motivate what the concrete threat to society is and why expulsion is necessary despite the fact that minor penalties were imposed. Moreover, the authorities must take into account the circumstances under which the offences were committed.¹⁰⁹²

In *Sweden*, the Migration Court of Appeal adopted the broadest interpretation of 'public security' in case MIG 2009:11. In this case, a Croatian national was expelled for a drugs-related crime for which he was convicted 5 years earlier. His personal circumstances and his ties to Sweden were not considered, which would seem not to be fully in line with Article 28(1) and case law of the CJEU. Indeed, in C-348/96 *Calfa*, the CJEU held that the personal conduct must present a present threat. In the joined cases C-482/01 and C-493/01, *Orfanopoulos and Oliveri* (2004), the European Court held that the public policy/public security criterion had to be interpreted strictly, also in drugs related crimes. And in C-145/09 *Tsakouridis* (2010), the Court held that a threat to public security can be assessed based on penalties, risk of re-offending, but also on the risk of compromising the social rehabilitation of the EU citizen in the State where he has become genuinely integrated.

In the *United Kingdom*, national courts have emphasised the need for a present threat to a fundamental interest of society, and warned against using previous convictions or offender assessment reports made at the time of the offence to inform a deportation decision (e.g. Case *A, B, C*, 2013). However, in several cases, previous convictions; evidence of an individual's continued unwillingness to reform or to abide by the criminal law; a willingness to mislead judges; escalating levels of violence; and even financial circumstances, were considered to determine a present threat (e.g. Cases *Jarusevicius*,¹⁰⁹³ *Batista*,¹⁰⁹⁴ *Flaneur*¹⁰⁹⁵). In a judgment of 2014, *Vassallo (Qualifying residence; pre-UK accession)* [2014] UKUT 00313 (IAC), the Upper Tribunal re-affirmed the consideration in *Essa (EEA: rehabilitation/integration)* [2013] UKUT 316 (IAC), that:

(F)or any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending.

Moreover, in a recent case, the Court of Appeal held that in cases concerning EU citizens who have committed offences and are being considered for deportation, it is in the interests of the citizen, the

¹⁰⁹¹ 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 , COM(2009) 313 final, 2 July 2009

¹⁰⁹² Raad van State, 18 June 2013, ECLI:NL:RVS:2013:62. For further details, see the country study on the Netherlands, Section 3.2.3

¹⁰⁹³ *Jarusevicius v Secretary of State for the Home Department* [2012] UKUT 120 (IAC).

¹⁰⁹⁴ *Batista v Secretary of State for the Home Department* [2010] EWCA Civ 896

¹⁰⁹⁵ *Flaneur's Application for Judicial Review*, Re [2011] NICA 72

host state and the Union itself that the offender should cease to offend. In *SE (Zimbabwe) v Secretary of State for the Home Department* (2015), the Court of Appeal held that if the offender's rehabilitation is incomplete, it is relevant to consider the offender's prospects of future rehabilitation (a) if he is deported to his home state and (b) if he remains in the host state. The EU has a collective interest in promoting the rehabilitation of all EU citizens who have lapsed into crime.¹⁰⁹⁶

With regard to *Belgium*, in 2013 the Commission notified this state that its implementation of the directive was not correct with regard to, *inter alia*, the fact that Belgium's rules on protection against expulsions on grounds of public policy or public security offer safeguards to non-EU family members of Union citizens only but not to Union citizens. In response to this criticism the principle of proportionality has been revised in the amendments of 19 March 2014.

Finally, in *Iceland* a new provision has been included in the Act on Foreigners, reproducing all the elements of Articles 27 and 28 of the directive, following criticism from the EFTA Surveillance Authority expressed in a Reasoned Opinion of December 2012.

4.2.3.3 Re-entry bans

In all studied countries, national law provides for the possibility of imposing a re-entry ban, prohibiting a person who has been expelled on grounds of public order or public security, to re-enter the country for a determined period of time. The exact conditions of such re-entry bans vary from one country to another, and usually their length is linked to the seriousness of the crime or conduct that led to expulsion. In most countries, the length of the prison sentence foreseen for a certain crime in national criminal law will be used as a criterion to determine the length of the re-entry ban (the longer the prison sentence, the longer the re-entry ban will be). This is the case in *Sweden, Denmark, the Netherlands, the United Kingdom* and *Iceland*. However, in *Belgium* a re-entry ban for EU/EEA nationals and their family members can, as established by law, only have a length of ten years regardless of the crime/conduct that led to the person's expulsion.

In *Denmark*, the length of the re-entry ban varies according to different situations. A permanent re-entry ban is imposed if: (i) the alien must be deemed a danger to national security; or (ii) the alien must be deemed a serious threat to public order, safety or health.¹⁰⁹⁷ Otherwise, section 32(2) of the *Aliens Act* enumerates the length of a re-entry ban, which can vary between 4 and 12 years, in relation to the length of the prison sentences foreseen for different crimes. A permanent re-entry ban will be imposed for expulsion based on crimes for which a prison sentence of two years or more is foreseen according to the national criminal code.¹⁰⁹⁸ A similar approach is adopted in *Iceland*.

In *Sweden*, EU/EEA-citizens only receive re-entry bans on serious grounds of public order or security and such bans are only given in connection with criminal convictions delivered by a court. The bans are seldom lifted. If that should happen it would probably be if a long time has passed since the expulsion and the person concerned has very strong family ties to Sweden.¹⁰⁹⁹

In the *Netherlands*, a re-entry ban will only be imposed when the EU citizen (or his family member) has been declared 'undesirable' (*ongewenst verklaard*), which amounts to an expulsion decision. In accordance with Article 8.22, paragraphs 4,5 and 6 of the Aliens Decree, a request to lift such a

¹⁰⁹⁶ *SE (Zimbabwe) v Secretary of State for the Home Department*, Court of Appeal, [2015] I.N.L.R. 122

¹⁰⁹⁷ *Aliens Act*, Article 32(4)

¹⁰⁹⁸ For further details, see the country study on Denmark, Section 3.2.3.4

¹⁰⁹⁹ *Idem*.

‘declaration of undesirability’ can only be introduced when a reasonable period of time has passed since the expulsion of the person concerned on grounds of public order or public security, or when the expulsion has occurred at least three years before the introduction of such a request. If a ‘declaration of undesirability’ is lifted, this also leads to a lifting of the re-entry ban.

In the *United Kingdom*, entry in breach of an exclusion order will not constitute the exercising of rights under the EU Treaties and thus, under Regulation 24, such a person may be removed as an illegal entrant. Exclusion orders and the decision not to revoke exclusion orders are EEA decisions for the purposes of the EEA Regulations and therefore, unlike non-EEA cases, attract a right of appeal.

4.2.3.4 Abuse of rights or fraud: Article 35 of the directive

The transposition of Article 35 of the directive into national law is not completed in all countries considered. This provision states:

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. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

In *Belgium*, the substance of this provision has been incorporated especially in Article 42septies of the Law of 15 December 1980, which states that the immigration authorities ‘can refuse the entry, or terminate the right to stay of a EU citizen or of his family members when he, or they, have used false or misleading information, or false or falsified documents, or when they have resorted to fraud or other illegal means, which have been decisive for the recognition of this right.’¹¹⁰⁰ A specific entity has been set up, the *Cellule fraude*, with the task to identify cases of fraud, in particular identity fraud, and abuse of rights.

In *Denmark*, Article 35 of the directive has been transposed in Article 30(3) of the EU Residence Order, which states that a right of residence will end ‘(...) in the event of abuse of rights, if the basis for issue of a person’s registration certificate or residence card was incorrect, or the person in question obtained the registration certificate or residence card by fraud, including by virtue of a marriage of convenience.’ False representation or illegal residence has led in a few cases to expulsion on grounds of a threat to the public order and security.¹¹⁰¹

In the *Netherlands*, Article 35 is partly implemented in Article 8:25 of the Aliens Decree. Only fraud is at present included in the legislation, while ‘abuse of rights’ will be added through a forthcoming legislative amendment. However, in practice, the courts may not accept abuse of rights as a ground to limit the rights granted under Directive 2004/38/EC, due to the emphasis on proportionality.¹¹⁰²

In *Sweden*, Article 35 is incorporated in Chapter 3a, Section 4, Para 3 the Aliens Law as far as marriages of convenience is concerned. Otherwise there is no explicit implementation of this article.¹¹⁰³

¹¹⁰⁰ Article 42septies, Law of 15 December 1980 (with further amendments), (*Translation by the author*)

¹¹⁰¹ For further details, see the country study on Denmark, Section 3.2.3. for further details.

¹¹⁰² Information provided by representatives from the Ministry of Security and justice and of the IND, following the interview held on 3 March 2015

¹¹⁰³ Information received from representatives of the Swedish Migration Service.

In the *United Kingdom*, this provision is incorporated in Regulation 19 (EEA Regulations). Regulation 19 now also requires the Secretary of State to consider the new regulation 21B (which came into force on 1 January 2014),¹¹⁰⁴ which additionally permits the Secretary of State to exclude those who are considered to have abused their EEA rights of residence, or if there are reasonable grounds to suspect that admission would lead to the abuse of those rights.

An abuse is considered to be:¹¹⁰⁵

- (a) Conduct designed to circumvent the need to be a qualified person
- (b) Attempting to re-enter the UK within 12 months of being removed, where the person is unable to show that he or she would be a qualified person or a family member of a qualified person/person with residence
- (c) Entering or attempting to enter into a marriage of convenience
- (d) Using fraud to obtain or assist another to obtain the right to reside

Regulation 21B permits the Secretary of State to exclude a person where there are *reasonable grounds to suspect* that the person has abused the rights of residence, for up to 12 months, unless that person can show that there has been a material change in his or her circumstances. Such a change in circumstances requires proof that the individual will be a qualified person on entry, or a family member thereof. The effect is to remove the initial right of residence, provided for under regulation 13 and Article 6 of the directive, from those whom the Secretary of State deems abusive.

Finally, in *Iceland*, Article 35 of the directive has been incorporated into Icelandic law in Article 40, paragraphs 1 and 2 of the Act on Foreigners, which are formulated in a general manner, and also refer to marriages of convenience as a form of abuse. This Article has been introduced into the Act on Foreigners as part of the 2014 legislative amendments. The use of a false identity to enter the country or to obtain a right of residence may be considered as a threat to public order, and lead to a refusal of entry or expulsion, depending on the specific circumstances of the case. However, there is no specific practice in this respect, and there have been no court cases on such an abuse.

4.2.3.5 Marriages of convenience

Marriages of convenience are generally considered as a serious form of abuse in all studied countries, and measures have been taken in most of them to address this issue.

In the *United Kingdom*, the Home Office recognizes the immediate threat posed by sham marriage and as a result launched Operation Mellor in January 2013 to develop a cohesive coordinated and consistent approach to tackling sham marriages involving foreign nationals.¹¹⁰⁶ Some examples of national case law are *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038(IAC), and *Miah (interviewer's comments: disclosure: fairness)* [2014] UKUT 00515 (IAC). In a recent, and strongly criticised case, *R (Bilal Ahmed) v SSHD IJR* [2015] UKUT 00436 (IAC), the Upper Tribunal concluded that where the Secretary of State claims a reasonable suspicion that the third country national spouse of an EEA national (exercising Treaty rights in the UK) has entered

¹¹⁰⁴ Introduced by the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013, SI 2013/3032

¹¹⁰⁵ Enforcement Instructions and Guidance, Ch 50

¹¹⁰⁶ For more details, see the country study on the United Kingdom, Section 3.2.4. and *The Home Office response to the Independent Chief Inspector's reports: A Short Notice Inspection of a Sham Marriage Enforcement operation 14th October – 24th October 2013*, available at <https://www.gov.uk/government/publications/response-to-sham-marriage-enforcement-operation-report>

into a sham marriage, he or she is no longer a spouse under the EEA regulations and thus gets no in country appeal right.¹¹⁰⁷

In the *Netherlands*, courts have pronounced themselves in several cases on marriages (or partner relationships) of convenience,¹¹⁰⁸ and also the Council of State has provided further guidance in this regard. The main points that emerge from this case law are:

- In the assessment of whether a marriage is genuine, or whether it should be qualified as a ‘marriage of convenience’, the decisive element is the *intention* of the spouses;
- When assessing the nature of the marriage through interviews with each of the spouses, differences in their replies must be *multiple* and concern *essential subjects*;
- The Secretary of State is not obliged to hear the applicant in an administrative appeal against a refusal to grant a derived right of residence, to take account of new facts (such as that a marriage of convenience has later evolved into a genuine relationship), that occurred *after* the decision on the initial application;
- However, when a *second application* for a residence right is introduced, new facts can be brought forward, (including a change in the relationship since a first refusal), but the Secretary of State is not obliged to take these new facts into account when the evidence provided is clearly insufficient;
- The Secretary of State is not obliged to hear the applicant in an administrative appeal against a refusal to grant a residence right on the ground of a marriage of convenience, *if there cannot reasonably be any doubt, beforehand, that the objections cannot lead to a different decision.*

In *Belgium*, *Denmark* and *Iceland* there are no reported cases on marriages of convenience.

4.2.4 Case study

In order to clarify and illustrate the practice in the different countries considered, the Norwegian Directorate of Immigration, UDI, presented a set of facts that has occurred in Norway, involving a TCN immigrant who had been expelled on grounds of public order, and who requested the lifting of his re-entry ban after he had entered into a durable relationship with a Swedish citizen, with whom he lived in another EU/EEA state before returning to Norway. In this section, the facts of the case will first be set out (a), followed by a some comparative considerations based on the replies received from government representatives on how such a situation would be handled in their country (b). Further details on how a set of facts as presented in the example from Norway would be handled in the studied countries are presented in the separate country studies.

a) Facts of the case: example from Norway

Rejected asylum seekers have the obligation to leave Norway. An asylum seeker stays illegally in Norway for 3 years, and then marries a Norwegian citizen. The rejected asylum seeker is then expelled and imposed a 5 years entry ban in conformity with Norwegian legislation (The

¹¹⁰⁷ For further details, see the country study on the United Kingdom, Section 3.2.4

¹¹⁰⁸ For example, Rechtbank Den Haag, judgment of 30 April 2015, Case No. AWB 14/24152

Immigration act, provisions relevant for third country nationals). The new formed couple travels to Sweden, lives there for 7 months, and returns to Norway shortly after. The third country national/former asylum seeker, now a family member of a EEA citizen, requires to be registered in Norway as a family member of a EEA citizen. Norwegian authorities refuse to lift the re-entry ban due to his adverse immigration history. The administrative decision of refusal to lift the entry ban merely points to the fact that person committed a grave violation of the provisions in the Immigration Act.

*b) Approach followed in the studied countries - Comparative considerations*¹¹⁰⁹

When comparing the replies received from the government representatives on how such a situation would be handled in their country, the following points emerge:

1. In all studied countries, when a TCN who has a re-entry ban applies for a right of residence under EU regulations, it must be assessed whether the reason for the ban means, that the application must be refused with regard to public order, security or health. Decisions made on grounds of public policy or public security must comply with the principle of proportionality and must be based exclusively on personal behavior. Previous criminal convictions cannot in itself be the reason for such a decision. The personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications not relating to the case or that have general prevention shall not be used.
2. Moreover, in all countries considered, the fact that the TCN national has married a citizen of the host state, and has lived together with this spouse for a period exceeding three months in another EU/EEA state, means that this person is, in principle, entitled to a derived residence right through family reunification with a returning national, if the stay was 'genuine' and 'actual', and if there is no evidence of a marriage of convenience.
3. In one country (*Belgium*), an application for residence will be considered to imply also a request for a lifting of the re-entry ban. However, in several countries a two-step approach needs to be followed. Indeed, in *Sweden*, the Migration Agency must first consider if the third country citizen has a right of residence as a family member of an EEA-citizen; if so, the Agency must assess if the re-entry ban should be lifted. A similar approach is followed in the *Netherlands*. Such a two-step procedure also applies in *Denmark*, where a re-entry ban imposed on a national of a EU member state or an alien covered by the EU regulations may be lifted "if particular reasons make it appropriate." In Danish case law it has been established that when assessing whether there are particular reasons, the focus must be on, *inter alia*, the time that has elapsed since the issuance of the re-entry ban, the duration of the re-entry ban and the existence of substantial new facts in the case.
4. In most countries, such a residence right can only be refused if the TCN national fulfills the abovementioned strict conditions to be considered a serious threat to public order or public security. For some countries it was explicitly indicated that an earlier illegal stay alone is normally not an obstacle to receive a residence card or a residence permit (*Sweden, the Netherlands*), and for some other countries, the same conclusion seems to follow from the information provided (*Belgium*). In the *United Kingdom*, an earlier illegal stay will lead to additional scrutiny, including an assessment of whether the marriage is one of convenience.

¹¹⁰⁹ Information on the UK and Iceland will be added as soon as it has been received from the government contact.

4.3 Conclusion

This comparative study has attempted to bring together the main findings from the individual Country Studies on the implementation of directive 2004/38 in five EU member states and one EFTA state, and to identify significant convergences and divergences in the practice of these countries at the legislative, administrative and judicial levels. Considering the broad range of issues covered by the directive, and the continuously evolving legal context surrounding them – due to the growing case law from the CJEU on the one hand, and to the interplay between the Executive and Judicial branches within each country on the other – this overview is far from complete, and it is probably outdated by the time it is released. Nevertheless, a picture has been drawn which at least sketches the contours of how the rights of EU/EEA citizens as protected by the directive itself, and by the Treaty provisions on free movement are given effect across the selected countries; how these countries deal with questions that arise as these rights are increasingly being invoked; and how they handle the tension between the obligation to guarantee these rights on the one hand, and the necessity to avoid and respond to abuse on the other. Another element that came out of this study is the challenge for states to find a balance between guaranteeing EU free movement rights on the one hand, and more restrictive national migration laws on the other.

When considering to what extent the studied countries have made use of their room for maneuver offered by the directive and by EU treaty provisions on free movement and citizenship, two approaches can be distinguished. On the one hand, this ‘leeway’ has been used to *go beyond* the terms of the directive; but on the other hand, some states have used -their interpretation of- this room for maneuver to adopt a *more restrictive approach* than others.

Indeed, states have *gone beyond* the terms of the directive, firstly, by adopting broader definitions of qualified persons than those of the directive itself. This is especially so with regard to the definition of family members. While all the categories of family members and extended family members mentioned in the directive are now incorporated into national law in all but one of the studied countries, most of them have adopted a broad definition of partners in a ‘durable relationship, duly attested’ as foreseen in art. 3(2) b of the directive, granting them the same rights as spouses.¹¹¹⁰

Secondly, states have also used the possibilities offered by primary EU law on the free movement of persons to situations, which do not directly fall within the scope of the directive. Even though the CJEU, through its growing jurisprudence in this field, has provided substantial guidance on how states should deal with such situations – *e.g.* situations with no cross-border element, or family reunification with EU/EEA citizens who return to their home state after a ‘genuine and effective’ stay in another EU/EEA state – the lack of codification still provides ample room for discretion on how to act at the national level.

Indeed, this comparative overview has shown that there is a substantial national case law on these points, which also highlights some differences of approach. While all the studied countries have adopted a rather cautious attitude towards granting residence rights by virtue of primary EU law and by applying an analogous application of the directive in accordance with the relevant case law of the CJEU, some countries have been even more restrictive than others. For example, with regard to family reunification with a EU/EEA citizen who returns to his home state (so-called *Surinder Singh* cases), the *United Kingdom* has recently adopted the so-called ‘centre of life’ test, with which the returning EU/EEA citizen must prove the ‘genuine’ and ‘effective’ nature of his/her stay abroad. The conditions to be fulfilled to meet this test are clearly stricter than those formulated in the

¹¹¹⁰ Only the United Kingdom has not followed this approach and has remained strictly within the terms of the directive

jurisprudence of the CJEU. In most of the other countries, national authorities do not go beyond the criteria developed by the European Court, but interpret them strictly. For example, in *the Netherlands*, the Council of State, in some recent decisions of 2015, has required returning EU/EEA citizens to provide both administrative and factual evidence of their genuine and effective stay abroad. At the same time, this highest judicial body for administrative matters has also called on the government to establish more precise criteria and types of evidence, in order to enhance transparency. Also in *Denmark* the CJEU's case law on family reunification for returning nationals is strictly applied, and a specific Briefing Note on the issue confirms – perhaps unnecessarily – that in such cases, the directive does not apply, and that the government is not bound by its provisions.

However, the analysis has also highlighted examples of an *extensive approach* towards granting rights based on primary EU law. For instance, in a 2014 legislative revision, *Belgium* has incorporated the CJEU judgment in *Zambrano* into its national law, by including the parents of a minor EU citizen child among the persons who can apply for a derived right of residence, even if they have not made use of their free movement rights. According to representatives of the Belgian Immigration Office, this provision goes beyond the Court's judgment in this case, since it does not require that the person has 'sufficient resources.' As already mentioned above, it does not seem to be immediately clear that the CJEU included, in this judgment, the condition of having sufficient resources among the requirements for the primary carer of a minor EU citizen to obtain a derived right of residence. However, it is true that this condition must generally be fulfilled to be eligible for a derived right of residence, and in that sense, the Belgian provision incorporating *Zambrano* can indeed be considered as a relatively 'lenient' basis for acquiring a right of residence.

On the other hand, the comparative examination has also shown that states sometimes *apply a restrictive interpretation of their own* to the directive and/or to the case law of the CJEU. Indeed, some states have decided to apply additional conditions for granting rights under the directive, on points where it could be argued that the directive itself did not actually leave any margin for maneuver for states. Examples are the 'right to reside' test, and the requirement for TCN family members to obtain a so-called 'EEA family permit' before they can even enter the country, both adopted by the *United Kingdom*.¹¹¹¹ The position of the Home Office with regard to using the 'room for maneuver' provided by the directive is, according to information received from a representative of the UK Home Office (Free Movement Team), in November 2015, that

The UK Government applies the Directive in a way that protects the free movement rights of EU nationals and their family members whilst ensuring the UK is able to tackle fraud and abuse of free movement. We will continue to apply all measures available to us under the terms of the Directive, and have sought the Commission's support for Member States to use the full extent of their powers to address abuse, as set out in Article 35.

It should be noted that with regard to the 'right to reside' test, Advocate General Cruz Villalón has recently concluded in Case C-308/14, that in his view, '(i)t does not constitute discrimination (...) if national legislation provides that, when examining claims for social benefits such as child benefit or child tax credit, the Member State's authorities may carry out the checks necessary to ensure that nationals of other Member States claiming those benefits are lawfully resident in its territory.'¹¹¹² He also considered that the UK had fulfilled the necessary requirements in terms of proportionality and procedural safeguards, and therefore concludes that the case against the UK should be dismissed.

¹¹¹¹ For further details, see Sections 3.1.4 and 3.2.1.1. above and the same sections in the country study on the United Kingdom

¹¹¹² Opinion of Advocate General Cruz Villalón, delivered on 6 October 2015, Case C-308/14, paragraph 99, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=169143&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=85658>

This attitude also seems to have been adopted in some countries with regard to the application of the principle of proportionality as included in Article 27 of the directive. Even though the directive itself, and the relevant case law of the CJEU explicitly lay down the criteria that must be fulfilled before a state can expel a EU/EEA citizen on the ground of public order or public security, these are not always followed at the national level. For example, in *Denmark*, there have been several cases of expulsion of EU/EEA citizens, without giving due consideration to the duration of the stay, and the degree of integration in the host state. Also the criteria of a ‘serious’ or ‘imperative threat’ have not always been duly substantiated. The same has occurred in *the Netherlands* and the *United Kingdom*, even though in these countries the national courts have annulled several of such decisions. Especially in *the Netherlands*, the courts have emphasised that the authorities need to duly motivate their decisions of expulsion, explaining, *inter alia* why a threat to the public order remains even though a sentence has been served for a minor offence (even in the case of multiple minor offences), and taking due account of the personal situation of the person concerned.

The requirement that national authorities need to duly motivate their decisions to restrict the rights awarded under the directive, also applies to situations in which a right of residence is terminated on the ground that the person no longer complies with the criteria of Article 7 of the directive, in particular the criterion of having sufficient resources. The comparative overview has highlighted that most countries considered regularly take such decisions, which do not fall within the scope of ‘expulsions’ based on the public order or public security criterion, and therefore do not entail a re-entry ban. Nevertheless, termination of a residence right leads to an administrative order to leave the country, and therefore the authorities are also under an obligation to apply specific safeguards. As demonstrated in this analysis, these safeguards are often not sufficiently taken into account. It should be noted that in *Belgium*, there has been a clear change in the approach adopted by the *Conseil des contentieux des étrangers* in this regard since 2014. Whereas in several earlier decisions, the *Conseil des contentieux* emphasised that the burden of proof that a migrant still complies with the conditions to have a continued right of residence was placed on the migrant him/herself, in the last few years more importance is being attached to the need for the migration authorities to duly motivate its decisions to terminate a temporary right of residence, and to ensure the right of the migrant to be heard before a final decision is taken. Moreover, due account must be taken of the personal situation of the person concerned, including humanitarian factors, such as the family situation, his/her health situation, and the degree of social and cultural integration in the host country.¹¹¹³

With regard to the *abuse of rights and fraud*, the analysis has shown that Article 35 of the directive has been incorporated in all studied countries, even though in the *Netherlands* this provision has only partly been transposed (regarding fraud; abuse of rights will be the subject of a forthcoming legislative amendment). The most far-reaching possibilities for the authorities to refuse entry or residence, or to expel a person on this ground can be found in the *United Kingdom*, where the Secretary of State may exclude those who are considered to have abused their EEA rights of residence, or *if there are reasonable grounds to suspect that admission would lead to the abuse of those rights*.¹¹¹⁴ In the *Netherlands*, several cases have clarified the possibilities and limits of the authorities to deny residence on the ground of existence of a marriage of convenience.

¹¹¹³ Judgments stating that the burden of proof lies with the migrant, *e.g.* *X v. Belgium*, Case no. 92 621 (30 November 2012), *X v. Belgium* (19 July 2012); judgments emphasizing the need for the authorities to duly motivate their decisions and to ensure the migrant's right to be heard: *X v Belgium*, No. 144652 (30 April 2015), *X v Belgium*, No. 146740 (21 May 2015), *X v Belgium*, No. 148537, (25 June 2015)

¹¹¹⁴ For further details, see the country study on the United Kingdom, Section 3.2.3.4

Before concluding, it should be mentioned that an interesting example of effective administrative practice has been found in *Denmark*, where the Ministry of Justice and (until 2011) the Ministry of Integration regularly issue Briefing Notes clarifying, specific points of the national legislation and how these must be implemented in the light of Judgments from the CJEU. This practice contributes to enhanced transparency and provides clarity for both administrative services and for the public at large.

On the whole, the analysis has demonstrated that the implementation of Directive 2004/38/EC in the studied countries has evolved significantly since its entry into force. While there are still many issues to be resolved, there is little doubt that the free movement of persons as it has evolved in EU law and jurisprudence, is gradually being integrated into the legal order and administrative practice of the states considered. The extent to which this integration occurs, and the way in which it becomes tangible, and legally enforceable for EU/EEA citizens themselves, varies from one country to another. It will be a major challenge for the EU member states and EFTA states in the years, and probably decades ahead, to achieve a balance between ensuring the free movement rights based on EU law on the one hand, and responding to the growing flow of migrants from Africa and the Middle-East on the other.

Part VI: Concluding chapter

1 Introduction

1.1 Purpose and content of the present chapter

The purpose of the concluding chapter is to provide a summary of observations and conclusions as well as make concrete recommendations. In the following, we will separate between recommendations regarding national law and practices and the country studies. Before making concrete recommendations, it is necessary to elaborate briefly on the rules on conflict and principles of interpretation in Norwegian law.

1.2 Rules on conflict and principles of interpretation

1.2.1 The relationship between international law and national law

As regards the relationship between international law and national law, Norway generally follows a dualistic approach and thus requires international law to be implemented by legislative acts adopted by Norwegian authorities in order to become applicable in Norwegian law. Rules of international law that have not been implemented are therefore normally superseded by conflicting national rules.¹¹¹⁵

Section 3 of the Immigration Act establishes an exception to this dualist doctrine. The provision states:

The Act shall be applied in accordance with international provisions by which Norway is bound when these are intended to strengthen the position of the individual.

IA Section 3 not only prescribes that the provisions of the act shall be interpreted in accordance with the principle of presumption but also gives rules of international law legal effect in Norwegian law when they are intended to strengthen the position of individuals.¹¹¹⁶ In case of conflict between international and Norwegian rules of law, the former shall consequently take priority over the latter when this is advantageous to the individual in question. The provision encompasses both current and future obligations so as to take possible changes and developments within international law into account.¹¹¹⁷

Once an international rule of law is properly implemented, it becomes part of the Norwegian legal system. Possible conflicts may then arise between the implemented rule and other national rules. Where the provision in question serves to fulfil Norway's obligations under the EEA Agreement, it follows explicitly from Section 2 of the Norwegian EEA Act¹¹¹⁸ that it shall be given priority:

¹¹¹⁵ See for instance Rt. 2007 page 234, para 54, and Carl August Fleischer (2005), *Folkerett* (Oslo: Universitetsforlaget) pages 359 et seqq.

¹¹¹⁶ Ot.prp. No. 75 (2006-2007) page 47

¹¹¹⁷ Ot.prp. No. 75 (2006-2007) page 401

¹¹¹⁸ Act relating to the Implementation of the Main Text of the Agreement on the European Economic Area (EEA) etc. of 27 November 1992 No. 109

Provisions in legislative acts of Parliament that serve to fulfil Norway's obligations under the agreement shall in the case of conflict take precedence over other provisions regulating the same matter. The same applies if an administrative regulation that serves to fulfil Norway's obligations under the agreement conflicts with another regulation, or gets in conflict with a later legislative act of Parliament.¹¹¹⁹

However, a legislative act that is intended to implement EEA obligations may in fact turn out to be insufficient in this regard and therefore incompatible with the underlying EEA rule. In that case, the priority provision in Section 2 of the EEA Act would not be applicable due to the lack of provisions given by Norwegian authorities that 'serve to fulfil Norway's obligations under the EEA Agreement'.¹¹²⁰ Still, where there has been a genuine will to implement the EEA rule on the part of the legislator, and an application would give a private part an advantage towards public authorities, it is likely that the EEA rule will prevail.¹¹²¹ Otherwise, the question of priority must—as a general rule—be resolved in accordance with the dualist doctrine, which means that Norwegian law prevails with the important exception for cases that are covered by Section 3 of the Immigration Act.

1.2.2 *The principle of presumption*

Genuine conflicts between international law (or national law that implements international obligations) and national rules rarely occur. In most cases, inconsistencies are resolved through the process of interpretation. Of particular importance in that regard is the principle of presumption, which entails that national law is presumed to be in accordance with international law. By applying the principle of presumption, national courts will thus try to avoid interpretations that are inconsistent with Norway's obligations under international law.¹¹²²

The EFTA Court has, as has the CJEU, held that

national courts are bound to interpret national law, and in particular legislative provisions specifically adopted to transpose EEA rules into national law, as far as possible in conformity with EEA law. Consequently, they must apply the interpretative methods recognised by national law as far as possible in order to achieve the result sought by the relevant EEA rule.¹¹²³

The *travaux préparatoires* to the Norwegian accession to, and implementation of, the EEA Agreement state that Norwegian courts are expected to use all the means available to them, among these the principle of presumption, to achieve the results required by the EEA Agreement. The Norwegian Supreme Court has followed suit and confirmed that the principle of presumption also applies to the EEA Agreement.¹¹²⁴

The precise content of the EEA rule in question needs to be determined by applying the method and reasoning of the CJEU. This follows from the fundamental aims to harmonise the state of law throughout the EEA and to secure homogeneity between EU law and EEA law.¹¹²⁵ Relevant

¹¹¹⁹ Our translation

¹¹²⁰ Rt. 2000 page 1811 and Erik Magnus Boe (2010), *Innføring i juss. Juridisk tenkning og rettskildelære* (Oslo: Universitetsforlaget), page 416 et seqq.

¹¹²¹ See Finn Arnesen and Are Stenvik (2015), *Internasjonalisering og juridisk metode. Særlig om EØS-rettenns betydning i norsk rett* (Oslo: Universitetsforlaget) page 144-147

¹¹²² Ot.prp. No. 79 (1991-92) page 4 and Rt. 2000 page 1811

¹¹²³ Case E-1/07 *Criminal proceedings against A* [2007] EFTA Ct. Rep. 246, para 39

¹¹²⁴ Rt. 2000 page 1811

¹¹²⁵ Cf. inter alia Arnesen and Stenvik (2015) page 25 et seqq.

statements of the CJEU and the EFTA Court must be taken into account. Where the CJEU and the EFTA Court have interpreted a provision differently, the case law of the CJEU should, as a general rule, be followed.¹¹²⁶ Exceptions to this rule are, as indicated by the EFTA Court, probably only possible where ‘differences in scope and purpose (...) under specific circumstances lead to a difference in interpretation between EEA law and EC law’.¹¹²⁷

After the content of the relevant EEA rule has been determined, this will—through the principle of presumption—influence the conclusions that are to be drawn from other sources of law and the weight attributed to them. The extent of this influence generally depends on the character of the obligation under the EEA Agreement and the particular area of law. Where the EEA rule in question protects citizens from interventions from public authorities, however, its impact will generally be significant.¹¹²⁸ Applying a national rule of law contrary to EEA obligations would probably only be possible in exceptional cases, where the legislator has expressed a clear intention to this effect or where the national provision otherwise would be utterly vacuous.¹¹²⁹ Thus, national sources of law that in principle—i.e. when considered in isolation—indicate a different result than the one anticipated by the EEA rule must normally either be interpreted in accordance with EEA law or, if that is not possible, be given limited weight.

The combined effect of the principle of presumption and Section 3 of the Immigration Act is that Directive 38/2004/EC has an effect in Norwegian domestic law that equals the effect the EU law doctrines of direct effect and supremacy gives the directive in the domestic law of the EU member states.

1.3 Concluding remarks EEA analysis

Part III of the study has discussed the case law from the EEA Courts with a view to explore the possibility of ‘more room for manoeuvre’ for Norway as an EFTA state in the context of the Citizens Directive. The question initially asked by the UDI concerned possible consequences of the EEA Agreement lacking the Union citizenship provisions as enshrined in Articles 20–25 TFEU. The starting point for the analysis was decision No 158/2007 by the EEA Committee regarding the incorporation of the Citizens Directive in the EEA Agreement and in particular the Joint Declaration stating essentially that Union citizenship and immigration law are not part of the EEA Agreement.

The study is commissioned by the UDI with the objective of assisting the administrative authority in its daily application of immigration law. The starting point for the analysis of the position under EEA law therefore relates to the UDI’s position of being an administrative subordinate organ obliged to apply national immigration law in Norway in full compliance with Norway’s obligations under the EEA Agreement. The EFTA Court is the authoritative institution on the interpretation of EFTA states’ obligations under EEA law.¹¹³⁰ Absent a contrary opinion from the CJEU on the state of EEA law, the administrative bodies must comply with the current state of the law as interpreted by the EFTA Court. Given the pending or soon-to-be-pending cases as well as the possibility of the CJEU being confronted with a case similar to Case E-26/13 *Gunnarsson*, the state of the law as interpreted by the EFTA Court may change in the near future. The conclusion in this report is nevertheless based

¹¹²⁶ Joined cases E-9/07 and E-10/07 *L’Oréal* [2008] EFTA Ct. Rep. 259, para 27, Arnesen and Stenvik (2015) page 96 et seqq.

¹¹²⁷ Joined cases E-9/07 and E-10/07 *L’Oréal*, para 29

¹¹²⁸ Rt. 2000 page 1811 and Arnesen and Stenvik (2015), page 81 et seqq.

¹¹²⁹ Arnesen and Stenvik (2015) page 107

¹¹³⁰ Only exceptionally will national courts refrain from accepting this authority of the EFTA Court, see the discussion centered around the Supreme Court of Norway’s decision in the *STX* case, HR-2013-00496-A

on an interpretation of the law as it stands at the cut-off date. Based on the law as it stands, our analysis is the following.

The material is limited but based on the existing decisions from the EEA Courts the right to move and reside freely for Union citizens as provided in EU law is paralleled in the EEA Agreement for EEA nationals. This includes rights to free movement, residence and equal treatment. This right to freedom of movement includes not only the explicit rights laid down by the directive regarding rights against the home state (such as avoiding exit barriers and the obligation to issue the necessary identity cards in Chapter II) but also the right for the moving individual not to meet certain obstacles to movement from the home state in parallel with the rights for Union citizens in the EU legal order. In essence, it has not been possible to identify in existing case law grounds for more ‘room for manoeuvre’ regarding the interpretation and application of the Citizens Directive as incorporated in the EEA Agreement. On the contrary, there is support for an interpretation of the directive that ensures the same right of freedom of movement for EU member state and EFTA state nationals under the EEA Agreement as for Union citizens in the territory of the EU. Rights for Union citizens going beyond free movement rights are not part of the EEA Agreement.¹¹³¹ To this end, there is no support in the case law from the Courts to interpret the Joint Declaration to mean that there is ‘more room for manoeuvre’ for EFTA states under the Citizens Directive as part of EEA law even if EEA law does not include the treaty provisions on Union citizenship or on immigration policy.

2 Assessment of specific issues

2.1 Family members’ derived right of residence

2.1.1 ‘Accompany or join’ – Article 3(1)

The directive applies to family members who ‘accompany or join’ a Union citizen in the host member state, cf. Article 3(1). Application of the directive thus requires that the family member actually reside in the host member state in which the Union citizen exercises his or her right to free movement.

Apart from the requirement of living in the same host member state, the provision is to be interpreted broadly in order to ensure that the purpose of the directive—which essentially is to facilitate Union citizens’ exercise of free movement and residence in other member states—is realised effectively throughout the EU. The case law of the CJEU therefore indicates that the term ‘accompany or join’ should be understood in accordance with the following principles:

- The family relationship can be established after the Union citizen entered the host member state.
- The family member can have resided in the host member state before the Union citizen arrived there.
- The family member may not be refused a right of residence based solely on the fact that he or she has not been legally resident in a member state before entering into the territory of the host member state. This implies that a family member may arrive in the host member state directly from a third country, and may also have been residing illegally in the host member state before the family relationship with the Union citizen was established.¹¹³²

¹¹³¹ Confer Part III of the Report for the discussion and delimitation of Union citizenship rights in an EEA context

¹¹³² Part II of the report Section 2.3.2

The wording of the implementing provision in the Immigration Act—Section 110 second paragraph, first sentence—does not correspond fully with the wording of Article 3(1) of the directive. Accordingly, family members are subject to the EEA-specific rules of the act as long as they ‘accompany or are reunited’ with an EEA national. Read in isolation, the term as such indicates that the family relationship must already be established at the time the EEA national enters the host state. UDI Circular No. 2010-181 seems to be based on such an interpretation, as it stipulates that it is a ‘condition that the family was established before entry to Norway, cf. the Immigration Act Section 110 second paragraph’. This would however imply that situations in which the family relationship is established in Norway are not covered by the implementing rules in light of the obligations under the directive—as specified by the CJEU—Section 3 of the Immigration Act and the principle of presumption. Thus, the statement in UDI Circular No. 2010-181 is not correct as to the state of Norwegian law.

Although primarily concerned with the prevention of abuse pursuant to Article 35 of the directive, Ministry Circular No. AI-1/2014 also addresses some issues that are relevant in the present context. On the one hand, it is stated that ‘it is irrelevant how the TCN entered the host country and whether the prior residence within the EEA was lawful’. However, the circular nevertheless seems to differentiate between situations where the family enters Norway simultaneously and situations where the EEA national already resides in Norway for some time before the TCN family member applies for a residence card. Simultaneous entry may thus, according to the circular, indicate that the EEA national has not had the required ‘actual and genuine stay’ in Norway. The same seems to apply to situations where a TCN family member arrives directly from a third country.¹¹³³

Ministry Circular No. AI-1/2014 is currently under revision. In our view, Section 110 second paragraph, first sentence of the Immigration Act—as interpreted above—does not provide a basis to treat EEA nationals and their family members less favourably with regard to residence solely on the grounds that the family member arrives at the same time as the EEA national or directly from a third country.

2.1.2 ‘Core’ family members – Article 2(2)

As the analysis in Part II of this report shows, the directive draws a basic distinction between ‘core’ family members and members of the ‘extended’ family of the Union citizen. While core family members shall be given an automatic, derived right of residence based on their status, member states are given a certain degree of discretion over whether to admit members of the extended family.

Core family members are defined in Article 2(2) of the directive, which is implemented in Section 110 third paragraph of the Immigration Act. Below, certain issues relating to spouses and dependent relatives are considered more closely. The implementing legislation relating to extended family members is assessed under 2.1.3.

Spouses – Article 2(2)a

Spouses are included into the group of core family members pursuant to Article 2(2) a of the directive. As the analysis of the directive shows, the CJEU has stated that the status as ‘spouse’ is not dependent on the couple living together and that the directive does not require ‘any conditions other than that of being a spouse’. A marriage is, according to the CJEU, in force until it is fully dissolved by the competent authority by a so-called decree absolute, as opposed to a conditional decree. Hence,

¹¹³³ Part IV of the report Section 3.1.2.2

couples are regarded as spouses even if they do not live together and even if they live with new partners and intend to get divorced.¹¹³⁴

In the Immigration Act, spouses are included in the definition of core family members through Section 110 third paragraph, letter a. ‘Spouse’ within the meaning of this provision is in principle any person who has contracted a valid marriage with an EEA national in Norway or abroad and, in the latter case, whose marriage is recognised in Norway. The requirements for contracting a marriage in Norway are laid down in the Norwegian Marriage Act Chapters 1–3, while dissolution is regulated in Chapter 4. Marriages contracted outside Norway are—with some exceptions—recognised pursuant to Section 18a of the act.¹¹³⁵

As has been noted in the report on national migration law, Ministry Circular No. AI-1/2014 indicates that the duration of the marriage is considered relevant for the application of Chapter 13 of the Immigration Act to spouses. Accordingly, if the couple in question has only been married or in a registered partnership for a short time, this may be taken as an indication that the condition of an ‘actual and genuine stay’ is not met.

As regards the dissolution of marriages, the interpretation applied by the UDI indicates that the right of residence of spouses is dependent on whether there is ‘some kind of family life between the married couple’. If, on the other hand, the couple has ‘initiated a process to terminate the marriage, this could entail the loss of the right of residence’. In that regard, the UDI ‘considers that the date of the actual termination of family life is relevant’.¹¹³⁶ The fact that the spouses have not been living together for several years has, it appears, also been taken as a confirmation that the actual family life has ceased.¹¹³⁷

Based on the CJEU’s understanding of the directive, Section 3 of the Immigration Act and the principle of presumption, it is our view that being a ‘spouse’ within Chapter 13 of the Immigration Act cannot be dependent on the duration of the marriage and/or whether the couple lives together. Furthermore, a marriage is to be regarded valid until it is fully dissolved through a divorce. Where the Norwegian Marriage Act applies, formal separation or termination of cohabitation in accordance with Sections 21 and 22 of the act would most likely not as such deprive a person of the status of a ‘spouse’.¹¹³⁸

The analysis of the practice in other EU member states and Iceland regarding the rights of a spouse or registered partner has shown that the spouse or registered partner enjoys the same rights as the EU/EEA citizen (reference person). The length of the marriage is not a relevant factor in this respect.

Dependency – Article 2(2) c and d

Family members within the meaning of Article 2(2) are also the so-called dependent relatives in the descending and ascending line, cf. letters c and d of the provision. The concept of dependency has been specified by the CJEU and may be summarised as follows:

¹¹³⁴ Part II of the report Section 2.3.3.1

¹¹³⁵ Part IV of the report Section 3.1.2.3

¹¹³⁶ Letter from ASD to the Authority in case nr. 74864 of 3 March 2014, item 1. The letter is available at <http://www.eftasurv.int/media/public-documents/701210.pdf>

¹¹³⁷ Letter from ASD to the Authority in case no. 74864 of 3 March 2014, item 1 and 2

¹¹³⁸ Part IV of the report Section 3.1.2.3

- The need of support must be assessed at the time of applying to join the Union citizen.
- The family member's capability of, and intention of, obtaining employment in the host member state is irrelevant.
- There is no requirement that the family member must establish that he or she has tried to be supported by other means.
- The support may be provided for by both the Union citizen and his or her spouse.¹¹³⁹

The rights of dependent family members are implemented in Section 110 third paragraph letters c and d of the Immigration Act. Accordingly, direct descendants above the age of 21 and direct relatives in the ascending line are considered family members within the meaning of IA Chapter 13 if the person in question is 'dependent upon the EEA national'.

The wording of the Immigration Act Section 110 third paragraph letters c and d mirrors the Danish version of the directive. However, case law from the CJEU suggests that the support may be provided by either the Union citizen or his or her spouse. Moreover, the relevant legislative and administrative provisions in the other studied countries do not explicitly require that dependent family members be supported by the EEA national personally. In two countries, the *United Kingdom* and *Denmark*, it is even explicitly foreseen that such support may also be provided by the spouse/partner of the EEA national.¹¹⁴⁰ Thus, pursuant to Section 3 of the act and the principle of presumption, Immigration Section 110 has to yield to the directive as understood by the CJEU.

The dependency criterion is described more precisely in UDI Circular No. 2010-025. According to the circular, it must inter alia be documented 'that the family member (...) will have a genuine need for such provision in future'. The statement may be interpreted in two different ways: Either the person in question must have a continuing need for support in the country in which he or she resides at the time the application is made or the need for support shall persist after he or she has entered Norway.¹¹⁴¹ In view of the case law of the CJEU summarised above, Section 3 of the Immigration Act and the principle of presumption, the second interpretation is ruled out.

The legislation and practice in the other EEA states examined in the context of this study show a high degree of uniformity on this point. As demonstrated in the comparative analysis (Section 3.1.5., Table 1),¹¹⁴² in all countries, in order to establish dependency of a family member on the EEA national, the following is required:

- (i) The family member is not in a position to support him/herself and cover his/her basic (or 'essential') needs, taking into consideration his or her financial and social conditions;
- (ii) The material needs of the family member were already covered by the EU/EEA citizen in the home country or in the country where he/she came from; and
- (iii) The need for material support also existed in the home country or the country where he/she came from when he/she applied to join the EU/EEA citizen.

Therefore, the deciding moment for the dependency is when the family member in question applied to join the EEA national, and the dependency must exist in the country in which he/she resides at the time the application is made.

¹¹³⁹ Part II of the report Section 2.3.3.4

¹¹⁴⁰ See the Part VII of the report, Annexes with country studies on the United Kingdom and Denmark Section 3.1.5

¹¹⁴¹ See also Marie Grønvik (2015) Fri bevegelse for hele familien? Master thesis, available at <https://www.duo.uio.no/bitstream/handle/10852/45475/212.pdf?sequence=7&isAllowed=y>

¹¹⁴² This table provides a detailed comparison of all the elements considered to establish dependency in the various countries

In view of the case law of the CJEU summarised above, and considering the uniform practice of the other studied countries, the first abovementioned interpretation should be applied.

2.1.3 *Members of the extended family – Article 3(2)*

As mentioned above, member states are given a certain degree of discretion over whether to admit the family members defined in Article 3(2) and may lay down further criteria to be taken into account in the assessment. The obligation of the member states consists in the ‘facilitation’ of entry and residence. According to the CJEU, this means that extended family members shall be given ‘a certain advantage, compared with applications for entry and residence of other nationals of third states’. It does not however ‘oblige the Member States to grant every application for entry and residence submitted by persons who show’ that they are covered by the scope of Article 3(2).¹¹⁴³

The family members for whom entry and residence shall be facilitated include two groups: ‘other family members’ and partners with whom the Union citizen has a ‘durable relationship, duly attested’.

Other family members – Article 3(2) a

Other family members pursuant to Article 3(2) a include dependants who are not covered by Article 2(2) c or d as well as ‘members of the household’ and family members with ‘serious health’ problems that ‘strictly require’ personal care by the Union citizen. These concepts have been presented in Part II of the report on the directive.

Article 3(2)a is implemented in the Immigration Act through Section 110 fifth paragraph in conjunction with Immigration Regulation Section 19-7. The provision of the IR inter alia includes foster children, full brothers and sisters and persons in need of care into the definition of family members provided that certain conditions are met.

As a consequence of objections raised by the EFTA Surveillance Authority, IR Section 19-7 is currently under consideration, including a proposal for a new letter e, which includes dependent relatives and members of the household into the circle of persons who may derive rights from IA Chapter 13 as family members of EEA nationals. The government expects to be able to implement these changes by early 2016.¹¹⁴⁴ In view of the current revisions, reference is made to the analysis in the report on the directive Section 2.3.4 for further guidance on the obligations under EU and EEA law with regard to members of the extended family in general and ‘other family members’ in particular.

In all the other EEA states studied in the context of this study, all persons included in the directive as ‘other family members’ (Article 3(2) a) have been incorporated into national law. In two of these countries, the categories of ‘other family members’ were incorporated into national law only recently. In *Belgium*, they were included in 2014, after a notification from the Commission of February 2013, and in *Iceland*, ‘other family members’ were included in the Regulation on Foreigners in December 2014, after criticism from the EFTA Surveillance Authority on this point, formulated in a Reasoned Opinion of 2012.¹¹⁴⁵

¹¹⁴³ Part II of the report Section 2.3.4

¹¹⁴⁴ Reply to reasoned opinion of 8 October 2015, item 2 (not yet published)

¹¹⁴⁵ EFTA Surveillance Authority, Reasoned Opinion, see above, note 1002 delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice concerning Iceland’s failure to correctly transpose the Residence Directive, Case No. 67839, 19 December 2012.

Partners in a durable relationship – Article 3(2) b

Article 3(2) b applies to the ‘partner with whom the Union citizen has a durable relationship, duly attested’. The provision refers to de facto partnerships (as opposed to registered partnerships) and may consequently also apply to cohabitation. As the analysis of the directive shows, member states may in principle refer to a minimum amount of time as a criterion in the assessment of whether the relationship is durable. However, other aspects may also be relevant and should be taken into consideration where appropriate. This follows inter alia from the obligation to undertake an ‘extensive examination of the personal circumstances’ with a view to maintain the unity of the family in a broader sense.¹¹⁴⁶

In the Immigration Act, cohabitants are included in the definition of core family members through Section 110 third paragraph, letter b, and are thus given the same right of residence as spouses, direct descendants under the age of 21 and dependent relatives in the descending and ascending line. This means that cohabitants are not only given an advantage but an automatic derived right of entry and residence. With regard to the legal effects of being in a relationship of cohabitation, Norwegian law consequently seems to go beyond what is required under Article 3(2) b. The legislative background of the provision shows that this to a large extent is due to the enhanced protection that cohabitants gradually have obtained in various areas of Norwegian law, including the general immigration legislation. Pursuant to Article 37 of the directive, member states are not precluded from granting more favourable rights than those laid down in the directive.

The question has however been raised whether the threshold for being regarded a ‘cohabitant’ pursuant to Chapter 13 of the IA is too high, with the result that some partners, whose entry and residence should be facilitated pursuant to Article 3(2), are excluded entirely from its application.

Section 110 third paragraph, letter b of the act requires that there is a ‘permanent connection’ between the cohabitants and that this connection can be documented. It follows from IR Section 19-6 that the requirement is ‘deemed to be met where the cohabitants meet the conditions mentioned in Section 41 of the Act and Section 9-2 of the regulations’. Pursuant to Section 41, which is part of the general provisions of the Immigration Act, a residence right is granted where the cohabitants have lived in a relationship for at least two years and intend to continue their cohabitation.¹¹⁴⁷ Exceptions apply if the couple have or expect joint children.¹¹⁴⁸

The fact that the requirement of a permanent connection is ‘deemed to be met’ where the two-year condition in IA Section 41 is fulfilled does not as such exclude the granting of residence rights also under other circumstances. Moreover, although the preparatory works relating to the general provisions of the Immigration Act indicate that the application of a minimum duration requirement is regarded as both a suitable and necessary measure to ensure proper control and overcome challenges relating to evidence, considerations like these are not necessarily applicable without further ado in relation to the EEA-specific rules of the act. If personal circumstances call for the protection of family life even though the two-year requirement is not met, the relevant provisions of the Immigration Act Chapter 13 and the Immigration Regulation Chapter 19 must be interpreted accordingly.

¹¹⁴⁶ Article 3(2) and Part II of the report Section 2.3.4.3

¹¹⁴⁷ Part IV of the report Section 3.1.2.4

¹¹⁴⁸ Part IV of the report Section 3.1.2.4

Due to objections raised by the EFTA Surveillance Authority, the government nevertheless plans to amend IR Section 19-6 by early 2016 so that an exception may be made ‘if other special reasons indicate a permanent connection between the cohabitants’.¹¹⁴⁹

In the states other than Norway examined as part of this study, there are some slight differences with regard to ‘partnerships, duly attested’, as mentioned in Article 3(2) b of the directive, as follows:

In *Denmark*, the rights of spouses are also granted to cohabitants, who are defined as persons of at least 18 years of age, who live together at a shared residence in regular cohabitation of prolonged duration with a principal person who is also at least 18 years old. It is a pre-condition for the right of residence of a cohabitant that the principal person undertakes to support the applicant.

The Netherlands goes even further than Denmark, since the same rights as spouses are granted to *de facto* partners as well. Also going beyond the directive, direct descendants of a *de facto* partner who are younger than 18 years are recognised as ‘other family members’.

In *Sweden*, cohabiting partners are considered as family members with equal rights as spouses. They are defined as ‘two people who live together on a permanent basis as a couple and who have a joint household’.

In *Belgium*, three different forms of ‘partners’ are recognised, the first two of which fall within the scope of ‘family members’ based on Article 2(2), whereas the third incorporates the ‘durable partnership, duly attested’ of Article 3(2) b, directive:

- Registered partnerships that are recognised as equal to marriage under Belgian law;
- Registered partners in accordance with the law (which may be the law of another state), when certain conditions are met;¹¹⁵⁰
- Partners having a ‘durable relationship, duly attested’ (as meant in Article 3(2) b, directive). They must prove the existence and the durable nature of their relationship, with any suitable means. Regarding the durable nature, factors that will be taken into account are especially the duration, the intensity and the stability of the relationship.

The *United Kingdom* has adopted a more restrictive approach, whereby partners in a ‘durable relationship, duly attested’ are considered as ‘extended family members’, as opposed to ‘family members’, and the two categories have a different legal status, similarly as mentioned above for Norway.

Finally, in *Iceland*, the categories of partners mentioned in Article 3(2) b are considered to fall within the scope of cohabitants who are included under ‘direct family members’ pursuant to Article

¹¹⁴⁹ See Part IV of the report Section 3.1.2.4

¹¹⁵⁰ These conditions are:

a. The partners must prove that they have a duly attested, durable and stable relationship. The durable and stable nature of the relationship is demonstrated when:

- The partners prove to have lived together, either in Belgium or in another country, for at least one year before the application; or
- They prove that they have known each other for at least two years before the application, and that they had regular contacts, either by telephone, through exchanges of letters or electronic messages, and that during those two years they have met three times for at least 45 days in total; or
- They have a child together;

b. The partners will come to live together in Belgium;

c. They are both older than 21 years old;

d. They are not married and they do not have a durable and stable partnership with another person; (...).

2(2) of the directive. Cohabitation can either be registered or established by other means. For registration of cohabitation, the same conditions apply as for a new marriage. That is, the persons must both be at least 18 years old, they cannot be related (siblings, cousins, etc.) and if one of the partners was married before, the financial agreements related to the divorce must be finalised before entering into a new marriage/registered cohabitation.

2.2 TCN family members' independent right of residence in case of divorce – Article 13(2)

Article 13(2) of the directive regulates TCN family members' right to retain their residency rights in case of divorce, annulment of marriage or termination of registered partnership. The provision does not apply to other family members, such as partners in a durable relationship. The right is conditional on the family member being either a worker, self-employed or a person with sufficient resources within the meaning of Article 7(1) or a family member of another family member who fulfils these criteria. The directive also lays down some additional conditions, of which at least one must be fulfilled. These may be summarised as follows:

- **Duration of the marriage:** If the marriage or registered partnership lasted at least three years, including one year in the host member state, prior to initiation of the divorce or annulment proceedings, the TCN family member may retain his or her right of residence. In case the Union citizen national leaves the host member state 'for the purpose of settling in another member state or third country' before the divorce proceedings are initiated, this right can only be claimed if the TCN spouse has resided in the host member state in accordance with Article 7(1) 'up to the date of commencement of the divorce proceedings'.
- **Custody of the Union citizen's children:** A TCN family member may retain his or her right of residence if he or she has custody of the Union citizen's children, either by agreement or by court order. If the Union citizen is or was a worker and the child attends school/education, the more favourable rules of Article 10 of Regulation 49/2011 will apply.
- **Particularly difficult circumstances:** A TCN family member may retain his or her right of residence in particularly difficult circumstances, such as having been victim of domestic violence while the marriage or registered partnership was subsisting. The list is not exhaustive, and circumstances other than violence may in principle also be covered.
- **Access to minor children in the host member state:** A TCN family member may retain his or her right of residence if he or she has the right of access to a minor child provided that the court has ruled that such access must be in the host member state and for as long as is required.

Article 13(2) is implemented in the Immigration Act through Section 114 fourth paragraph. Although the provision only refers to 'marriage', IR Section 19-15 clarifies that it applies correspondingly to cessation of cohabitation. Norwegian law thus goes beyond what is required under the directive in this respect.

Regulation 49/2011 is implemented in Norwegian law by the Act of 14 December 2012 No. 81 and is consequently applicable to children of workers.

The wording of the national provision relating to 'particularly difficult circumstances' does not correspond fully with the wording of the corresponding provision of the directive. The directive indicates that having been victim of domestic violence during the marriage or registered partnership

only constitutes an example of circumstances that may be regarded as ‘particularly difficult’ (cf. ‘such as’). In comparison, Section 114 fourth paragraph letter c states that the right of residence may be retained if the spouse or any children ‘have been exposed to violence or other serious abuse in the marriage’. The preparatory works relating to Section 114 fourth paragraph also indicate that the spouse must have been exposed to violence during the marriage or partnership.¹¹⁵¹ Since the provision of the directive may, in principle, also apply to situations other than those that involve violence and abuse, the Norwegian rule—read in isolation—therefore seems to be narrower than required. In light of the obligations under the directive, Section 114 fourth paragraph letter c should be interpreted liberally, and its application should thus not be restricted solely to situations that involve violence and abuse. In order to meet requirements of legal certainty, the provision should be given a wording that closer reflects the wording of the directive and thus explicitly refers to the ‘particularly difficult’ assessment.

As mentioned in the report on national migration law, there seems to be some uncertainty regarding the applicability of Section 114 fourth paragraph in situations where the TCN family member and the reference person are separated from each other without being formally divorced. In essence, the question is whether the provision could apply to cases where the spouses are formally separated or have terminated their cohabitation pursuant to the Marriage Act. In our view, this question should be assessed based on the definition of ‘spouse’ in Section 110 third paragraph, letter a in order to ensure consistency. In that connection, reference is made to the analysis above, where it is concluded that a marriage should be regarded valid until it is fully dissolved through a divorce pursuant to the Norwegian Marriage Act and that formal separation or termination of cohabitation in accordance with Sections 21 and 22 of the Marriage Act should not deprive a person of the status of a ‘spouse’. Conversely, formal separation or termination of cohabitation should in principle not constitute ‘divorce’ within the meaning of Section 114 fourth paragraph.

This conclusion is also supported by the practice applied in all the other studied countries, with one exception (the Netherlands). Indeed, in most countries, a de facto separation will not have any effect on the residence right of the spouse/registered partner as long as the marriage or the registered partnership is still legally valid and no formal divorce proceedings have been initiated or formal steps have been taken to terminate the registered partnership. However, in the Netherlands, a de facto separation may lead to a termination of the residence right of a TCN spouse or registered partner. The factual situation will be decisive in this regard. However, in practice, the authorities are generally not aware of a de facto separation, only when the spouse or partner applies for some form of social assistance.¹¹⁵²

2.3 TCN family members’ right of permanent residence – Article 16(2)

The directive confers TCN family members of Union citizens a right of permanent residence if they ‘have legally resided with the Union citizen in the host Member State for a continuous period of five years’; cf. Article 16(2).

In view of the relevant case law of the CJEU, ‘legal residence’ in the context of Article 16 should be understood pursuant to the following principles:

- ‘Legal residence’ refers to residence in compliancy with the conditions laid down in the directive. Hence, residence pursuant to national law or other EU law that does not comply

¹¹⁵¹ Part IV of the report Section 3.2.1.3

¹¹⁵² See Part VII of the report, Annex with country study on the Netherlands, Section 3.2.1.2, and the Part V of the report, comparative analysis, also Section 3.2.1.2.

with the conditions of Article 7 of the directive cannot be considered ‘legal’ for the purpose of permanent residence under Article 16.

- A person who has resided for five years in the host member state pursuant to EU legislation in force prior to the directive may acquire a right of permanent residence pursuant to Article 16.
- Periods of residence spent during imprisonment cannot be taken into consideration in the context of the acquisition of permanent residence.¹¹⁵³

Regarding the condition of having ‘resided with’ the Union citizen, case law from the CJEU in relation both to permanent residence pursuant to Article 16 and to the definition of spouse in Article 2(2) (cf. above) implies that member states may not require that family members of EEA nationals must have lived under the same roof as the reference person in order to obtain a right of permanent residence as long as they live in the same member state.¹¹⁵⁴

Article 16(2) of the directive is implemented in Section 116 first paragraph of the Immigration Act, which provides that a family member who is not an EEA national ‘and who under Section 114, first paragraph, has lived with an EEA national and has had a continuous lawful stay in the realm of five years’ is granted a right of permanent residence.

As noted in the report on national migration law, the wording may—read in isolation—indicate that the TCN family member and the EEA national actually must have cohabited during the five-year period. The requirement is further specified in Section 19-20 first paragraph of the Immigration Regulation, according to which ‘the cohabitation must have been of a certain extent, as a general rule that the parties live together in a shared dwelling and return to the dwelling every day or at least one day a week’.¹¹⁵⁵

In the preparatory works, it is emphasised that a wide interpretation must be applied in this regard. Accordingly, the requirement will generally be met if a spouse or partner is commuting on a weekly basis, because the couple has their respective places of work in different parts of the host state. Furthermore, children who move out from their parents’ home, for example in connection with their studies, will still be regarded as ‘having lived with an EEA national’ during this period of time.¹¹⁵⁶

The wording of the Immigration Act does not necessarily exclude the applicability of Section 116 first paragraph in situations where the family member does not actually share a dwelling with the EEA national. The term used in the Norwegian rule (‘has lived together with’) is not fundamentally different from the term used in the directive (‘resided with’) and may also be interpreted to mean that the family member must have lived in the same member state as the EEA national. In addition, although the preparatory works in principle indicate a narrower interpretation than the one applied by the CJEU, the relevant statements do express an intention to implement the directive correctly.

With respect to the question of whether time spent in prison is considered as lawful residence, the practice in the other studied countries is almost uniform: With the exception of *Belgium* (where this

¹¹⁵³ Part II of the report Section 3.3.4

¹¹⁵⁴ Part IV of the report Section 3.2.1.4

¹¹⁵⁵ UDI Circular No. 2011-016 Section 5.1

¹¹⁵⁶ Ot.prp. No. 72 (2007-2008) page 39

question is answered in the affirmative), in all other countries, time spent in prison is *not* considered as lawful residence. The same approach is taken with regard to time spent in a psychiatric hospital, as an alternative for a prison sentence (although in *Sweden*, there is no guidance or practice with respect to this latter situation).¹¹⁵⁷

2.4 Restrictions on rights of entry and residence

2.4.1 Restrictions on grounds of public policy or public security – Article 27

2.4.1.1 The application of Article 27

The EEA states have a margin of discretion when defining which interests they want to protect under the headings of public policy and public order. Still, the scope of this is limited by EU/EEA-law, and derogations from the right to freedom of movement for persons are to be interpreted strictly.

Public policy refers to the prevention of disturbances to social order and includes, but is not limited to, criminal offences. Where behaviour other than criminal offences is considered a threat to public policy, EU/EEA law requires that the national authorities have ‘clearly defined their standpoint’ regarding the activities in question.¹¹⁵⁸ Thus, a prerequisite to claim that certain behaviour, although not considered a criminal offence, constitutes a threat to public policy is that this is clearly pronounced by national authorities.

Public security revolves around the security of the state, both internal and external. Article 83(1) TFEU lends considerable guidance as to the contents of this concept, guidance that is also relevant in an EEA context.

Measures taken to restrict the freedom of movement for one specific person on the grounds of public policy or public security have to be based on the personal conduct of the person in question. Thus, a case-by-case assessment has to be carried out, where the issue is whether (unrestricted) residence for the person in question constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.

Where personal conduct is considered to be a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, the measures taken must meet the requirements of the proportionality test. Thus, the measures taken must be necessary in order to protect the relevant interest of society, i.e. the measures have to be appropriate and not impose stricter restrictions on free movement than necessary in order to protect said interest.

Finally, the interest of the individual concerned and those of the state have to be balanced.

For a more detailed discussion of the proportionality assessment, reference is made to Part II of this report, Section 4.7.

In all the studied countries, restrictions on the rights of entry and residence can be applied on the grounds of public order, public security or public health, in accordance with the conditions laid down in Article 27 of the directive. All countries considered in this study have included these grounds into their national legislation as well as the principle of proportionality of Article 27(2). However, there

¹¹⁵⁷ See Part V of the report, comparative analysis, Section 3.2.1.3., Table 3.

¹¹⁵⁸ Case E-15/12 *Wahl* para 101.

are some differences among the different countries regarding the exact interpretation of these grounds and the application of the proportionality principle. The proportionality principle, included in Article 27(2) of the directive, is incorporated in national law in all the studied countries, but in practice, it is not always strictly applied in all its elements. In particular, the differentiated levels of protection foreseen in Article 28 of the directive, whereby the level of protection against expulsion is higher when a person has resided longer in the host state, are not always guaranteed. This can especially be seen in the case law in *Denmark, the United Kingdom*, and in a few cases in *Sweden*.

Even though the directive itself and the relevant case law of the CJEU explicitly lay down the criteria that must be fulfilled before a state can expel an EU/EEA citizen on the grounds of public order or public security, these are not always followed at the national level. For example, in *Denmark*, there have been several cases of expulsion of EU/EEA citizens without giving due consideration to the duration of the stay or the degree of integration in the host state. In addition, the criteria of a ‘serious’ or ‘imperative threat’ have not always been duly substantiated. The same has occurred in *the Netherlands* and *the United Kingdom*, even though in these countries the national courts have annulled several of such decisions. Especially in *the Netherlands*, the courts have emphasised that the authorities need to duly motivate their decisions of expulsion, explaining *inter alia* why a threat to the public order remains even though a sentence has been served for a minor offence (even in the case of multiple minor offences) and taking due account of the personal situation of the person concerned.¹¹⁵⁹

2.4.1.2 ‘Adverse immigration history’ as grounds for expulsion?

In relation to the provisions of the directive on possible restrictions on the grounds of public policy or public security, the UDI has raised the question of whether, and to what extent, a person may be expelled because he or she has an ‘adverse immigration history’, e.g. has previously attempted to obtain residence by deliberate deception, false representation (including the use of a false ID), illegal entrance, ‘overstaying’ and so on.

In this regard, the analysis of practice in the other studied countries has demonstrated that in accordance with their national legislation—which incorporates Article 27 of the directive—decisions made on the grounds of public policy or public security must be based exclusively on personal behaviour; previous criminal convictions cannot in themselves be the reason for such a decision; and the personal conduct must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. Justifications not relating to the case or based on general prevention shall not be used. In most countries, an adverse immigration history will, by itself, not be a sufficient ground to justify restrictions of the right to residence.¹¹⁶⁰ However, in *Denmark*, the grounds of ‘public order and public security’ are interpreted relatively broadly. For example, illegal residence (based on false identity papers) has been qualified as a serious threat to the public order and security. The Danish Supreme Court confirmed this in two cases,¹¹⁶¹ also confirming that this was in conformity with the directive.¹¹⁶²

Moreover, in *Sweden*, persons with an adverse immigration history (e.g. abuse and/or fraud, deliberate deception, making a false representation, illegal entrance, attempting to obtain asylum or other permits of stay on the basis of deliberate deception) may not qualify for a residence permit

¹¹⁵⁹ For further details, see Part V of the report, comparative analysis, Section 3.2.3.2.

¹¹⁶⁰ See Part V of the report, comparative analysis, Section 3.2.4. Case study

¹¹⁶¹ Supreme Court, Case 58/2012; Supreme Court, Case-364/2010

¹¹⁶² For more details, see Part VII of the report, Annex with country study on Denmark, Section 3.2.3.2

under Directive 2004/38/EC and may therefore be refused entry depending on the specific circumstances. However, with respect to EU/EEA citizens and their family members who have already been granted a right of residence, the question of whether the behaviour mentioned above is considered to be such a threat to public order that it justifies expulsion will be considered. This must be assessed in every single case, but most likely, such behaviour, unless it is very grave and/or repeated, would not be considered such a threat to public order.¹¹⁶³

As explained in the report on national migration law, the preparatory works relating to Section 122 of the Immigration Act indicate that ‘serious or constantly recurring infringements of the Immigration Act’ may in principle constitute a basis for expulsion.¹¹⁶⁴ Possible penalties for infringements of the IA are regulated in Section 108 of the Act. UDI Circular No. 2010-022 clarifies that breach of the duty to register¹¹⁶⁵ cannot as such constitute a basis for expulsion pursuant to Section 122 or rejection pursuant to Section 121 first paragraph letter c.¹¹⁶⁶ In relation to other infringements, the situation is more uncertain. *Vevstad* is of the opinion that the use of false identities or ‘abuse of the asylum system’ probably does not qualify for expulsion of persons who under their true identity still meet the conditions for residence.¹¹⁶⁷

2.4.2 *Re-entry bans and conditions for lifting them*

The EFTA Surveillance Authority has commented on some specific issues relating to TCN family members for whom an entry ban has previously been issued pursuant to the general provisions of the IA and who subsequently become a family member of an EEA national or Norwegian national (typically through marriage). The Authority *inter alia* refers to the following situations:¹¹⁶⁸

- If the TCN applies in Norway for a residence card as a family member pursuant to IA Chapter 13
- If the TCN travels to Norway on the basis of a residence card issued by another EEA state pursuant to the implementing legislation in that state

According to Norwegian practice, the TCN must in both situations first apply for the lifting of the previous entry ban. The examination may take up to six months. In the first situation, the Norwegian immigration authorities will simultaneously assess whether the TCN shall be provided with a residence card.

The Authority is of the opinion that national practice is problematic in several respects, cf. Section 3.6 of Part IV of the report on national immigration law.

In all the studied countries, national law provides for the possibility of imposing a re-entry ban, prohibiting a person who has been expelled on the grounds of public order or public security from re-entering the country for a determined period of time. The exact conditions of such re-entry bans vary from one country to another, and usually, their length is linked to the seriousness of the crime or

¹¹⁶³ Information received from a representative of the Swedish Migration Service, July 2015.

¹¹⁶⁴ Part IV of the report Section 3.4.1 and Ot.prp. No. 72 (2007-2008) page 43 (our translation)

¹¹⁶⁵ Immigration Act section 117

¹¹⁶⁶ UDI Circular No. 2010-022 Section 3.3.5

¹¹⁶⁷ *Vevstad* (2012) commentary to section 122, para 4

¹¹⁶⁸ Letter of 6 February 2015

conduct that led to expulsion. In most countries, the length of the prison sentence foreseen for a certain crime in national criminal law will be used as a criterion to determine the length of the re-entry ban (the longer the prison sentence, the longer the re-entry ban will be). This is the case in *Sweden, Denmark, the Netherlands, the United Kingdom and Iceland*. However, in *Belgium*, a re-entry ban for EU/EEA nationals and their family members can, as established by law, only have a length of ten years regardless of the crime/conduct that led to the person's expulsion.¹¹⁶⁹

For a more detailed discussion of these issues, reference is made to Part V of this report.

2.4.3 Abuse of rights and fraud - Article 35, directive

Article 35 of the directive provides that 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'. The material scope of the provision may be summarised as follows:

- Where the use of rights conferred by EU law was not genuine and effective and the sole purpose was to avoid national immigration law, or;
- The family relationship is not genuine, e.g. marriage of convenience, or;
- There has been a forgery of documents or other kinds of falsifications.¹¹⁷⁰

Regarding the requirement of 'genuine and effective' use of rights conferred by EU law, CJEU case law indicates that a distinction must be drawn between the Union citizen's intentions, i.e. his or her motive for triggering EU law on the one hand, and the genuineness and effectiveness of the exercise of free movement rights on the other hand. Accordingly, a person's motives for triggering EU law (such as avoiding national legislation) are generally not considered relevant. The central question is rather whether the exercise of cross-border activities as such is genuine and effective.¹¹⁷¹

In case of returnees, the Commission has provided an indicative list of factors that may be taken into account.¹¹⁷² This list must in turn be applied in light of the subsequent case law from the CJEU; see in particular Part II Section 7 of the report on the directive.

With regard to the relationship between the Union citizen and his or her family members, the directive explicitly refers to marriages of convenience as defined in recital 28 of its preamble, i.e. a relationship 'contracted for the sole purpose of enjoying the right of free movement and residence'.

Article 35 of the directive is implemented in Section 120 of the Immigration Act. As noted in Part IV of the report on national immigration law, the wording of Section 120 first paragraph, first sentence is ambiguous:¹¹⁷³

*A foreign national who otherwise satisfies the conditions for a right of residence under this chapter does not have such a right if there are circumstances that provide grounds for refusing the foreign national entry into or a stay in the realm under other provisions in the Act.*¹¹⁷⁴

¹¹⁶⁹ For further details, see Part V of the report, comparative analysis, Section 3.2.3.3., and the separate country studies in Part VII, in the same Section.

¹¹⁷⁰ Part II of the report Section 7.5

¹¹⁷¹ Part II of the report Section 7

¹¹⁷² COM (2009) 313, page 18

¹¹⁷³ Part IV of the report Section 3.5

The wording implies that even though an EEA national or a family member in principle fulfils the conditions for a right of residence under Chapter 13 of the act, such a right does not exist if the person in question may be refused entry or residence according to ‘other provisions of the Act’. The exact basis for refusal is however not entirely clear. The preparatory works provide little clarification, as it is merely stated that the provision covers situations where there are grounds to reject or expel a person in accordance with Chapter 13 or ‘the general rules of the 2008-act’.¹¹⁷⁵

Marriages of convenience are addressed in the sixth paragraph of Section 120, which *inter alia* provides that the authorities may refuse to issue a residence card ‘if it is likely (...) that the main purpose of the marriage was to obtain legal residence in the realm for the applicant’. As noted in the report on national migration law, the provision is clearly based on the general provision in Section 40 fourth paragraph of the Immigration Act, according to which a residence permit ‘may be refused if it appears most likely that the main purpose of contracting the marriage has been to establish a basis for residence in the realm for the applicant’.¹¹⁷⁶ The review has also shown that Section 40 fourth paragraph is drawn on by both Norwegian courts and the immigration authorities when interpreting Section 120 sixth paragraph.

Section 120 of the Immigration Act raises questions regarding the relation between the general rules of the act concerning entry and residence on the one hand and the implementing provisions in Chapter 13 on the other hand. As explained above, the principle of presumption and IA Section 3 entail that other rules are applicable only to the extent that this is in conformity with Norway’s international obligations. As a consequence, the right of entry and residence for persons that are covered by the scope of the directive may in principle only be restricted to the extent that this also follows from the directive itself. In this connection, attention is called to the fact that the threshold for regarding a marriage a marriage of convenience seems to be lower pursuant to Section 40 fourth paragraph (cf. ‘main purpose’) than under the directive (cf. ‘sole purpose’). In our view, it is therefore likely that the application of Section 40 fourth paragraph may put the individual in question in a less advantageous position than anticipated by the directive.

With regard to the *abuse of rights and fraud*, the analysis has shown that Article 35 of the directive has been incorporated in all the studied countries, even though in the *Netherlands* this provision has only partly been transposed (regarding fraud; abuse of rights will be the subject of a forthcoming legislative amendment). The most far-reaching possibilities for the authorities to refuse entry or residence, or to expel a person on this ground, can be found in the *United Kingdom*, where the Secretary of State may exclude those who are considered to have abused their EEA rights of residence or *if there are reasonable grounds to suspect that admission would lead to the abuse of those rights*.¹¹⁷⁷ In the *Netherlands*, several cases have clarified the possibilities and limits of the authorities to deny residence on the grounds of the existence of a marriage of convenience.¹¹⁷⁸

For a more detailed discussion of these issues, reference is made to Part V of this report.

¹¹⁷⁴ Emphasis added

¹¹⁷⁵ Ot.prp. No. 72 (2007-2008) page 67 (our translation)

¹¹⁷⁶ Cf. also Prop. 30 L (2009-2010) page 11, where it is stated: ‘As in section 40 fourth paragraph, this provision will simplify the evidence as it will be sufficient that the acquisition of a residence right has been the *main purpose* of the marriage in order to reject the application’ (our translation)

¹¹⁷⁷ For further details, see Part VII of the report, Annex with country study on the United Kingdom, Section 3.2.3.4.

¹¹⁷⁸ For further details, see the comparative analysis in Part V of the report

3 Best practice

Finally, a few points on best practice are relevant. An interesting practice has been adopted in *Denmark*, where the Ministry of Justice and (until 2011) the Ministry of Integration have regularly issued Briefing Notes clarifying, in a detailed manner, specific points of the EU Residence Order and the Aliens Act, and the way certain provisions of these Acts must be implemented in the light of Judgments from the CJEU. This practice contributes to enhanced transparency of government policies, and provides clarity for both administrative services responsible for individual decisions, and for the public at large. This is an example of ‘best practice,’ which may be of interest for Norway and other countries.

Moreover, in several countries, the importance of regular exchange of information between the government agencies responsible for Immigration and those for Social Security has been emphasized.

Part VII: Annexes with country studies

Country Study Belgium *

1 Introduction

1.1 General public attitude towards immigration and free movement

Public opinion in Belgium is rather critical with respect to immigration. According to an opinion poll by Ipsos More published in August 2015,¹¹⁷⁹ in Belgium, 61 per cent of the respondents found that immigrant numbers are far too high. Germany, the European country accommodating the highest number of immigrants, has a figure of 'only' 43%. Moreover, 58% of the Belgian respondents think that immigration has a negative impact on their country. A small majority of the Belgians (52%) is convinced that it is harder to find a job due to immigrants. At the same time, 56 % estimates that the burden migrants are putting on public services is too heavy. Only 12 out of 100 of the Belgians taking part in the poll are of the opinion that migrants have a positive influence on the development of their nation. Reducing immigration flows and reforming the Belgian migration policies has been a major theme of political parties such as Vlaams Belang ('Flemish interest') and Nieuwe Vlaamse Alliantie, NVA, (New Flemish Alliance), whose main ultimate objective is to render the Dutch-speaking region Flanders independent from the French-speaking Walloon region. The latter party won 32 % of the vote in the 2014 federal elections, and is part of the current government coalition.

1.2 Summary of main conclusions

In Belgium Directive 2004/38/EC (hereafter: 'the directive') has, for the most part, been incorporated into national law. Some provisions, including those regarding the definition of family members, have been interpreted more broadly than the minimum criteria of the directive itself. Belgium has regularly adjusted its legislation and administrative practice to take account of the Judgments of the Court of Justice of the European Union (CJEU). Moreover, legislative proposals are currently being prepared to adapt the relevant legal framework to a landmark judgment of the Constitutional Court of September 2013.¹¹⁸⁰

The report also shows that Belgium has adopted a relatively permissive approach towards granting residence rights based on primary EU law on the free movement of persons. At the same time, the Belgian authorities apply a strict approach when assessing if migrants comply with the requirements set for acquiring residence rights, including the requirements of having sufficient resources, so as to avoid that they become a burden on the social security system. At the same time, since 2014 a consistent case law of the *conseil des contentieux des étrangers* explicitly emphasises the need for

* The author would like to thank Mr Frédéric Duterme and Mrs Dolores Geurts, legal experts at the Belgian Directorate for Immigration, for their substantial help in collecting the information presented in this study, and Hedvig Verschuere, University of Antwerp, for his advice in the early stage of the research. However, the responsibility for the content of this Country Study remains entirely with the author

¹¹⁷⁹ <http://deredactie.be/cm/vrtnieuws.english/News/1.2410731>. The poll involved 17,533 citizens from 24 different developed countries

¹¹⁸⁰ *Cour constitutionnelle*, Judgment n° 121/2013 of 26 September 2013

the authorities to duly motivate their decisions to terminate the right of residence on this ground, and to ensure that the person concerned is heard before a final decision is taken.

2 Implementation of Directive 2004/38/EC: General Assessment

2.1 National implementing legislation

The main national law regulating access, residence, establishment and expulsion of foreigners on Belgian territory is the Law of 15 December 1980 concerning the access to the territory, the residence, the establishment and removal of foreigners, with further amendments.¹¹⁸¹ Directive 2004/38/EC was first implemented through a law of 25 April 2007, which introduced a new chapter into the Law of 15 December 1980, followed by implementing royal decrees. The most recent amendments were introduced through a law of 19 March 2014.¹¹⁸²

2.2 Institutional context and complaint procedures

The implementation of the directive falls under the responsibility of the Secretary of State for Asylum and Migration, who also acts as deputy to the Minister of Security and Internal Affairs. The competent government agency is the Immigration Office (*Direction-Générale Office des Etrangers*).

Individual decisions of the Immigration Office can be appealed before the *Conseil du Contentieux des Etrangers*, a specialised administrative body that was created in 2006. Appeals against its decisions can be brought before the Council of State (*Conseil d'Etat*).

2.3 Administrative policies and guidelines

The Immigration Office provides guidelines and advice to the competent administrative services on the implementation of the directive, taking account of legislative amendments and relevant judicial cases from the CJEU and national courts. Specific instructions may be included in a circular (*circulaire*) to the administrative services when significant changes are required, but usually they are transmitted through internal service notes and oral presentations.

3 Specific Assessment: Interpretation of the Individual Provisions of the Directive

3.1 Personal Scope - To whom does it apply?

3.1.1 EU/EEA citizens

Article 40 (2) of the Law of 15 December 1980 refers to Union citizens, defined as persons having the nationality of one of the member States of the European Union. According to Article 69bis of the Royal Decree of 8 October 1981 on the implementation of the abovementioned law, the provisions of Title II of this act also apply to citizens from EFTA States and Switzerland. However, Swiss nationals will receive a different type of residence document than EU/EEA citizens.

¹¹⁸¹ *Loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers*. (Hereafter: 'Law of 15 December 1980')

¹¹⁸² *Loi du 19 mars 2014 modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (C-2014/00295)

3.1.2 *Definition of family members*

Family members are defined in Article 40bis, paragraph 2.2 of the Law of 15 December 1980. They include all the categories mentioned in Article 2(2) of the directive:

1. The *spouse* of the EU citizen, or the *person with whom a registered partnership was concluded which is recognised as equal to marriage under Belgian law*;
2. The *partner, with whom the EU citizen has concluded a registered partnership in accordance with 'a law'*, (which may be the law of another State), when the following conditions are met:
 - a. The partners must prove that they have a duly attested, durable and stable relationship. The durable and stable nature of the relationship is demonstrated when:
 - The partners prove to have lived together, either in Belgium or in another country, for at least one year before the application; or
 - They prove that they have known each other for at least two years before the application, and that they had regular contacts, either by telephone, through exchanges of letters or electronic messages, and that during those two years they have met three times for at least 45 days in total; or
 - They have a child together.
 - b. The partners will come to live together in Belgium;
 - c. They are both older than 21 years old;
 - d. They are not married and they do not have a durable and stable partnership with another person;
 - e. They are not persons as meant in Articles 161-163 of the Civil Code
 - f. Regarding neither of them a decision was taken based on Article 167 of the Civil Code.
3. *Direct descendants of the EU citizen or his/her registered partner* as mentioned under 1 or 2 above, who accompany or join them, who are under 21 years old or dependent on the EU citizen or the registered partner;
4. Dependent family members in the ascending line of the EU citizen or the registered partner as mentioned under 1 or 2 above, who accompany or join them;
5. The *father or the mother of a minor EU citizen*, as meant in Article 40(4)(1) under 2 of the Law of 15 December 1980, in so far as the minor is at his/her charge and he/she has the effective custody.

The definition of *other family members* was included in the Law of 15 December 1980 (Article 47 (1)) only in 2014, after a notification from the European Commission of February 2013 with regard to its failure to transpose correctly a number of provisions of directive.¹¹⁸³ Now, all the persons mentioned in Article 3(2) of the directive are included in the Article 47(1) of the Law of 15 December 1980:

¹¹⁸³ http://europa.eu/rapid/press-release_MEMO-13-122_en.htm

- The *partner with whom the EU citizen has concluded a duly attested, durable relationship*, that does not fall within the scope of Article 40bis, paragraph 2.2 (see above);
- Family members who do not fall within the scope of Article 40bis paragraph 2 and who were *dependent on the EU citizen, or who were members of the EU citizen's household*;
- Family members not falling within the scope of Article 40bis paragraph 2 and who, for serious health reasons, strictly require the personal care of the EU citizen.

According to Article 47ter, these other family members enjoy the same rights as the family members mentioned in Article 40bis paragraph 2. Moreover, the evidence to be provided by other family members to prove the existence of the relationship with the EU citizen is mentioned in Article 47ter(3). According to this provision, partners must prove the existence and the durable nature of their relationship, with any suitable means. Regarding the durable nature, factors that will be taken into account are especially the duration, the intensity and the stability of the relationship.

3.1.3 *Definition of economically active persons*

There is no specific definition of economically active persons in the sense of the directive in the relevant the implementing legislation.

3.1.4 *Definition of self-sufficiency; sufficient resources*

A person is considered to comply with the criterion of having 'sufficient resources' when he/she has at his/her disposal an amount that is just above the amount that would give rise to a right to a social allowance. This is an indexed reference amount, which depends on the family situation of the person concerned. Since 1 September 2015, these amounts are the following: 555,81 euro per month for a cohabiting person; 833,71 euro for a single person; 1.111,62 euro for a person who lives together with a family at his/her charge.¹¹⁸⁴ However, if the person concerned does not have this minimum amount at his/her disposal, this will not lead to an automatic refusal of residence. Each application will be considered on an individual basis, taking account of all relevant elements.

The same amount applies in the case family reunification by a Belgian citizen who has made use of his free movement rights and returns to Belgium.

When assessing the resources of which the person disposes, a number of social benefits are *not* taken into account, which is listed in Article 40ter of the Law of 15 December 1980. These include the *revenu d'intégration*, *l'aide sociale* (social assistance), family allocations, including allocations for minor children, and *allocations d'attente, de transition et du chômage* (waiting allowances, transition allowances, and unemployment benefits). Indeed, unemployment benefits that the person may receive in Belgium are currently *not* taken into account. However, when a person applies for family reunification, unemployment benefits may be taken into account if he/she actively seeks employment.¹¹⁸⁵ Other forms of contributory or non-contributory benefits, including pensions, are taken into account in this assessment.

It should be noted that a system has been set up whereby every month, the agency responsible for social assistance, the *Service Publique de Programmation Intégration Sociales*, (*SPPIS*) provides to the Immigration Service, a list of all EU/EEA citizens and their family members who have received

¹¹⁸⁴ *Arrêté royal modifiant l'arrêté royal du 3 septembre 2004 visant l'augmentation des montants du revenu d'intégration*, 30 August 2015

¹¹⁸⁵ Information provided by representatives of the Immigration Office

social allowances for three consecutive months over the last twelve months. This list is used as a source of information, which can be used as part of a more thorough investigation regarding compliance with the criterion of self-sufficiency. It does not have any automatic consequences.¹¹⁸⁶ Nevertheless, it has been an effective mechanism to identify situations in which, after further examination, the criterion of sufficient resources turned out not to be satisfied any longer.¹¹⁸⁷ According to the latest Activities Report of the Immigration Office, in 2013, the right of residence of 2.712 EU citizens (including their family members) has been terminated, of which 95% were based on Article 42bis of the Law of 15 December 1980 (the remaining 5% were based on Article 42septies of this same law, concerning termination of residence because of fraud). This number includes 1.677 EU citizens and their family members who were considered to constitute an unreasonable burden on the social assistance system.¹¹⁸⁸

3.1.4.1 Relevant case law - Article 42bis

According to Article 42bis of the Law of 15 December 1980 (with further amendments), the right of "temporary" residence may be terminated if a EU citizen no longer satisfies the conditions of being a worker, a self-employed person, or a student, or if he/she no longer has 'sufficient resources'.

Over the years, there have been several appeals before the *Conseil des contentieux des étrangers* against decisions of the migration authorities based on this provision. It should be noted that there has been a clear change in the approach adopted by this administrative appeals body, since 2014. Whereas in several decisions adopted before 2014, the *Conseil des contentieux des étrangers* emphasised that the burden of proof that a migrant still complies with the conditions to have a continued right of residence was placed on the migrant him/herself, in the last few years more importance is being attached to the need for the migration authorities to duly motivate its decisions to terminate a temporary right of residence.

Some examples of the previous case law are the following:

- *X v. Belgium*, (Judgment No. 84 855, 19 July 2012), (Italian citizen, former worker, and former student). The *Conseil des contentieux des étrangers* held that it is the responsibility of the migrant to provide all elements of information necessary to establish that he/she still complies with the conditions to have a continued right of residence, when he/she is aware that a decision ending the right of residence might be taken (and not that of the competent State agency); and it is also incumbent on the migrant to invoke any exceptions in the applicable law from which he/she may benefit;
- *X v. Belgium*, (Judgment No. 92 621, 30 November 2012). The *Conseil des contentieux des étrangers* ruled in the same sense with regard to a Romanian citizen, former self-employed person, considering that it was incumbent on the migrant to provide information (medical certificates etc), when his right of continued residence was being examined, and also to provide elements that his right to a family life (Art 8 ECHR) would be violated in case of a termination of his right of residence.

¹¹⁸⁶ A separate mechanism, the *Cellule Fraude du Service Long Séjour*, was created to identify identity fraud; however, this administrative entity has no direct competence to look into social security fraud. Information received during a meeting with representatives of the Belgian Immigration Office on 23 June 2015

¹¹⁸⁷ See also the following sub-section, for information on recent national case law in Belgium on decisions in which the right of residence has been terminated on this ground.

¹¹⁸⁸ *Office des étrangers, Rapport des activités 2013*, https://dofi.ibz.be/sites/dvzoe/FR/Documents/2013_FR.pdf

However, in its more recent case law, an increased attention paid by the *Conseil des contentieux* to the motivation of the decision by the authorities can be noticed. For example:

- *X v Belgium*, (Judgment No. 144652, 30 April 2015), concerned a Polish citizen who had been granted a temporary right of residence based on his status as a worker. His right of residence was terminated based on the assessment that he no longer fulfilled the conditions for a continued residence, in particular because he had only worked for his initial employer for a short period of time; and he had benefitted from a social allowance since at least a year, which indicated that he had no paid employment, and that he did not have sufficient resources to support himself. Moreover, the appellant had not answered a written request from the migration authorities to provide information about his financial and family situation, which could be relevant for the authorities' decision. The *Conseil des contentieux* referred to a recent decision of the Council of State (Case No. 230.257 of 19 February 2015), in which it emphasised that a person's right to be heard before any administrative decision is taken that might substantially affect his/her rights is an essential guarantee under EU law. The *Conseil des contentieux des étrangers* concluded that in this case, the authorities had not acted in conformity with their duties to duly motivate their decision, and that they had not done sufficiently to assemble the necessary information from the appellant, even though he did not reply to the questionnaire that was sent to him (but for which it has not been established that it was actually received by the appellant). The decision to terminate his right of residence was annulled.
- *X v Belgium*, (Judgment No. 146740, 21 May 2015), concerned a Spanish citizen whose right of residence was also terminated based on the assessment that he no longer fulfilled the requirement of having sufficient resources. He appealed the decision arguing, as in the abovementioned case, that the authorities had not duly motivated their decision and that they had failed to give the appellant the possibility to be heard before the decision was taken. The *Conseil des contentieux* reaffirmed, again referring to the decision of the Council of State 230.257 of 19 February 2015, that the authorities have the obligation to search for the information that allows it to take an informed decision (*en connaissance de cause*). Indeed, the authorities are bound to investigate the case and therefore to invite the foreigner to be heard concerning the reasons that would oppose a termination of his residence and his expulsion. Nevertheless, in the present case, the *Conseil des contentieux* considered that the authorities had given sufficient opportunity to the appellant to provide all the relevant information, by inviting him to do so in writing. The disputed decision was therefore not annulled.
- In *X v Belgium*, (Judgment No. 148537, 25 June 2015), the appellant was a French citizen, who had a temporary residence permit in Belgium based on her status as a worker. Her residence right was terminated on the ground that she had never actually carried out any paid work, and that she did no longer comply with the requirement of having sufficient resources, since she had benefitted from social benefits for an extended period of time. The appellant complained that the authorities had not duly motivated their decision, that they had not taken sufficient account of factors (mentioned in Art. 42bis para 2, *in fine*) such as her family situation, the length of her stay, her social and cultural integration, and her health situation. The *Conseil des contentieux* reiterated the considerations in its earlier decisions with regard to the obligation of the authorities to actively search for the elements of information that are needed to take an informed decision, and to provide the person concerned with the opportunity to present arguments to support his/her case, including with regard to 'humanitarian factors', such as those mentioned above (*e.g.* family situation, health). The disputed decision was annulled.

- In all these cases, the appellants also complained of a violation of Article 8 of the European Convention on Human Rights (right to family life), and in the latter case, a violation of Article 3 of the Convention on the Rights of the Child (best interests of the child). The relevant considerations of the *Conseil des contentieux* are not explicitly considered here, since they fall outside the scope of this section of the report. Finally, it should be noted that on 15 January 2015, the Commission has started a pilot investigation into the Belgian practice of expulsion of EU citizens who have lost their employment.¹¹⁸⁹

Text box 1 - Evolving Case law *Conseil des contentieux des étrangers* on Article 42bis

Until 2014	From 2014 onwards
Burden of proof that a migrant still complies with the conditions to have a continued right of residence was placed on the migrant him/herself.	More importance is attached to the need for the migration authorities to <i>duly motivate its decisions</i> to terminate a temporary right of residence.
	<p>Authorities have a legal duty to:</p> <ul style="list-style-type: none"> – Investigate each case – Actively search for the information needed to take an informed decision – Provide the migrant with the opportunity to be heard, and to present arguments to support his/her case – Take account of 'humanitarian factors' (e.g. family situation, health).

3.1.5 *Establishing 'dependency'*

The following criteria are used to establish dependency in the sense of the directive:

- In the country from which the dependent person arrives in Belgium, he/she did not have sufficient resources to live independently
- At the moment of application for a right of residence, the person was already dependent on the reference person
- Proof of regular financial transfers from the reference person to the dependent person is required, covering a period of at least 6 months

A case-by-case assessment is made, considering the specific situation of each applicant. Documents proving that the person concerned was dependent on the reference person should be issued by the authorities of the country of origin or the country where the family members and the EU citizen resided before moving to Belgium. In the absence thereof, any other suitable evidence may be provided. Moreover, family members who require the personal care of the EU citizen for serious health reasons need to demonstrate that this personal care is strictly required.

¹¹⁸⁹ EU PILOT 7316/15/EMPL —Belgique (Objet: Expulsion des citoyens européens ayant perdu leur emploi en Belgique), see [http://www.osservatorioinca.org/section/image/attach/chap\(2014\)3546.pdf](http://www.osservatorioinca.org/section/image/attach/chap(2014)3546.pdf)

3.2 Material scope - Which rights are covered, to whom do they apply and what do they entail?

3.2.1 Rights against the host state

3.2.1.1 Right of entry, right of residence for up to 3 month: Arts 5 and 6, directive¹¹⁹⁰

The *right of entry* is established in Article 41 of the Law of 15 December 1980. In accordance with Article 5(1) of the directive, proof of a EU citizen's identity and nationality can be provided either by a passport, or by an identity card (Article 41(1), Law of 15 December 1980). Moreover, such proof can also be provided -for EU/EEA citizens- by other means than a passport or an identity card.

For TCN family members, as foreseen in Article 5(2) of the directive, a valid passport is required, as well as a visa, in accordance with Regulation 539/2001/EC of 15 March 2001, unless the person concerned possesses a EU residence permit issued by another EU/EEA state in accordance with Article 10 of the directive (Article 41(2), Law of 15 December 1980).

According to Article 41bis of the Law of 15 December 1980, EU/EEA citizens and their family members should register in the *commune* (communal administration) within ten days after their arrival. However, this formality does not apply to EU/EEA citizens and their family members who stay in a hotel, youth hostel or any other house that is subject to the regulation concerning the control of travellers.

3.2.1.2 Right of residence between 3 months and 5 years: Art 7, directive

3.2.1.2.a. Transposition of Article 7 in national law

The right of residence for a period between 3 months and 5 years is included in Article 40(4) of the Law of 15 December 1980, which incorporates all the elements enumerated in Article 7 of the directive. EU/EEA citizens intending to stay for a period exceeding three months should register with the local authorities within the first three months following their arrival in the country.

3.2.1.2.b. Retention of residence rights in certain situations, Article 13, directive

Article 42 *ter*, first paragraph, under 4, states that:

Unless the family members of a Union citizen who are themselves Union citizens, benefit themselves from a residence right as foreseen in Article 40 (4), or comply again with the conditions included in Article 40bis (2), the Minister or his delegate can terminate their residence right within five years after the recognition of their right of residence as family member of the Union citizen, in the following cases:

(...)

4. The marriage with the Union citizen whom they have accompanied or joined is dissolved, the registered partnership mentioned in Article 40bis (2), under 1 or 2, is terminated, or they no longer live together.¹¹⁹¹

¹¹⁹⁰ The implementation of the right of exit, laid down in article 4 of the directive, is not considered here since the focus of this study is on the rights to entry and residence

¹¹⁹¹ Unofficial translation by the author. The original text reads as follows:

However, the Constitutional Court, in its judgment 121/2013 has ruled with regard to this provision, that only a divorce or an annulment of a marriage; or a formal termination of a registered partnership can put an end to the right of residence. The Constitutional Court considered that the possibility to terminate a right of residence when the spouses no longer live together, which amounts to a *de facto* separation (but not yet a pronounced divorce), must be understood not to apply to the spouse, but only to the other family members who have obtained a right of residence in the context of the family reunification.

Therefore, based on this interpretation given by the Constitutional Court, a *de facto* separation is not a reason to terminate a right of residence.¹¹⁹²

Text box 2 - Art. 13, directive and *de facto* separation

<p>Art. 13(2), directive: <i>Retention of the right of residence of TCN family members in the case of divorce, annulment of marriage or termination of registered partnership</i></p>	<ul style="list-style-type: none"> – <i>De facto</i> separation does <i>not</i> have any impact on the right of residence of a spouse or registered partner – As long as the spouses are married or the registered partnership is in force, Article 13 does not apply even if the spouses/partners do not/no longer live together.
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3.2.1.3 Right of permanent residence: Art 16, directive

The right of permanent residence is implemented in Articles 42quinquies and 42sexies of the Law of 15 December 1980. Such a right is granted to EU/EEA citizens and their family members who have legally resided in Belgium for a period of five years (art 42quinquies). In certain circumstances, a permanent right of residence can be acquired before the period of five years has expired, in accordance with the exemptions included in Article 17 of the directive (Article 42sexies).

In Belgium, time spent in prison or in a psychiatric hospital as an alternative sentence will be considered as legal residence, and it is therefore taken into account when evaluating if the person concerned has acquired a right to permanent residence; it contributes to the required five-year period.

Text box 3: Time spent in prison

<p>Practice in Belgium:</p>	<ul style="list-style-type: none"> – Time spent in prison is considered as <i>lawful residence</i> – Time spent in a psychiatric hospital as an
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'A moins que les membres de famille d'un citoyen de l'Union qui sont eux-mêmes citoyens de l'Union, bénéficient eux-mêmes d'un droit de séjour tel que visé à l'article 40, § 4, ou satisfassent à nouveau aux conditions visées à l'article 40bis, § 2, le ministre ou son délégué peut mettre fin à leur droit de séjour dans les cinq années suivant la reconnaissance de leur droit de séjour (1) en tant que membre de la famille du citoyen de l'Union, dans les cas suivants:

4° le mariage avec le citoyen de l'Union qu'ils ont accompagné ou rejoint est dissous ou annulé, il est mis fin au partenariat enregistré visé à l'article 40bis, § 2, alinéa 1er, 1° ou 2°, ou il n'y a plus d'installation commune'

¹¹⁹² Information provided by a representative of the Immigration Office

	alternative to a prison sentence is <i>also considered as lawful residence</i>
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3.2.2 *Rights against the home state*

3.2.2.1 Rights of persons returning to the home State after a stay in another EU/EEA Member State and their family members - family reunification

The Belgian legislation on the rights of persons to family reunification, including for persons returning to Belgium after a stay in another EU member State, has been revised -and further amendments are underway-, after the judgment from the Constitutional Court of 26 September 2013, already mentioned above.¹¹⁹³ In this judgment, the Constitutional Court considered several provisions of the Aliens Act, including those regarding the possibilities for Third Country Nationals to acquire a right of residence in Belgium as a result of family reunification. The Court has annulled several provisions of the Aliens Act, and has given a detailed interpretation of the applicable Articles. For example:

- Art 40bis, para 2(1), 2, sub c, of the Law of 15 December 1980 was annulled, which imposed a minimum age of 21 years for both partners as a condition for family reunification; this minimum age has been set at 18 years (Law of 19 March 2014);
- The Constitutional Court held that Art 40bis is also applicable to Belgian citizens who have made use of their free movement rights and return to Belgium after a stay in another EU/EEA State, confirming their right to family reunification under the same conditions as other EU/EEA citizens who moved to Belgium. This is already applied in Belgium, and a legislative amendment in this sense has been submitted to Parliament.

The Constitutional Court has also interpreted several other provisions of the Aliens Act. The Judgment has been explained in a Circular of 20 December 2013, which also provides guidelines for the competent agencies on its consequences for requests of family reunification (C – 2013/00828, Service Publique Fédérale Intérieure).

3.2.2.2 Rights of caretakers of minor citizens (involving a cross-border element)

The jurisprudence of the CJEU in C-200/02 *Zhu and Chen*¹¹⁹⁴ and C-86/12 *Aloka*¹¹⁹⁵ have been included in the Law of 15 December 1980 with the inclusion of Article 40bis, paragraph 2, letter 5, as part of the legislative revision of 2014. This new provision stipulates that the father or the mother of a minor citizen of the European Union, who has at his/her disposal sufficient resources not to become a burden on the social security system and comprehensive sickness insurance, is considered as a family member of a EU citizen. The provision provides the possibility for TCN parents of a minor EU citizen to acquire a derived right of residence, so that their minor child can exercise his/her rights as a EU citizen. A condition is that they have sufficient resources and comprehensive sickness insurance not only for themselves, but also for the child. The Commission has undertaken a 'pilot investigation' with regard to such cases in Belgium.

¹¹⁹³ See above, note 1182

¹¹⁹⁴ Case C-200/02 *Zhu and Chen* [2004] ECR I-09925

¹¹⁹⁵ Case C- C-86/12 *Aloka* ECLI:EU:C:2013:645

3.2.2.3 Cases with no cross-border element (*Zambrano* case)

Belgium has adopted a broad interpretation of the CJEU's judgment in Case C-34/09 *Zambrano*,¹¹⁹⁶ and in cases with similar facts a derived right of residence may be granted to a TCN primary carer of a minor EU citizen. The Belgian legislator has incorporated this judgment in the Law of 15 December 1980, in Article 40ter, first paragraph, second sentence. This provision even goes beyond the terms of *Zambrano*, since the only conditions to be fulfilled are the establishment of the parental link between the minor EU citizen and the carer, and proof of their identity. Indeed, the Belgian legislator has not included among these conditions that the carer of the EU citizen child must have sufficient resources, in order to be granted a derived right of residence.

3.2.2.4 Rights against home- and host state of commuters and their family members

In Belgium, residence rights are regularly granted to family members of commuters who live in Belgium and travel to other countries for work purposes. The decision in these situations depends on the specific circumstances of each case.

3.2.3 *Restrictions on the freedom of movement and residence: refusal of entry or residence; expulsion measures; re-entry bans*

3.2.3.1 Refusal of entry or residence

In addition to the failure to meet the conditions of Articles 5, 6, or 7 of the directive as a ground for refusing entry or residence, according to Article 43(1) of the Law of 1980, the entry and residence of EU citizens and their family members can also be refused for reasons of public order, national security or public health. This provision transposes Article 27(1) and (2) of the directive, by determining the following additional limits to invoking the abovementioned reasons:

(i) They cannot be invoked to serve economic ends, and (ii) measures taken on grounds of public order or national security must respect the principle of proportionality, and they must exclusively be based on the personal conduct of the individual concerned. Moreover, the existence of prior penal convictions cannot be the only motivation for such measures. The conduct of the person concerned must represent a real, present and sufficiently serious threat to a fundamental interest of society. Justifications that are not directly related to the individual case concerned, or that are based on reasons of general prevention cannot be accepted. In addition, Article 43 of the Belgian Law of 1980 also transposes Article 29 of the directive related to grounds of public health. However, whereas the directive states that the only diseases that can constitute a ground for a restriction of the rights of entry or residence are those determined by the World Health Organization, the Belgian law refers to 'diseases included in a list attached to this law', which could in theory entail a risk if this list is not regularly updated.

3.2.3.2 Expulsion measures

According to Article 45(1) of the Law of 15 December 1980, EU citizens and their family members who have a right of residence in the context of a stay of at least one year can only be expelled by way of a royal expulsion decision (*arrêté royal d'expulsion*), after a notification from a specialised consultative commission (*Commission consultative des étrangers*). However, a legislative amendment has been submitted to the Belgian Parliament to cancel this condition, which is not in line with the directive.¹¹⁹⁷

¹¹⁹⁶ Case C-34/09 *Zambrano* [2011] ECR I-01177

¹¹⁹⁷ Information provided by a representative of the Immigration Office

This same article determines, in its subsequent paragraphs, that EU citizens and their family members who have acquired a permanent right of residence can only be expelled on serious grounds of public order or national security (paragraph 2). Moreover, the following persons can only be expelled in case of a serious threat to national security (*atteinte grave à la sécurité nationale*): (i) EU citizens and their family members who have resided in Belgium for a period of ten years, and (ii) minor EU citizens or their family members, unless expulsion would be in the best interest of the minor based on the applicable international conventions. Even though this provision contains basically the same elements as those included in Article 28 of the directive, it should be noted that the Belgian law uses the term 'national security' instead of 'public security' as laid down in the directive, and 'a serious *atteinte* to national security', instead of the directive's term 'imperial grounds of public security', which may give rise to different interpretations in the Belgian context compared to those in other EU/EEA states.

In 2013, the Commission notified Belgium that its implementation of the directive was not correct with regard to the fact that Belgium's rules on protection against expulsions on grounds of public policy or public security offered safeguards to non-EU family members of Union citizens only but not to Union citizens. After consultations with the Commission on this point, the principle of proportionality has been revised in the legislative amendments of 19 March 2014. A new paragraph was introduced in Article 43 of the Law of 15 December 1980, stating that 'when the authorities consider taking a decision to expel a EU citizen or his family members on the ground that he constitutes a threat to the public order or to public security, account must be taken of the duration of the stay of the person in Belgium, his age, his health situation, his family situation, his economic situation, the degree of his social and cultural integration in Belgium, and the intensity of his ties with his country of origin.'¹¹⁹⁸

As explained by a representative of the Immigration Office,¹¹⁹⁹ Belgium has not defined the terms 'public order' and 'public security' by creating a 'catalogue' of offences, which could constitute a threat to either the public order or to public security. However, this could change when a preliminary ruling will be given in the pending case before the CJEU, Case C-228/15 *Velikova*.¹²⁰⁰

3.2.3.3 Re-entry bans

For EU citizens and their family members, the duration of re-entry bans is 10 years (Article 26 of the Law of 15 December 1980). Based on the current legislation, it is not possible to apply any other duration. This also applies to TCN family members.

3.2.3.4 Abuse or fraud: Article 35 of the directive

Article 35 of the directive has been incorporated into Belgian law in Article 42septies of the Law of 15 December 1980, which states that the immigration authorities 'can refuse the entry, or terminate the right to stay of a EU citizen or of his family members when he, or they, have used false or misleading information, or false or falsified documents, or when they have resorted to fraud or other illegal means, which have been decisive for the recognition of this right.'¹²⁰¹ A special administrative

¹¹⁹⁸ Article 43, paragraph 4, of the Law of 15 December 1980 as amended by the Law of 19 March 2014

¹¹⁹⁹ Following a meeting held with representatives of the Immigration Office on 23 June 2015

¹²⁰⁰ Case C-228/15, *Reference for a preliminary ruling from the Tribunale di Catania (Italy) lodged on 19 May 2015 — Criminal proceedings against Snezhana Velikova*

¹²⁰¹ Article 42septies, Law of 15 December 1980 (with further amendments), (*Translation by the author.*) Original text: "Le ministre ou son délégué peut refuser l'entrée ou mettre fin au droit de séjour du citoyen de l'Union ou des membres de sa famille lorsque celui-ci ou

entity has been created, the *Cellule Fraude du Service Long Séjour*, which has the task of investigating cases in which it is suspected that fraud has been committed with a view to obtaining a right of residence. It focuses in particular on identity fraud or false representation, but also on marriages/partnerships/adoptions of convenience. Identity fraud is especially detected through requests for identity modifications introduced by migrants before the local administrations (*communal offices*), which are then transmitted to the Immigration Office for advice.¹²⁰²

3.2.4 Case study

In order to clarify and illustrate the practice in the different countries considered in this study, the Norwegian Directorate of Immigration (UDI), has presented a set of facts that occurred in Norway. These facts involved a TCN immigrant who had been expelled on grounds of public order, and who requested the lifting of his re-entry ban after he had entered into a durable relationship with a Swedish citizen, with whom he lived in another EU/EEA state before returning to Norway. In this section, the facts of the case will first be set out (a), followed by a brief description on how Belgium would deal with this situation, had it occurred within its jurisdiction (b).

a) Facts of the case: example from Norway

Rejected asylum seekers have the obligation to leave Norway. An asylum seeker stays illegally in Norway for 3 years, and then marries a Norwegian citizen. The rejected asylum seeker is then expelled and imposed a 5 years entry ban in conformity with Norwegian legislation (The Immigration act, provisions relevant for third country nationals). The new formed couple travels to Sweden, lives there for 7 months, and returns to Norway shortly after. The third country national/former asylum seeker, now a family member of a EEA citizen, requires to be registered in Norway as a family member of a EEA citizen. Norwegian authorities refuse to lift the re-entry ban due to his adverse immigration history. The administrative decision of refusal to lift the entry ban merely points to the fact that person committed a grave violation of the provisions in the Immigration Act.

b) Belgium¹²⁰³

In the following description on how such a situation would be handled in Belgium, all references to 'Norway' and 'Norwegian' nationality will be replaced by 'Belgium' and 'Belgian' nationality.

In the case as outlined above, the Belgian citizen (with whom the TCN immigrant got married) clearly made use of her free movement rights as recognized by the TFEU, and returns to the home state after a stay in another EU/EEA host state. Therefore, upon her return to Belgium together with her TCN spouse, Article 40bis of the Law of 15 December 1980 will be applicable (setting out the rights of family members, including spouses). Considering that the period of residence in the host member state exceeded three months, and conform the constant jurisprudence of the CJEU, the TCN spouse/former immigrant has to be granted the same rights as a EU citizen. In such a case, and to the extent that the Belgian citizen fulfills the conditions to benefit from family reunification, the application for residence is considered as an implicit request for a lifting of the re-entry ban, based on an internal note from the Director General of the Immigration office.

ceux-ci ont utilisé des informations fausses ou trompeuses ou des documents faux ou falsifiés, ou ont recouru à la fraude ou à d'autres moyens illégaux, qui ont été déterminants pour la reconnaissance de ce droit."

¹²⁰² Rapport annuel de l'Office des étrangers 2013, available at https://dofi.ibz.be/sites/dvzoe/FR/Documents/2013_FR.pdf

¹²⁰³ Information provided by representatives of the Belgian Directorate for Immigration, following interviews held on 2 and 23 June 2015

4 Conclusion

In Belgium Directive 2004/38/EC has, for the most part, been incorporated into national law, especially after a legislative revision in 2014, by which some new provisions were included into the Law of 15 December 1980, including on 'other family members' as mentioned in art. 3(2)a of the directive. Some provisions, including those regarding the definition of family members, have been interpreted more broadly than the minimum criteria of the directive itself. Belgium has regularly adjusted its legislation and administrative practice to take account of the Judgments of the Court of Justice of the European Union (CJEU). Moreover, legislative proposals are currently being prepared to further adapt the relevant legal framework to a landmark judgment of the Constitutional Court of September 2014, concerning several aspects related to family reunification.

The report also shows that Belgium has adopted a relatively permissive approach towards granting residence rights based on primary EU law on the free movement of persons. In this regard, the possibility for parents of minor EU citizens to acquire a right of residence in situations involving a cross-border element has been included in the Law of 15 December 1980 during the 2014 legislative revision. Also in situations with no cross-border element, in which a parent of a minor EU citizen applies for a derived right of residence, such as in *Zambrano*, Belgium has adopted a relatively open attitude towards granting such rights. At the same time, the Belgian authorities apply a strict approach when assessing if migrants comply with the requirements set for acquiring residence rights, including the requirements of having sufficient resources, so as to avoid that they become a burden on the social security system. However, the competent administrative appeals court, the *Conseil des contentieux des étrangers*, has, in recent years, increasingly emphasised the obligations of the authorities to duly motivate their decisions to terminate a right of residence, to take account of 'humanitarian factors' (such as the migrant's family situation, health issues, and the degree of social and cultural integration), and to give the migrant an opportunity to be heard before the decision is taken.

Legislative proposals have been prepared to complete the adjustments of the national legislation to the conclusions of the Constitutional Court of 26 September 2013. These have been approved by the Council of State and will be presented to the Belgian Parliament in due course.

Country Study Denmark*

1 Introduction

1.1 General public attitude towards immigration and free movement

In Denmark, immigration policies are relatively strict compared to other European countries.¹²⁰⁴ Moreover, in recent years, Euro-scepticism has increased within the Danish population, as evidenced by the significant rise of the party *Dansk Folkeparti* in the last European elections, which received 26,6 percent of the votes.

In a survey performed by Cevea in 2014,¹²⁰⁵ 55 percent of the Danish population stated that they fear that citizens from other European countries will migrate to Denmark with the sole purpose of getting a share of the Danish welfare benefits. At the same time, 58 percent of Danes perceive the possibility of other EU-citizens to make use of the Danish welfare system as a threat towards the Danish welfare state. On the other hand, 49 percent of the Danish people believe that citizens from other European countries ought to have access to the Danish healthcare system on the same terms as the Danes. All in all, the signal is that the Danish population fears for the future of welfare and the influence on it from the EU institutions.¹²⁰⁶

1.2 Summary of main conclusions

As will be shown in this report, in Denmark the incorporation of Directive 2004/38/EC (hereafter: 'the directive') into national law is, to a large extent, completed and on some points, including the definition of family members, the Danish interpretation goes beyond the minimum criteria of the directive. Denmark has adjusted its legislation and administrative practice on several occasions to take account of the Judgments of the Court of Justice of the European Union (CJEU). An interesting practice is the regular issuing of Briefing Notes, providing detailed information on the government's interpretation of new judgments of the CJEU and on the way this should be taken into account in administrative decisions.

The report also shows that Denmark has adopted a restrictive approach towards granting residence rights based on primary EU law on the free movement of persons, while broadly interpreting the grounds for expulsion, in particular the public order and security criteria, which has given rise to a substantial body of national case law.

* The author would like to thank the representatives of the Danish Immigration Service and the Ministry of Justice for the information they provided during, and after an interview held on 27 February 2015, and Dr. Catherine Jacqueson, University of Copenhagen, for her help and advice. However, the full responsibility for the contents of this study remains with the author

¹²⁰⁴ Danish Ministry of Immigration (2010, November 7). *Nye Tider. Nye krav*. http://www.nyidanmark.dk/NR/rdonlyres/DD9BA445-E4AA-431E-ADF6-10147E46CF0B/0/nye_tider_nye_krav.pdf, cited by Lukas Slothuus, *Immigration Policy and Controversy in Sweden and Denmark*, in Student Pulse, an open-access online academic journal, 2011, VOL. 3 NO. 03, <http://www.studentpulse.com/articles/409/immigration-policy-and-controversy-in-sweden-and-denmark>

¹²⁰⁵ Cited by Kristian Weise, *The Danish People's Party takes stable centre-left voters*, Policy Network, 27 May 2014, http://www.policy-network.net/pno_detail.aspx?ID=4651&title=The-Danish-Peoples-Party-takes-stable-centre-left-voters

¹²⁰⁶ *Idem*. Civea is an independent centre-left think-tank, see <http://www.cevea.dk/english>

2 Implementation of Directive 2004/38/EC: General Assessment

2.1 National implementing legislation

In Denmark, most of the material provisions of the directive have been transposed in the EU Residence Order (2011).¹²⁰⁷ However, the right to entry and the conditions for expulsion are included in the Aliens Act (2014).¹²⁰⁸ Even though the Aliens Act applies to all foreigners alike, it explicitly states that 'the limitations provided for by this Act only apply to aliens falling within the EU rules to the extent that it is compatible with those rules' (Section 2(3)).

Overall, the transposition of the directive in the two above-mentioned legislative acts complies with its main requirements. However, it must be noted that the provision on equal treatment (Art 24, directive) has not been explicitly incorporated into the Danish implementing laws. Only the exceptions to equal treatment of Art 24(2) are explicitly or implicitly implemented in existing Acts. This is explained by the fact that equal treatment is a general principle in the Danish legal order, and therefore it was not considered necessary to include it also in the specific implementing legislation of the directive.

On some points, the Danish implementing laws have given an extensive interpretation to the provisions of the directive, making use of the 'room for manoeuvre' provided. This is particularly the case with respect to the definition of family members, since both registered partners and cohabitants (under certain conditions) are assimilated to spouses. Moreover, Denmark is one of the few EU member states who correctly provide for a more favourable treatment of jobseekers without formalities in relation to the right of residence under Article 6.¹²⁰⁹ To date, the Commission has not launched any infringement proceedings against Denmark with regard to the implementation of the directive.

2.2 Institutional context and complaint procedures

The competent agency to take decisions concerning the right of residence pursuant to EU-rules is the State Administration, which is part of the Ministry for Economic Affairs and the Interior.¹²¹⁰ The State Administration has nine local departments throughout the country, where applications for residence can be presented and information about the conditions for residence may be obtained. Complaints against decisions by the State Administration can be made to the Danish Immigration Service, which is an agency of the Ministry of Integration, Immigration and Housing.¹²¹¹ Hereafter, complaints can be brought before the Regional High Courts. As a final resort, the Supreme Court may be asked to pronounce itself on the interpretation and application of legal principles.

2.3 Administrative policies and guidelines

The Ministry of Justice and the Immigration Service provide detailed administrative guidelines setting out the specific rules and procedures for all situations covered by the directive.

¹²⁰⁷ Executive Order No. 358 on Residence in Denmark for Aliens Falling within the Rules of EU law of 21/4/2006 (*EU Opholdsbekendtgørelsen*) with further amendments. The Executive Order currently in force is No. 474 of 12 May 2011

¹²⁰⁸ Aliens (Consolidation) Act, No. 1021 of September 2014. A number of amendments have been made to the prior version (2013): <https://www.retsinformation.dk/forms/r0710.aspx?id=164258>

¹²⁰⁹ Report from the Commission to the European Parliament and the Council on the 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(2008) 840 final, of 10 December 2008, p.4

¹²¹⁰ <http://www.statsforvaltningen.dk/site.aspx?p=5466>

¹²¹¹ https://www.nyidanmark.dk/en-us/authorities/the_danish_immigration_service/

Moreover, the Ministry of Justice and (until 2011) the Ministry of Integration have regularly issued Briefing Notes clarifying specific points of the *EU Residence Order* and the *Aliens Act*, and the way certain provisions of these Acts must be implemented in the light of Judgments from the CJEU.¹²¹² This practice contributes to enhanced transparency of government policies, and provides clarity for both administrative services responsible for individual decisions, and for the public at large.

3 Specific Assessment: Interpretation of the Individual Provisions of the Directive

3.1 Personal Scope - To whom does it apply?

3.1.1 EU/EEA Citizens

Article 1(2) of the *EU Residence order*, states: "For the purposes of this Order, any EEA national or Swiss national is treated as the equivalent of an EU national."

3.1.2 Definition of family members

The *EU Residence Order* includes all categories of family members mentioned in the directive's Art 2(2).¹²¹³ As for the *definition of spouse/registered partner* (Art 2(2)(a) and (b, directive), a registered partner is assimilated to a spouse. Moreover, Section 2 (3) of the *EU Residence Order* stipulates that the provisions on spouses apply similarly in cases where a person above 18 years of age cohabits at a shared residence in regular cohabitation of prolonged duration with a principal person above 18 years of age. It is a pre-condition for the right of residence of a cohabitant that the principal person undertakes to support the applicant (Section 16). This is a transposition of Art 3(2)(b) of the directive, which refers to 'a durable relationship, duly attested'. Also *dependent relatives above the age of 21*, (Art 2(2)(c), directive), are considered as family members.

'*Other family members*' as mentioned in Art 3(2)(a) are recognised as well, but their rights are conditional upon demonstration of their economic dependency on the EU citizen, both in the home and the host State.¹²¹⁴ However, once these persons are recognised as 'other family members', they have the same rights as family members mentioned in Art. 2(2) of the directive.

3.1.3 Definition of economically active persons

According to Danish legislation, the category of 'economically active persons' includes, besides workers and self-employed persons, also former workers, jobseekers, providers of services ('seconded persons') and students.¹²¹⁵

¹²¹² E.g. Briefing Note of the Ministry of Justice of 11/1/2013 on practice regarding visas in force from 15/1/2013; Legal Interpretative Note of the Ministry of Justice of 14/8/2012 on the EFTA Court's judgment in the *Clauder* case (*Juridisk fortolkningsnotat om Clauderdommen*);

Briefing Note of the Ministry of Justice of 30/6/2011 on deportation on grounds of lack of sufficient resources or on the ground of protection of the public order; Briefing Note of the Ministry of Integration of 11/5/2011 on the legal implications of the *Zambrano* ruling. This note was later updated by the Ministry of Justice taking account of the cases *McCarthy*, C 434/09, *Dereci*, C 256/11, and *O and S*, C 356-357/11; Briefing Note of the Ministry of Justice of 3/5/2010 on reviewing negative decisions infringing Article 12 of Regulation 1612/68 and Art 12(3) of the Residence Directive following the Courts's rulings in *Ibrahim* and *Teixeira*; Briefing Note of the Ministry of Integration of 18/5/2009 on the right of permanent residence; Briefing Note of the Ministry of Integration of 17/3/2009, on the condition of dependency.

¹²¹³ *EU Residence Order* (2011), Section 2(2)

¹²¹⁴ For more details on the condition of dependency, see below, Section 3.1.5

¹²¹⁵ *EU Residence Order*, Sections 3, 4 and 5

3.1.4 *Definition of 'self-sufficiency'*

For non-economically active persons, the *EU Residence Order* imposes, in Section 6(1), the condition to have 'such income or means at his disposal for his support that he is presumed, upon specific assessment, not to become a burden on the public authorities', following Art. 7(1)(b) of the directive.¹²¹⁶ As specified in a Briefing Note on this subject, referring to Article 8(4) of the directive:¹²¹⁷

For the Danish administration of the rules this means that the requirement of "sufficient resources" will always be fulfilled if the person in question has a monthly amount at his or her disposal, which equals the minimum level of Danish Start Help. If the person in question on the other hand has a monthly amount at his or her disposal that lies below this level, this may not automatically lead to a denial of the application. Whether a residence right shall be granted or not will in the latter case depend on an assessment of the personal situation in the particular case.¹²¹⁸

The minimum level of Danish Start Help is depends on the family situation of the person concerned. The amount is only a starting point, and the authorities always carry out a concrete assessment. The amounts are as follows:

- 25 years old, married and cohabitants: 5.267 D.kr. per person
- 25 years old, single: 6.351 D.kr. per person
- Below 25 years old, not living with the parents: 5.267 D.kr. per person
- Below 25 years old, living with the parents: 2.618 D.kr. per person

The amounts differ depending on whether the person has children or not.

This same Briefing Note refers to two judgments from the CJEU, case C-200/02 *Zhu and Chen*¹²¹⁹ (noting the Court's conclusion that the condition of having sufficient resources is also met if the financial means are secured by a family member of the Union citizen), and C-408/03, *Commission v Belgium* (with reference to the Court's statement that it may not be required that the person who provides for the Union citizen is connected with the beneficiary by a legal link). It concludes that

Thus, it is neither possible to require that the Union citizen in question personally has the resources, nor that there exists a mutual obligation between the supporting person and the Union citizen pursuant to national law to provide such support.¹²²⁰

With regard to *students*, Danish policy complies with Article 7 (1) letter c and Article 8(3) point 3, which state that students may document the requirement of sufficient resources by a declaration and without referring to any specific amount.

¹²¹⁶ See also the Briefing Note of the Ministry of Justice of 30/6/2011 on deportation on grounds of lack of sufficient resources

¹²¹⁷ Article 8(4) states: "*Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.*"

¹²¹⁸ Briefing Note of the Ministry for Refugees, Immigration and Integration of 17 March 2009 on "sufficient resources" – Directive 2004/38 Article 7 (1) letter b, c, and d (*Summary and English translation by the research team*)

¹²¹⁹ Case C-200/02 *Zhu and Chen* [2004] ECR I-09925

¹²²⁰ *Idem*

With respect to the temporal extension of the condition of 'sufficient resources', it is required that this condition must be fulfilled continuously in order to preserve the right of residence as a self-sufficient person or student. This follows from Article 14 (2), which stipulates that the right of residence of a self-sufficient person is conditioned by the fulfillment of the requirements laid down in Article 7 (1) letter b.¹²²¹ If a person has sufficient resources for only a limited period of time, and after a few months it appears that he does not have such resources, his residence permit may be revoked. However, it is clearly established that the condition of 'sufficient resources' does no longer apply when a person has acquired permanent residence based on Article 16.¹²²²

Finally, section 6(2) of the *EU Residence Order* transposes the second condition of Article 7(1)(b), directive, by requiring that 'the person in question takes out health insurance covering the period until he becomes eligible for services under the Health Act.'

3.1.5 *Establishing 'dependency'*

As set out in a specific Briefing Note on the dependency criterion,¹²²³ a family member of an EU citizen, falling within the categories of Article 2(2) of the directive, and who applies for residency is considered to be 'dependent' on the EU citizen if the following criteria are fulfilled, which were established in light of the judgments of the CJEU in the cases *C-200/02 Zhu and Chen*, and *C-1/05 Jia*.¹²²⁴

- The family member in question shall not be in a position to support him- or herself and cover his or her basic needs, taking into consideration his or her financial and social conditions.
- The material needs of the person in question shall in the home country be covered by the Union citizen or his or her spouse.
- The need for material support must exist in the home country of the family member or in the State whence he or she came at the time when he or she applies to join the Union citizen or his or her spouse.
- The mere fact that the Union citizen or his or her spouse supports the family member in question does not prove that there is a genuine relationship of dependency.
- Any documentation may be provided in order to show that there is a need for material support.
- A document which is issued by an authority in the home country or the country whence the person in question came, and which shows that there is a relationship of dependency, may thus not constitute a necessary requirement for obtaining a residence right.

¹²²¹ *Idem*

¹²²² *Idem*

¹²²³ Briefing Note of the Ministry of Integration of 17/3/2009, on the condition of dependency (*Summary and English translation by the research team*)

¹²²⁴ *C-1/05 Jia* [2007] I-00001

For other family members (cousins, uncles etc.), direct descendants above the age of 21 or relatives in the ascending line of the Union citizen or his or her spouse, one of the following conditions must be met in order for the person in question to be covered by the directive, cf. Article 3 (2) point a:

- The person in question shall receive support from the Union citizen in the country whence he or she came,
- The person in question shall be included in the household of the Union citizen in the country whence he or she came, or
- Serious conditions relating to health make it absolutely necessary that the Union citizen personally cares for the person in question.¹²²⁵

3.2 Material scope - Which rights are covered, to whom do they apply and what do they entail?

3.2.1 *Rights against the host state*

3.2.1.1 Right of entry, right of residence for up to 3 months: Articles 5 and 6, directive¹²²⁶

The right of entry and the right of residence for up to 3 month are included in the *Aliens Act (2013)*, in Sections 2, 5(2) and 9, for EU/ EEA citizens and their family members, as outlined in the directive. For family members not having the nationality of an EU/EEA Member State (a Third Country National, or TNC), the *Aliens Act* and a Briefing Note of the Ministry of Justice¹²²⁷ require that the authorities apply an accelerated procedure (max 15 days) for visa applications, unless the situation is exceptional and duly justified. Visas are free of charge; no conditions of dependency or travel insurance can be imposed; only a valid passport and documentation of the family relationship can be required. The safeguards of Art 5(4), directive, are literally transposed in an Executive Order.¹²²⁸

As noted by E. Guild a.o.:

Although Article 6 does not impose any minimum financial resource requirement on migrant Union citizens, the right of residence conferred by this Article is only retained as long as Union citizens and their family members do not become an unreasonable burden on the social system of the host Member State. Equally, Member States are expressly authorized to limit access to social assistance during the first three months of residence.¹²²⁹

In Denmark, expulsion on grounds of lack of sufficient resources within the first 3 months can, since 2011, only be the consequence of the person requesting economic support from the state, but this in itself is not sufficient. Authorities need to consider whether, based on the personal circumstances of

¹²²⁵ *Idem*

¹²²⁶ The implementation of the right of exit, laid down in Article 4 of the directive, is not considered here since the focus of this study is on the rights to entry and residence

¹²²⁷ Briefing Note of the Ministry of Justice of 11/1/2013 on practice regarding visas in force from 15/1/2013

¹²²⁸ Briefing Note of the Ministry of Justice of 30/6/2011 on deportation on grounds of lack of sufficient resources or on the ground of protection of the public order under 1.5

¹²²⁹ Elspeth Guild, Steve Peers and Jonathan Tomkin (2014), *The EU Citizenship Directive: A Commentary*, (Oxford, Oxford University Press, 2014), p. 122, referring to Articles 14(1), 24(2) and recital 21 of the directive

the applicant, if he/she is an 'unreasonable burden.' Danish law was adjusted in 2011 with reference to *Grzelczyk*, C-184/89.¹²³⁰

Union citizens and their family members have no entitlement to social benefits within the first 3 months of their stay and for longer when the Union citizen is a first-time jobseeker. As the Act on Active Social Policy provides for public support to all persons in need that are lawfully residing in Denmark, an amendment to the Act was inserted in 2004 as a result of the EU's enlargement to the 10 new member states. It excludes short-term residents and jobseekers from entitlement to public support except from financial help to get back home. The Act explicitly excludes them from the entitlement to a non-contributory benefit ensuring a minimum means of subsistence (kontanthjælp).¹²³¹

3.2.1.2 Right of residence between 3 months and 5 years: Art 7, directive

Article 7 of the directive has been fully incorporated into the EU Residency Order, providing a detailed overview of which persons are entitled to a temporary right of residence, and under which conditions (Sections 3 - 12).¹²³²

Based on the *Aliens Act*, Section 25(b), illegal residence is a ground for expulsion, therefore, persons may be expelled if they cannot be considered *economically active* and do not fulfill the condition of *self sufficiency*. The right of residence of EU citizens or their family members may be terminated if they no longer fulfill the conditions for residence based on EU law.

3.2.1.2.a. Relevant jurisprudence and practice

In Denmark, expulsions on grounds of threats to public order or public security have sometimes been linked to economic considerations. For example, fines for minor offences (incl. 'squatting') were used as grounds for expulsion based on protection of public order. The Supreme Court has subsequently annulled these decisions.¹²³³

Moreover, recent practice has shown that the police has issued fines to, in particular, Roma people for illegal residence if they have not registered themselves after the first 3 months, and retaining them until they have paid their fine.¹²³⁴

3.2.1.2.b. Entitlement to social benefits

Entitlement to social benefits for all other Union citizens residing more than 3 months who are not workers or self-employed will be assessed case by case. According to the Act on Active Social Policy, as mentioned above, all persons lawfully residing in Denmark are entitled to public support if

¹²³⁰ Briefing Note of the Ministry of Justice of 30/6/2011 on deportation on grounds of lack of sufficient resources or on the ground of protection of the public order, available at https://www.nyidanmark.dk/NR/rdonlyres/A0CC770C-2298-47E3-9165-43178B582A72/0/notat_om_adgangen_til_ud_og_afvisning_af_eu_eos_statsborgere_30062011.pdf

¹²³¹ C. Jacqueson, 'Denmark', in U. Neergaard, C. Jacqueson and N. Holst-Christensen (eds.), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen, 2014*, Congress Publications Vol. 2, pp. 453-479 (hereafter: 'FIDE Report on Denmark'), at p. 461; Act No. 282 of 26/4/2004 inserting Sect. 12a in the Act No. 455 on Active Social Policy of 1997 (*Lov om aktiv socialpolitik*)

¹²³² See above, Sections 3.1.2.- 3.1.4, for further details on the definitions of family members, sufficient resources, and dependency

¹²³³ Supreme Court, Judgment of 31/3/13, Case 264/2010, U.2011.1794H

¹²³⁴ FIDE Report on Denmark, see above, note 1231, referring to information gathered from the Danish Charity Organization *Kirkens Korshaer*

the conditions for obtaining the benefit are fulfilled. Therefore, the central question whether the Union citizen is lawfully residing in Denmark.¹²³⁵ This issue has raised some concerns with respect to homeless persons who are nationals of other member states and who seek access to shelter homes. As noted by C. Jacqueson:

According to Danish law, shelter homes, which are to some extent State-funded, shall only accept persons who are legally residing in the country. In practice, lawful residence has in this respect been interpreted restrictively as excluding undocumented citizens (i.e. those who do not have a registration certificate, a residence card, or a Danish health card). (...) The authorities' underlying rationale is that such persons are in any event not lawfully residing in Denmark since they are requesting public support by using shelter homes. They do not fulfill the condition of self-sufficiency and are a burden on the social system.¹²³⁶

In her view, this rationale conflicts with the directive, especially Article 14, and also with the Ministry of Justice's own Briefing Note of 2011 on the possibility of expelling Union citizens who are requesting public support.¹²³⁷

3.2.1.2.c. Retention of the right of residence

The retention of the right of residence of family members in the event of death or departure of the EU citizen (Art 12, directive) has been transposed in Section 14 of the EU Residence Order. However, for TCN family members this retention of rights is conditional upon the person being economically active or self-sufficient, which is in line with the directive (Art. 12(2)). With respect to the right to remain for children of departed EU citizens who pursue an education in the host State (Art 12(3), directive), the Danish rules and practice were adjusted in 2010 and now comply with the judgments of the CJEU in *Ibrahim* and *Teixeira*, (C-310/08 and C-480/08),¹²³⁸ which confirmed this right of children in such a situation.¹²³⁹ Moreover, the retention of the right of residence of family members in the case of divorce, annulment of marriage or termination of registered partnership, (Art 13, directive) was transposed in EU Residence Order, Section 15, with the same condition for TCN family members as mentioned above (they must be economically active or self-sufficient). This is, again, in line with the directive (Art. 13(2)d). In Denmark a *de facto* separation does not have any effect on the residence right of the spouse or registered partner of the reference person. As long as the spouses are still married, or the registered partnership is still in force, Article 13 of the directive (as transposed in Section 15 of the EU Residence Order) does not apply; even when the spouses/partners do not live together any longer. This follows from C-267/83, *Diatta*.¹²⁴⁰

Text box 1 - Art. 13, directive and *de facto* separation

Art. 13(2), directive: <i>Retention of the right of</i>	– <i>De facto</i> separation does <i>not</i> have any
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¹²³⁵ See decisions of the Appeal Tribunal for Social and Employment Affairs (Ankestyrelsen) A-191-11 of 8/9/11, A-27-07 of 21/11/07; FIDE Report, p.461

¹²³⁶ FIDE Report on Denmark, see above, note 1231, at p. 462

¹²³⁷ *Idem*, Briefing Note of the Ministry of Integration of 30/6/2011 on deportation on grounds of lack of sufficient resources or on the ground of protection of the public order under 1.3 and 1.6

¹²³⁸ Case C-310/08 *Ibrahim* [2010] ECR I-01065 and Case C-480/08 *Teixeira* [2010] ECR I-01107.

¹²³⁹ Briefing Note of the Ministry of Justice of 3/5/2010 on reviewing negative decisions infringing Article 12 of Regulation 1612/68 and Art 12(3) of the Residence Directive following the Courts's rulings in *Ibrahim* and *Teixeira*

¹²⁴⁰ Case 264/83 *Diatta* [1985] ECR 00567

<i>residence of TCN family members in the case of divorce, annulment of marriage or termination of registered partnership</i>	<p>impact on the right of residence of a TCN spouse or registered partner</p> <p>– As long as the spouses are married or the registered partnership is in force, Article 13 does not apply even if the spouses/partners do not/no longer live together.</p>
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3.2.1.3 Right of permanent residence: Art 16, directive

This right is laid down in the *EU Residence Order*, Section 19 and further clarified in a Briefing Note of 2009.¹²⁴¹ It is granted to the same persons as foreseen by the directive, i.e. EU citizens and their family members (both family members who are themselves EU citizens, and those not having the nationality of a EU Member State), including cohabitants (see above, section 3.1.2.), who have resided legally in Denmark for a continuous period of five years.¹²⁴² According to the directive, the right of permanent residence is not conditional upon the person being economically active, on being self-sufficient, or on any other condition that may be required for residence between 3 months and 5 years. This has also been transposed into Danish law for EU citizens and their family members.

However, until mid- 2012 (EFTA Court, *Clauder*, E-4/11) the right of residence of *family members* was restrictively interpreted and enforced in Denmark. Until then, the EU citizen had to document being a worker or having sufficient resources to provide for his/her family. Following the *Clauder* judgment, the legislation was changed, and *family members, including TCN family members*, now have an unconditional right to reside with the permanently settled EU citizen. However, this only applies to family members (regardless of their nationality) or EU citizens. The 'old' practice still applies to *Third Country Nationals who are family members of another TCN* who has a permanent right of residence because of his/her relationship to a EU citizen. This difference is justified by the fact that

The EFTA Court does not decide on the possibility for family reunification with a reference person who is a third country national family member of an EU/EEA national, and who has obtained a right of permanent residence pursuant to Article 16 (2).¹²⁴³

Persons having obtained permanent residence in Denmark are entitled to the same social benefits as Danish citizens.

Moreover, following the CJEU's judgment in C-378/12, *Onuekwere*,¹²⁴⁴ time spent in prison is no longer considered as lawful residence when considering an application for a right to permanent residence. (Before that judgment, time in prison was considered as lawful residence in Denmark when deciding in such cases.) The same applies when the person in question has been sentenced to stay in a psychiatric hospital; this is *not* considered as lawful residence.

¹²⁴¹ Briefing Note of the Ministry of Integration of 18/5/2009 on the right of permanent residence

¹²⁴² As mentioned above in paragraph 2A, Danish law recognizes the same persons as family members as those mentioned in the directive: spouse, registered partner, children below the age of 21, dependent children above the age of 21, dependent other family members in an ascending line.

¹²⁴³ Legal Interpretative Note of the Ministry of Justice of 14/8/2012 on the EFTA Court's judgment in the *Clauder* case (*English translation by the research team*)

¹²⁴⁴ Case C-378/12 *Onuekwere* ECLI:EU:C:2014:13

Finally, the *administrative procedures of Articles 19-21 of the directive* are also transposed in the *EU Residence Order*. However, Danish law goes further than Art. 21, directive, since permanent residence also ends when it has been obtained fraudulently (e.g. through marriage of convenience or false declaration).¹²⁴⁵

Text box 1: Time spent in prison

<p>Since judgment CJEU C-378/12 <i>Onuekwere</i></p>	<ul style="list-style-type: none"> – Time spent in prison is <i>not</i> considered as lawful residence – Time spent in a psychiatric hospital as an alternative to a prison sentence is <i>not</i> considered as lawful residence either
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3.2.2 *Rights against the home state*

3.2.2.1 Rights of persons returning to the home State after a stay in another EU/EEA Member State and their family members - family reunification

When a Danish national who returns to Denmark after having resided in another EU/EEA State has a right to family reunification based on the free movement rules in the Treaty, the provisions of the directive will be applied by analogy (to define the protected family members, the length and the conditions for residence). However, as practice shows, Denmark has adopted a restrictive interpretation of the ECJ/CJEU's case law on family reunification. Indeed, Danish nationals need to demonstrate that they have genuinely and effectively resided in another MS (following from the *Metock* case, C 127/08), and thereafter the Immigration Service assesses on a case-by-case basis if this condition is fulfilled.¹²⁴⁶

3.2.2.1.a. *Relevant jurisprudence*

A few cases have reached the Courts. In the first case, a Danish couple returned to Denmark after 6 months in Germany, but the High Court found that EU law did not apply since the criterion of genuine and effective residence in Germany was not fulfilled. The High Court relied on the fact that the Danish national kept her apartment in Denmark while the couple resided in Germany, that she was frequently in Denmark where she worked at weekends, and that the plans of setting up a pizzeria in Germany were very loose. The court apparently suspected an abuse of EU law in order to circumvent the immigration laws.¹²⁴⁷

¹²⁴⁵ FIDE Report on Denmark, see above, note 1231, at p. 459; *EU Residence Order* 2009, section 32(2), which states: '(2) Subsection (1) hereof applies correspondingly in the event of abuse of rights, if the basis for issue of a person's registration certificate or residence card was incorrect, or the person in question obtained the registration certificate or residence card by fraud, including by virtue of a marriage of convenience.' According to Subsection (1), 'the competent authority, (...) shall decide whether the person in question may still reside in Denmark.'

¹²⁴⁶ FIDE Report on Denmark, see above, note 1231, at p. 469

¹²⁴⁷ Western High Court, Judgment of 27/3/2012, B-1173-11, U.2012.2187V, cited in FIDE Report on Denmark, see above, note 1231, at p.469

Another case of 2013 concerned an application for family reunification in Denmark between a Danish national and his Philippine spouse.¹²⁴⁸ The Danish national had for a period of time, shared the same address as his spouse in Sweden. The question for the Court was whether the couple had "established" themselves in Sweden. Documentation showed that he had left Denmark and was registered in Sweden between 1 February 2011 and 15 June 2011. He had obtained a residence card from the Swedish authorities. Other documentation included a tenancy agreement for a flat in Helsingborg (Sweden), receipts for payment of rent and a tenancy agreement that showed that he had rented out his premises in Denmark in this period. He had also set up a bank account in Sweden, to which 18000 Swedish kronas were transferred. Tickets that showed travelling to Helsingborg were also provided, and the address in Helsingborg was indicated in his car insurance. However, the Court concluded that the documentation was not sufficient to show that the Danish national had established a genuine and actual stay in Sweden. The Court pointed out that the documentation did not show that he had received income from renting out his premises in Denmark, and that the couple had the possibility to stay in the lower floor when in Denmark. Further, no bank transcripts had been provided which showed to what extent card or cash payments had been made in Sweden or in Denmark. Also, transcripts that showed cell phone activity in Denmark/Sweden had not been provided.

3.2.2.1.b. Practice adjusted to CJEU Judgments in *Eind* and *O. and B.*

It should be mentioned that Denmark adjusted its practice after the CJEU judgments in two cases: first to Case C-291/05, *Eind*,¹²⁴⁹ and recently (2014) to one particular aspect of Case 456/12 *O. and B.*¹²⁵⁰ Indeed, in 2008, Danish practice was changed with following the Court's consideration in *Eind*, that

(A) citizen of a country outside the EU (like the daughter in the case) has a right of family reunification, even though the father (the EU citizen) does not carry out any effective and genuine work when returning to his home state (the Netherlands).

Therefore, when assessing the residence rights of foreign nationals applying for family reunification with a Danish national who has exercised his or her right of free movement, since 2008 it is no longer a condition that the Danish national after his or her return subsists as a worker, self-employed person or service provider, or retired worker, self-employed person or service provider.

With respect to the CJEU's Judgment in Case 456/12, *O. and B.*, the Ministry of Justice has declared in a specific Briefing Note, to be of the opinion that the Danish requirement of becoming established is in accordance with the conclusions of the judgment, and that it therefore is not necessary to make adjustments or changes in this respect. According to the relevant Briefing Note,¹²⁵¹ the requirement of "genuine residence" is considered to be identical with the requirement of becoming established stipulated in the Case C-127/08 *Metock*¹²⁵² and developed in Danish practice. In the judgment the CJEU uses the formulation "family life is created or strengthened" to describe the character of the stay which is required in order to obtain a derived right of residence pursuant to TFEU Article 21(1).

¹²⁴⁸ District Court of Lyngby, Judgment of 21 October 2013, see <http://www.domstol.dk/lyngby/nyheder/domsresumeer/Pages/AegtefaellesammenfoerigfterEU-reglerneafvist.aspx>

¹²⁴⁹ Case C-291/05, *Eind* [2007] I-10719

¹²⁵⁰ Case 456/12 *O. and B.* ECLI:EU:C:2014:135

¹²⁵¹ Briefing Note from the Ministry of Justice of 26 May 2014 on the interpretation of case C-456/12, *O. and B.* and case C-457/12, *S. and G.* (Summary and English translation by the research team)

¹²⁵² Case C-127/08 *Metock* [2008] I-06241

The Ministry of Justice considers that the expression contributes to the description of "genuine residence" and, consequently, no independent or different meaning shall be attributed to it.¹²⁵³

However, Danish practice has been adapted to another point raised by the CJEU in *O. and B.* The Briefing Note recalls that the CJEU, in paragraph 50 of this judgment, that

(...) when a Union citizen returns to the Member State of which he is a national, the conditions for granting family reunification based on Article 21(1) TFEU solely by virtue of the reference being a Union citizen in the host Member State together with the family member in question, should not be more strict than those provided for by Directive 2004/38 for the grant of such a right of residence to a third country national who is a family member of a Union citizen in a case where that citizen has exercised his right of freedom of movement by becoming established in a Member State other than the Member State of which he is a national.¹²⁵⁴

Thus, it is held that

(a)ccording to the Directive a requirement of having sufficient resources may not be applied regarding core family members of a worker in Denmark who is a national of another Member State. It is therefore considered that there is a need to adjust the practice concerning the resources-requirement in those situations where the Danish national has stayed in another EU country as a non-economically active person, and where the person in question at his or her return changes status from economically inactive to economically active as a worker or self-employed person.¹²⁵⁵

The adjustment means that there is no longer a requirement of sufficient resources to provide for core family members in such a situation – as is the case for EU nationals who have the status of workers in Denmark. However, the requirement of sufficient resources may still be applied where the Danish national at his or her return has not changed status from economically inactive to economically active.

3.2.2.2 Rights of caretakers of minor citizens (involving cross-border element) (*Alokpa, Zhu Chen*)

It has not been possible to find any specific information on this point for Denmark.

3.2.2.3 Cases with no cross-border element (*Zambrano* case)

In Denmark, the EU free movement provisions are, in principle, only applicable if there is a cross-border element. Only in exceptional situations, EU law might apply in purely internal situations (Art 20 TFEU and case C-34/09 *Zambrano*¹²⁵⁶). The legal implications of *Zambrano* and subsequent cases are very narrow.¹²⁵⁷ Indeed, the *Zambrano* ruling only applies to cases where the decision of the Danish authorities would lead to the departure of the EU citizen child. The following criteria must be fulfilled: (1) the case concerns the right of residence of a parent of a Danish child, (2) the parent is a TCN; (3) the parent lives with the EU citizen and provide for his/her needs; (4) refusing

¹²⁵³ *Idem*

¹²⁵⁴ *Idem*

¹²⁵⁵ Briefing Note of 26 May 2014, see above, note 1251

¹²⁵⁶ Case C-34/09 *Zambrano* [2011] ECR I-01177

¹²⁵⁷ Briefing Note of the Ministry of Integration of 11 May 2011 on the legal implications of the *Zambrano* ruling. this note was later updated by the Ministry of Justice taking account of the cases C-434/09 *McCarthy*, C-256/11 *Dereci*, C- 356/11 *O. and B.*, and C-357/11 *S. and G.* (FIDE Report on Denmark, see above, note 1233, at p. 470)

a right of residence to the parent would lead to the departure of the child from the EU (which is most likely when there is no other parent with whom the child can live, (5) the parent does not need to be the biological parent, but can be another adult on whom the child is dependent.¹²⁵⁸ In the exceptional situation in which a Danish child is obliged to leave the EU, then the TCN will be granted a right of residence based on Art 20 TFEU. However, since the directive is not applicable to these situations, Denmark will not apply it by analogy, and its provisions will not be binding for the authorities.¹²⁵⁹

3.2.2.4 Rights against home- and host state of commuters and their family members

According to a Briefing Note of 2008,¹²⁶⁰ the Ministry of Integration is of the opinion that the CJEU's judgment in case C-60/00 *Carpenter*¹²⁶¹ does not mean that Danish nationals who provide services to nationals in other EU countries generally are entitled to be unified with third country family members in Denmark. Considering that the *Carpenter* case is based on a very specific assessment, the Ministry established that this judgment can only be applied to cases with similar circumstances. In particular, the following factors are of significant importance when assessing cases in light of the *Carpenter* judgment:

- Whether the spouse (the third country national) has entered legally
- Whether the case concerns partly the provision of services from the home country and partly business travels to the other EU countries to which the services are provided
- Whether the provision of services constitutes a large part of the professional activities of the person in question, partly in the Member State of origin and partly in other Member State
- Whether the purpose of the marriage/registered partnership/cohabitation is not solely to obtain an independent right of residence for the applicant
- Whether the couple has established a genuine family life in Denmark.¹²⁶²

According to a more recent Briefing Note of 2014,¹²⁶³ Danish practice needs to be adjusted to the judgment of the CJEU in C-457/12, *S. and G.*¹²⁶⁴ According to this note, the new practice will *firstly* cover (family members of) Danish nationals, who live in Denmark, but are workers in another Member State and therefore regularly travel to this other state. It is a condition that the person in question exercises activities in the other Member State to such an extent that the conditions for being regarded as a worker pursuant to TFEU Article 45 are met. This assessment corresponds to the assessment that is made when deciding whether a Danish worker before returning to Denmark has resided in another Member State as a worker. The new practice will *secondly* cover (family members of) Danish nationals, who live in Denmark and who are employed by an employer domiciled in Denmark, but who within the framework of their employment contract exercise professional activities in another Member State. In this respect, it must be assumed that the employment presupposes that a certain part of the work is to be performed in another Member State, and that an incidental temporary concentration of work-related travels for a shorter period of time is not enough.

¹²⁵⁸ In accordance with C- 356/11 *O. and B.* and C-357/11 *S. and G.*, cited in FIDE Report on Denmark, see above, note 1231, at p. 470

¹²⁵⁹ Briefing Note of 11 May 2011 on the interpretation of the Zambrano judgment (case 34/09), revised 22 June 2012 and 15 July 2013 due to subsequent case law

¹²⁶⁰ Briefing Note from the Ministry of Refugees, Immigration and Integration of 2 October 2008 on the interpretation of case C-127/08 *Metock* (English translation by the research team)

¹²⁶¹ Case C-60/00 *Carpenter* [2002] I-06279

¹²⁶² Briefing Note of 2 October 2008

¹²⁶³ Memo of 26 May 2014 on the interpretation of case C-456/12, *O. and B.* and case C-457/12, *S. and G.* (Summary and translation by the research team)

¹²⁶⁴ Case C-457/12, *S. and G.* ECLI:EU:C:2014:136

It is pointed out that the Union citizen in the case C-457/12, *S. and G.*, used 30 percent of his time to prepare and carry out travels to Belgium, and travelled there at least once a week.

For both groups of persons, family reunification may be conditioned on the fact that such reunification is *necessary* in order to secure that the Union citizen actually can exercise his free movement rights. According to paragraph 43 of the judgment (C-457/12 *S. and G.*), the fact that the third country national in question takes care of the Union citizens' child may be a relevant factor. At the same time, the CJEU notes that in the *Carpenter* judgment, the child was taken care of by the Union citizen's spouse. The mere fact that it might appear desirable that the child – in this case – be cared for by S., who is the mother of the Union citizen's spouse, is not sufficient in itself to constitute a dissuasive effect. The threshold to regard family reunification with other family members than close family members as "necessary" would therefore be higher. The Briefing Note concludes that in any case, it may be required that the third country national has entered Denmark legally and that the Union citizen and the third country national establish a genuine relationship of cohabitation in Denmark, cf. the current practice regarding the *Carpenter*-situation.¹²⁶⁵

3.2.3 *Restrictions on the freedom of movement and residence: refusal of entry or residence; expulsion measures; re-entry bans*

3.2.3.1 Refusal of entry or residence

According to the *Aliens Act*, Section 28, for EU citizens, access and residence for the first three months can be refused by administrative decision if the citizen constitutes a threat against public order, security or health, if they have a prohibition from re-entering the country, or if they cannot provide for their own needs.

Moreover, the EU Residence Order, Section 23(2), states that an application for a registration certificate (right of residence beyond the initial period of three months) may be refused on grounds of public policy, public security or public health, or in case of abuse of rights or fraud.

3.2.3.2 Expulsion measures

Expulsion of EU/EEA nationals is regulated in the *Aliens Act* (2013), which is applicable to all foreigners. The *principle of proportionality* (Art. 27(2), directive), according to which a decision of expulsion must be based on the personal conduct of the individual concerned; that a prior criminal conviction is not a sufficient ground; and that the conduct giving rise to an expulsion decision must constitute a genuine, present and sufficiently serious threat to a fundamental interest of society, is incorporated in the *Aliens Act*, Chapter 4, Sections 22-25. The expulsion rules are complex but based on the rationale: 'the longer the stay, the more serious the offense should be'.¹²⁶⁶ The offenses for which expulsion is justified are specified in the *Aliens Act*, Sect. 25b.

3.2.3.2.a. *Relevant national case law*

– *Expulsion of persons residing in Denmark for less than 5 years*

In two national cases that reached the Supreme Court, illegal residence was considered to render the person concerned a serious threat to the public order and security. Personal circumstances and

¹²⁶⁵ Memo of 26 May 2014, see above, note 1263

¹²⁶⁶ FIDE Report on Denmark, see above, note 1231, at p. 463

integration in Denmark did not change this assessment. In the first case,¹²⁶⁷ concerning an Iraqi citizen who was married to a EU citizen legally residing in Denmark, the Supreme Court first considered that the foreigner fulfilled the conditions for expulsion in the *Aliens Act*. It then added that the offenses (use of a false identity card in order to manufacture a right to residence and work, and illegal residence and work) made the person a genuine, present, and sufficiently serious threat to fundamental interests of society pursuant to the directive, which can justify expulsion for 6 years.

In a second case,¹²⁶⁸ the Supreme Court held that the expulsion of a Ghanaian national, who was condemned to 50 days in prison for using a false ID card, illegal residence and illegal work, was not breaching the principle of proportionality, since his link to Denmark was established illegally. Moreover, he was not living together with his Polish spouse at the time of his arrest, and his spouse should have been aware that he was residing illegally in Denmark.

Thus, as argued by C. Jaqueson, "in such cases it will be difficult to prove that expulsion is disproportionate; the argument used is that the link to Denmark has been established illegally and is not worth protection."¹²⁶⁹ However, it would seem that the ground for expulsion is the fact that using a false identity document is a serious offence included in the Penal Code, the commission of which is considered as a threat to the public order.

Text box 3 - Supreme Court judgments on the use of false identities

<p>Case 364/2010 (7 April 2011)</p> <ul style="list-style-type: none"> • Residence < 5 years • Link to Denmark was established illegally • Defendant had a spouse, one child and expecting another child in Denmark 	<ul style="list-style-type: none"> – Use of a false identity card in order to obtain a right to residence and work, and – Illegal residence and work <p>→ Made the person a genuine, present, and sufficiently serious threat to fundamental interests of society</p> <p>→ <i>Expulsion</i></p>
<p>Case 58/2012 (24 August 2012)</p> <ul style="list-style-type: none"> • Residence < 5 years • Link to Denmark was established illegally • Defendant (TCN) did not live together with his Polish wife 	<ul style="list-style-type: none"> – Use of false identity card, and – Illegal residence and work <p>→ Made the person a genuine, present, and sufficiently serious threat to fundamental interests of society</p> <p>→ <i>Expulsion</i></p>

– *Types of offences (residence of less than 5 years)*

¹²⁶⁷ Judgment of the Supreme Court of 24/8/12 in case 58/2012, reported in U.2012. 3399H

¹²⁶⁸ Judgment of the Supreme Court of 7/4/2011 in case 364/2010, reported in U.2011.2014H

¹²⁶⁹ FIDE Report on Denmark, see above, note 1231, at p.464

Some offences that were *not* considered sufficiently serious to justify expulsion include the import and sale of fireworks (4,5 months prison), violence against an airport officer (30 days prison), possession of a knife, and 'squatting' a home.¹²⁷⁰

On the other hand, *offences that were considered sufficiently serious to justify expulsion* are:¹²⁷¹

- Repeatedly driving under influence of alcohol (Eastern High Court: deportation was proportional since there was no evidence that the Polish national concerned was residing in Denmark, and he had no recent contact with his family residing there);¹²⁷²
- Stealing in shops using an 'alarm proof' bag (Supreme Court: criminality was part of a pattern and prior convictions in the home country of the person concerned);¹²⁷³
- Stealing in supermarkets (Supreme Court: the Polish nationals concerned had no link to Denmark, so expulsion was considered justified).¹²⁷⁴

– *Expulsion on serious grounds of public policy or security*¹²⁷⁵

Furthermore, there are some national cases, which involved a threat to public order and residence of the person concerned for a period longer than 5 years. In this regard, Art. 28(2) of the directive stipulates that expulsion measures are *not allowed* against EU citizens and family members who have a right of permanent residence, except *on serious grounds of public policy or security*. The Danish cases concerned the following offences:

- Repeated violence against persons (Eastern High Court: the Lithuanian national had committed several offences, he was twice sentenced to 3 months prison, therefore he was considered as a serious threat against public order, which led to expulsion for 3 years);¹²⁷⁶
- Repeated offences of fraud (Eastern High Court: a Spanish national was convicted to 4 months in prison for 13 offences using false names, false credit cards and making false declarations to the police). Reference was made to the Judgment of the CJEU in *Olazabal C 100/01* and to Art 27(2), and paras 23 and 24 of the Preamble of the directive, which require that the degree of integration of a person in the host State must be taken into account in expulsion decisions. The High Court found that expulsion was justified despite the fact that the person concerned had lived in Denmark for two years, and because the person's systematic criminal behavior made him a genuine, present, and sufficiently serious threat against the public order.¹²⁷⁷

– *Expulsion on imperative grounds of public security*

¹²⁷⁰ Western High Court, Judgment of 21/2/02, S-0310-02, U.2002.1080V; Eastern High Court, Judgment of 3/8/09, U.2009.2834Ø; Eastern High Court, Judgment of 12/4/10, S-2958-09, U.2010.2082Ø; Supreme Court, Judgment of 31/3/13 in case 264/2010, U.2011.1794H

¹²⁷¹ Cases mentioned in FIDE Report on Denmark, see above, note 1231, at p. 466

¹²⁷² Eastern High Court, Judgment of 14/3/12, S-328-11, U.2012.2231Ø

¹²⁷³ Supreme Court, Judgment of 29/12/08, case 170/2008, reported in U.2009.813H

¹²⁷⁴ Supreme Court, Judgment of 19/10/09 in case 425/2008, U.2010.250H

¹²⁷⁵ Cases mentioned in FIDE Report on Denmark, see above, note 1231, at p. 466-467

¹²⁷⁶ Judgment of the Eastern High Court of 29/1/09, S-3604-08, reported in U.2009. 1137Ø

¹²⁷⁷ Judgment of the Eastern High Court of 22/5/08, S-1196-08 reported in U.2008. 2079OE

Danish courts have decided several cases involving expulsion on imperative grounds of public security. One of these cases concerned a Slovakian national sentenced to 4,5 years of prison for theft and violence against persons. The seriousness of the offences and a prior conviction for 5 years were considered to be such that expulsion was necessary, although he had resided in Denmark for a period exceeding 10 years and was well integrated. (Western High Court).¹²⁷⁸

Another case resulted in the expulsion of a Croatian national who was sentenced to 5 years prison for robbery and was previously imprisoned for similar offences; he had also been sentenced to expulsion, but the sanctions were suspended. The person's strong links to Denmark could not outweigh the seriousness of the criminal acts (Eastern High Court).¹²⁷⁹

3.2.3.3 Re-entry bans

The length of the re-entry ban varies according to different situations. A permanent re-entry ban is imposed if: (i) the alien must be deemed a danger to national security; or (ii) the alien must be deemed a serious threat to public order, safety or health.¹²⁸⁰ Otherwise, according to section 32(2) of the *Aliens Act*, a re-entry ban in connection with expulsion is imposed as follows:¹²⁸¹

- (i) For 4 years if the alien is sentenced to suspended imprisonment or is sentenced to imprisonment for not more than 3 months or other criminal sanction involving or allowing deprivation of liberty for an offence that would have resulted in a punishment of this nature or duration;¹²⁸²
- (ii) For 6 years if the alien is sentenced to imprisonment for more than 3 months, but not more than 1 year, (*)
- (iii) For 12 years if the alien is sentenced to imprisonment for more than 1 year, but not more than 2 years, (*)
- (iv) Permanently if the alien is sentenced to imprisonment for more than 1 year and 6 months, but not more than 2 years, (*) unless a basis is found for imposing a re-entry ban for 12 years only; or for
- (v) Permanently if the alien is sentenced to imprisonment for more than 2 years (*)

Moreover, a re-entry ban in connection with expulsion under section 25b of the *Aliens Act* (which refers to expulsion of an alien who is staying in Denmark without the requisite permit, or who has been ordered to depart from Denmark immediately, or who fails to depart in accordance with the time limit for departure), may be imposed for 5 years if the alien is not a national of one of the countries mentioned in section 2(1) (third-country nationals) and has entered Denmark in violation of a re-entry ban previously imposed in connection with expulsion under section 25b.¹²⁸³

¹²⁷⁸ Western High Court, Judgment of 13/11/08, S-1421-08, U.2009.581V, cited in FIDE Report on Denmark, see above, note 1231 at p. 467

¹²⁷⁹ Eastern High Court, Judgment of 26/8/13, S-4062, cited in FIDE Report on Denmark, see above, note 1233 at p. 468

¹²⁸⁰ *Aliens Act*, Article 32(4)

¹²⁸¹ This paragraph refers to re-entry bans in connection with expulsions based on Sections 22-24 of the *Aliens Act*, which specify the conditions for expulsion according to the length of legal residence in Denmark

¹²⁸² The phrase "or other criminal sanction involving or allowing deprivation of liberty for an offence that would have resulted in a punishment of this nature or duration" is added also in the next paragraphs; in order to shorten the citation this will be indicated with "(*)"

¹²⁸³ *Aliens Act*, section 32(2), under 4

Finally, according to the *Aliens Act* section 32 (8), a re-entry ban imposed on a national of a Member State of the European Union or an alien covered by the EU regulations, may be lifted if particular reasons make it appropriate. The *Aliens Act* section 32 (8) implements Article 32 of Directive 2004/38/EC. In Danish case law, it has been established that when assessing whether there are particular reasons, the focus must be on, *inter alia*, the time that has elapsed since the issuance of the re-entry ban, the duration of the re-entry ban and the existence of substantial new facts in the case.¹²⁸⁴

3.2.3.4 Abuse or fraud: Article 35 of the directive

In Denmark, Article 35 of the directive has been transposed in the EU Residence Order, Section 30 (3), which states that a right of residence will end " (...) in the event of abuse of rights, if the basis for issue of a person's registration certificate or residence card was incorrect, or the person in question obtained the registration certificate or residence card by fraud, including by virtue of a marriage of convenience."

As shown above (paragraph 3.2.3.2.a, false representation or illegal residence has led in a few cases to expulsion on grounds of a threat to the public order and security (Article 27, directive). However, no cases have been reported involving marriages of convenience.

3.2.4 Case study

a) *Facts of the case: example from Norway*

Rejected asylum seekers have the obligation to leave Norway. An asylum seeker stays illegally in Norway for 3 years, and then marries a Norwegian citizen. The rejected asylum seeker is then expelled and imposed a 5 years entry ban in conformity with Norwegian legislation (The Immigration act, provisions relevant for third country nationals). The new formed couple travels to Sweden, lives there for 7 months, and returns to Norway shortly after. The third country national/former asylum seeker, now a family member of a EEA citizen, requires to be registered in Norway as a family member of a EEA citizen. Norwegian authorities refuse to lift the re-entry ban due to his adverse immigration history. The administrative decision of refusal to lift the entry ban merely points to the fact that the person committed a grave violation of the provisions in the Immigration Act.

b) *Denmark*

Directive 2004/38/EC is implemented in Danish law by order no. 474 of 12 May 2011 (*EU Residence Order*), as amended by Executive Order no. 305 of 28 March 2014 on Residence in Denmark for Aliens covered by the EU-regulations.

If, when applying for a right of residence under EU regulations a third-country national has a re-entry ban, it must be assessed whether the reason for the ban means, that the application must be refused with regard to public order, security or health, cf. *EU Residence Order* section 26 (3), which implement Article 27 (1) of the Directive 2004/38/EC. According to section 38 of the *EU Residence Order*, implementing Article 27 (2) of the Directive 2004/38/EC, decisions made on grounds of public policy or public security must comply with the principle of proportionality and must be based exclusively on personal behavior. Previous criminal convictions cannot in itself be the reason for such a decision. The personal conduct must represent a genuine, present and sufficiently serious

¹²⁸⁴ Information received from a representative of the Danish Immigration Service

threat affecting one of the fundamental interests of society. Justifications not relating to the case or that have general prevention shall not be used.

If the third country national, after this assessment, can grant right of residence under EU regulations, it has to be determined whether the entry ban may be lifted based on the *Aliens Act* section 32 (8) (Act no. 1021 of 19 September 2014), from which it follows, that a re-entry ban imposed on a national of a Member State of the European Union or an alien covered by the EU regulations, may be lifted if particular reasons make it appropriate. The *Aliens Act* section 32 (8) implements Article 32 of Directive 2004/38/EC. As already mentioned above (paragraph 3.2.3.3.), in Danish case law it has been established that when assessing whether there are particular reasons, the focus must be on, *inter alia*, the time that has elapsed since the issuance of the re-entry ban, the duration of the re-entry ban and the existence of substantial new facts in the case.

4 Conclusion

The transposition of Directive 2004/38/EC into Danish national law is for the most part completed and on some points, including the definition of family members, the Danish interpretation goes beyond the minimum criteria of the directive. Denmark continuously adapts its legislation and administrative practice following judgments of the CJEU.

An example of 'good practice' that may serve as an example for other States is the regular issuing of Briefing Notes by the Ministry of Justice and the Ministry of Refugees, Immigration and Integration, which provide detailed information on the government's interpretation of new judgments of the CJEU and on how this interpretation must be followed in administrative decisions.

The report also shows that Denmark has adopted a restrictive approach towards granting residence rights based on primary EU law on the free movement of persons, thereby also interpreting the relevant case law of the CJEU in a restrictive manner. At the same time, the grounds for expulsion are broadly interpreted, in particular the public order and security criteria, which has given rise to a substantial body of national case law. Therefore, it seems that the Danish attitude towards the concept of EU citizenship, and the rights (for EU/EEA citizens and their family members), and duties (for the government and its organs) that it entails, is rather cautious.

Country Study Iceland*

1 Introduction

Even though in Iceland the implementation process of Directive 2004/38/EC (hereafter: 'the directive') has taken longer than in other states, with the latest legislative amendments of 2014, this process is now virtually completed. After a detailed and critical review by the EFTA Surveillance Authority (hereafter: 'the Authority'), which issued a Reasoned Opinion to Iceland in December 2012,¹²⁸⁵ considerable efforts have been made at the national level to bring the legislation in line with the requirements of the directive. In January 2015, the Authority has closed the case and declared to be satisfied with the outcome of the legislative amendments. In Annex 1, a comprehensive overview is provided of all the points raised by the Authority, and of the corresponding legislative amendments.

Moreover, there are two judgments from the EFTA Court which directly concern Iceland's implementation of the Directive, case E-15/12 *Wahl*¹²⁸⁶ and case E-26/13 *Gunnarsson*.¹²⁸⁷ The main points of these judgments are presented in Annex 2.

1.1 General public attitude towards immigration and free movement

Icelandic attitudes to immigration depend to a considerable extent on the geographical origin of the immigrants in question, according to an opinion poll conducted by Maskína published in September 2015.¹²⁸⁸ While 72% of Icelanders are actively 'in favour' of immigration from countries in Western and Northern Europe, just 43% take the same view when it comes to immigrants from the Middle East. The most 'welcome' groups, according to the poll, are Western and Northern Europe (72% in favour), North America (66%) and Australasia (59%). The least 'welcome' groups are the Middle East (34% against), Africa (26%) and Asia (22%).¹²⁸⁹ At the same time, a significant number of Icelandic people signed up to a facebook page created by author and professor Bryndis Bjorgvinsdottir requesting the Government to increase the number of refugees from Syria to be received in Iceland, and inviting people to provide some form of support to these refugees themselves: 12.000 on a population of around 330.000 people.¹²⁹⁰ However, for the purpose of this study, the fact that almost three quarters of the population welcome immigrants from Northern and Western Europe, as mentioned above, is particularly significant as well.

* The author would like to thank Rósa Dógg Flosadóttir, Senior Legal Officer at the Icelandic Ministry of the Interior, for her substantial help in collecting the information presented in this study, and Ruta Janeckaite, EFTA Surveillance Authority, for the details provided during an interview held on 2 June 2015. However, the responsibility for the content of this Country Study remains entirely with the author

¹²⁸⁵ EFTA Surveillance Authority, Reasoned Opinion, see above, note 1001

¹²⁸⁶ Case E-15/12, *Wahl* [2013] EFTA Ct. Rep. 534

¹²⁸⁷ Case -26/13 *Gunnarsson* [2014] EFTA Ct. Rep. 254

¹²⁸⁸ http://icelandmonitor.mbl.is/news/politics_and_society/2015/09/18/immigrant_origin_an_issue_for_icelanders/. Maskína is an Icelandic organisation specialised in public opinion and market research, member of ESOMAR, <http://www.maskina.is/en>

¹²⁸⁹ *Idem*

¹²⁹⁰ <http://edition.cnn.com/2015/09/02/europe/europe-migrants-welcome/>

1.2 Summary of main conclusions

In Iceland Directive 2004/38/EC has, for the most part, been incorporated into national law, especially after a legislative revision in 2014, by which several new provisions were included into the Act on Foreigners, and in the Regulation on Foreigners. Due to Iceland's geographic situation and, as a consequence thereof, the relatively small number of applications for residence from EEA/EFTA nationals, the Icelandic authorities have not been confronted with all situations covered by the CJEU's jurisprudence. In particular, applications for residence based on articles 20 and especially 21 of the TFEU, which do not fall within the scope of the directive, have not been introduced in Iceland so far. As a result, the relevant case law of the CJEU has not been incorporated into Icelandic law, and no administrative guidance has been issued for such situations. A general total revision of the Act on Foreigners is currently ongoing, and this opportunity is also used to review the EEA Chapter once again to complete the adaptation of the relevant legal framework to the requirements of the directive.

2 Implementation of Directive 2004/38/EC: General Assessment

2.1 National implementing legislation

The main implementing legislation in Iceland consists of the following Acts:

- 1) Act No.96/2002 on Foreigners of 1 January 2003, with a series of amendments:
 - Act No. 86/2008 of 1 August 2008
 - Act No. 83/2012 of 29 June 2012
 - Act No. 64/2014 of 6 June 2014
- 2) Regulation on Foreigners No. 53/2003 of 23 January 2003
- 3) Amended on 17 December 2014 with Regulation No.1182/2014 Act No. 97/2002 on Foreigners Right to Work of 10 May 2002
- 4) Act on the Right to Free Movement and Residence of Workers within the EEA Area No. 105/2014

When drafting the amendments of the Act on Foreigners and of the Regulation on Foreigners, the Icelandic legal experts closely cooperated with the Authority in order to ensure that the proposed formulations covered the requirements of the directive. Also the implementing legislation from other EEA States was consulted, in particular that of Norway.

2.2 Institutional context and complaint procedures

The implementation of the directive falls under the competence of the Ministry of the Interior and the Ministry of Welfare, although the responsibility for most of the legislative amendments was in the hands of the Ministry of the Interior. The Ministry of Welfare is responsible for the implementation of all aspects of the directive related to work and social security.

The agency 'Registers Iceland' has the task, since 2008, to register EEA/EFTA nationals who have a right to stay in Iceland. The Icelandic Directorate of Immigration is responsible for issuing residence cards to TCN family members, and for establishing the right of permanent residence of EEA/EFTA nationals. The Directorate of Immigration also handles all matters related to the restriction of the right to free movement. Both the Directorate, and Registers Iceland fall under the authority of the Ministry of the Interior.

Since 1 January 2015, appeals against all decisions taken on the basis of the Act on Foreigners No. 96/2002 can be brought before the newly established Immigration Appeals Board. However, appeals

against decisions on expulsion based on a threat to the public order or public security can only be referred to the Ministry of the Interior. Prior to January 2015, the Ministry of the Interior served as an appeals body in all cases.

2.3 Administrative policies and guidelines

Administrative guidance on how to comply with the latest legislative amendments are provided through informal channels by the Ministry of the Interior; formal administrative guidelines have not been issued. Such official guidance may be issued when the Ministry of Welfare has clarified some questions as to when a person is considered to be an 'unreasonable burden' on the social welfare system.¹²⁹¹

3 Specific Assessment: Interpretation of the Individual Provisions of the Directive

3.1 Personal Scope - To whom does it apply?

3.1.1 EEA/EFTA nationals

Art 35 of the Act on Foreigners lays down the general scope of the Chapter stating that it regulates the right to enter and stay in the realm of foreign nationals covered by the EEA Agreement (EEA nationals) or the EFTA Convention (EFTA nationals).

3.1.2 Definition of family members

Family members are defined in article 35b of the Act on Foreigners. They include all the categories mentioned in Article 2(2) of the directive:

1. The *spouse* or *cohabitant* of the EEA/EFTA citizen, if the cohabitation is registered or can be established by other means;
2. *Direct descendants of the EEA/EFTA citizen or his/her cohabitant* as mentioned under 1 or 2 above, who are under 21 years old or dependent on the EEA/EFTA citizen or cohabitant;
3. *Dependent family members in the ascending line of the EEA/EFTA citizen or the registered partner* as mentioned under 1 or 2 above, who accompany or join them

The conditions that apply for the recognition of cohabitation are:

- The cohabitation is registered or can be established by other means;
- For registered cohabitation according to the Act on Domicile No. 21/1990, two individuals who live together, can have their cohabitation registered in the Population Register if the conditions in Chapter II of the Marital Act are fulfilled. This means that the same conditions as those for entering into a new marriage, also apply to registered cohabitation. These conditions are:
 - Both partners must be at least 18 years of age
 - They cannot be related (*e.g.* brothers/sisters; parents; adopted children)
 - They cannot be married or cohabitants with another person

¹²⁹¹ Information provided by a senior legal expert at the Icelandic Ministry of the Interior, during meetings held on 14 and 15 September 2015

- If one of the partners was married before, the financial agreements related to the divorce must be finalised before entering into a new marriage/registered cohabitation.

The definition of *other family members* was included in article 70 of the Regulation on Foreigners, in December 2014, in response to a point raised by the Authority in its Reasoned Opinion of December 2012.¹²⁹² Now, also the following 'other family members' may be granted entry and a right of residence:

- Family members who were/are *dependent on the EU citizen, or who were members of the EU citizen's household*;
- Family members not falling within the scope of article 35b of the Act on Foreigners and who, *for serious health reasons, strictly require the personal care of the EU citizen*.

The additional category mentioned in Article 3(2)b of the directive, *partners in a durable relationship, duly attested* has not been included in this provision, since it is considered to fall under the definition of cohabitants who, as mentioned above, are covered by article 35b of the Act on Foreigners.

According to article 70 of the Regulation on Foreigners, the relevant 'other family members' can have a right to enter and stay in Iceland if they are the EEA/EFTA citizen's dependents or if they have shared a home with him/her in the home State, and if they submit evidence confirming this. It may be required that the family member has lodging available and has a medical insurance covering all the risks covered under Icelandic law. If the family member is dependent on the EEA/EFTA citizen, the support he/she must have received from the reference person has been regular for at least a year before an application is submitted.

3.1.3 *Definition of economically active persons*

There is no specific definition of economically active persons in the sense of the directive in the relevant implementing legislation.

3.1.4 *Definition of self-sufficiency; sufficient resources*

A person is considered to comply with the criterion of having 'sufficient resources' when he/she has at his/her disposal an amount that is higher than the threshold under which a minimum subsistence benefit is granted. The exact amount depends on the family situation of the person concerned. In general, the Icelandic Directorate of Immigration will use the so-called 'minimum support criteria' as the reference amount. To date, the minimum support criteria of 1 April 2013 apply, which amount to:

- For an individual: ISK 163,635 per month
- For a couple: ISK 245,453 per month
- No additional amount is required for children.

When assessing the resources of which the person disposes, social benefits and pensions that the person receives from the home State, are taken into account. Also unemployment benefits that the person may receive in Iceland after losing a job (after having worked in Iceland for a minimum period of 12 months (for full benefits)) are included in this calculation.

¹²⁹² Reasoned Opinion, see above, note 1285, at paragraphs 14-21

Sufficient resources must be proven for the first three months. The municipalities should inform the Directorate of Immigration if a person becomes 'an unreasonable burden' on the social welfare system. The Ministry of Welfare is in the process of developing the exact criteria in this regard, following the latest legislative amendments of 2014.

3.1.5 *Establishing 'dependency'*

The following criteria are used to establish dependency in the sense of the directive:

- Relatives need to prove their family relationship with official documentation
- In the country from which the dependent person arrives in Iceland, he/she did not have sufficient resources to live independently
- At the moment of application for a right of residence, the person was already dependent on the reference person
- Proof of regular financial transfers from the reference person to the dependent person is required, covering a period of at least one year before the application for residence was introduced.

A case-by-case assessment is made, considering the specific situation of each applicant. Any suitable means of evidence may be provided to prove the abovementioned criteria. Moreover, family members who require the personal care of the EU citizen for serious health reasons need to demonstrate that this personal care is strictly required.

3.2 **Material scope - Which rights are covered, to whom do they apply and what do they entail?**

3.2.1 *Rights against the host state*

3.2.1.1 Right of entry, right of residence for up to 3 month: Arts 5 and 6, directive¹²⁹³

The *right of entry* is established in article 35 a of the Act on Foreigners, as amended in June 2014. In accordance with article 5(1) of the directive, proof of a EU citizen's identity and nationality can be provided either by a passport, or by an identity card (article 36). Moreover, such proof can also be provided -for EEA/EFTA citizens- by other means than a passport or an identity card.

For TCN family members, as foreseen in article 5(2) of the directive, a valid passport is required, as well as a visa, in accordance with Regulation 539/2001/EC of 15 March 2001, unless the person concerned possesses a EU residence permit issued by another EEA/EFTA state in accordance with article 10 of the directive (article 5 and 35 a Act on Foreigners).

3.2.1.2 Right of residence between 3 months and 5 years: Art 7, directive

The right of residence for a period between 3 months and 5 years is included in article 36 a of the Act on Foreigners, which incorporates all the elements enumerated in article 7 of the directive.

¹²⁹³ The implementation of the right of exit, laid down in article 4 of the Directive, is not considered here since the focus of this study is on the rights to entry and residence

3.2.1.3 Right of permanent residence: Art 16, directive

The right of permanent residence is implemented in article 38 of the Act on Foreigners. Such a right is granted to EEA/EFTA citizens and their family members who have legally resided in Iceland for a period of five years (art 38 and 38 a.). Periods spent in prison in Iceland after a conviction for criminal conduct will not be considered as legal residence in this regard. Periods spent in psychiatric care as an alternative to a prison sentence will probably not be considered as legal residence either, but there is no practice on this point so far.

In certain circumstances, a permanent right of residence can be acquired before the period of five years has expired, in accordance with the exemptions included in article 17 of the directive (article 38, Act on Foreigners).

Article 12 of the directive, which concerns the retention of the right to residence of family members after the death or departure of the EEA/EFTA citizen; and article 13, establishing the retention of the right of residence of family members after a divorce, annulment of marriage or termination of the registered partnership, are incorporated in article 37a of the Act on Foreigners. Since the legislative amendments of June 2014, this provision contains exactly the same conditions as those mentioned in the articles 12 and 13 of the directive.

In Iceland, no practice or specific guideline exists with regard to a TCN family member who is officially still married with the reference person (EEA/EFTA national), but is *de facto* separated.

3.2.2 Rights against the home state

3.2.2.1 Rights of persons returning to the home State after a stay in another EEA/EFTA Member State and their family members - family reunification

Art. 35, paragraph 2 of the Act on Foreigners states that the provisions of the EEA Chapter also apply to family members of Icelandic citizens who accompany or join the Icelandic citizen who returns to Iceland after having enjoyed his right of free movement according to the EEA or EFTA Agreement in another EEA or EFTA state. The relevant case-law of the CJEU is applied to examine whether the stay abroad was 'genuine' and 'actual'.

3.2.2.2 Rights of caretakers of minor citizens (involving a cross-border element)

The jurisprudence of the CJEU in C-200/02 *Zhu and Chen*¹²⁹⁴ and C-86/12 *Alokpa*¹²⁹⁵ has not been explicitly included in the Icelandic legislation. The Icelandic authorities have not yet received any applications for residence from parents of minor EU citizens in situations that would fall within the scope of this jurisprudence.

3.2.2.3 Cases with no cross-border element (*Zambrano* case)

There is no specific provision in Icelandic legislation on the rights of TCN parents of minor EU citizens in which there is no cross-border element, such as in the *Zambrano* case, and such situations have not occurred in practice so far.

¹²⁹⁴ Case C-200/02 *Zhu and Chen* [2004] ECR I-09925

¹²⁹⁵ Case C- C-86/12 *Alokpa* ECLI:EU:C:2013:645

3.2.2.4 Rights against home- and host state of commuters and their family members

Considering its geographic situation, commuting is non-existent or extremely rare. Therefore, up to now, the Icelandic authorities have not been confronted with any questions related to residence rights of commuters.

3.2.3 *Restrictions on the freedom of movement and residence: refusal of entry or residence; expulsion measures; re-entry bans*

3.2.3.1 Refusal of entry or residence

Entry or residence can be refused based on article 41 of the Act on Foreigners, on the following grounds:

- a. The EEA or EFTA national, or his family member, does not fulfill conditions regarding travel documents or other conditions for entry. The EEA or EFTA national has previously been expelled and the re-entry ban is still in force and he has not been granted a permission to enter Iceland,
- b. The EEA or EFTA national conducts him-/herself in a way referred to in the first paragraph of Article 42
- c. This is necessary in view of public order, public security or public health.

With respect to the grounds of public order, public security, or public health, the same limitations apply with respect to the refusal of entry or residence, as the limitations that apply to expulsion (see below, section 3.2.3.2.).

The EFTA Court has delivered an Advisory Opinion on the interpretation of the conditions set for a refusal of entry in article 27(2) of the Directive and the EEA Agreement, in Case E-15/12 *Wahl*.¹²⁹⁶ This case concerned a denial of entrance by the Icelandic authorities of a Norwegian citizen, Jan Anfinn Wahl, a member of the Norwegian chapter of the Hells Angels, who was detained at the airport of Reykjavik on grounds of public order and security. Based on a risk assessment by the police and the National Security Unit, Mr Wahl was considered as a threat to a fundamental interest of society, because of (i) his membership with the motorcycle organisation Hells Angels, and the connections of this organisation with organised crime, and (ii) his stated intention to engage in social contact with members of the Icelandic motorcycle club MC Iceland, which was in the final stage of joining the Hells Angels as its Icelandic chapter. The EFTA Court concluded, *inter alia*, that:

It is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organised crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In the light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met.¹²⁹⁷

¹²⁹⁶ See above, note 1286. For a more detailed overview of this case, see Annex 2.

¹²⁹⁷ See above, note 1286, at paragraph 92

The EFTA Court also held that it is not required that a state declares such an organisation to be prohibited, in order to refuse entry of a member of this organisation into its territory. However, according to the Court, "the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat to public policy and/or public security, it must have taken administrative measures to counteract those activities."¹²⁹⁸ The Supreme Court subsequently decided that Iceland had acted in accordance with the conditions set by the EFTA Court, when refusing entry of Mr Wahl into Iceland.¹²⁹⁹

3.2.3.2 Expulsion measures

According to articles 41 and 42 of the Act on foreigners, a EEA/EFTA national can be expelled on grounds of public policy, public security or public health. It is a condition for expulsion that the personal circumstances of the foreign national pose, or must be assumed to pose, a real, immediate and sufficiently serious threat to a fundamental societal interest. A decision cannot be based solely on preventive grounds. Expulsion based on a criminal conviction is only allowed if the conduct indicates that there is a risk of recidivism (assessment on future conduct). An EEA or EFTA national, or a member of his family, can also be expelled if the conditions for stay (according to Art. 36, Art. 36 a, 37 or 37 a) are not fulfilled. These two articles were already included in the Act on Foreigners since 2008, but they were amended as part of the legislative amendment of June 2014 to bring the wording more in line with the directive.

Informal internal guidance has been provided to the Directorate of Immigration with regard to expulsion based on these amended provisions. So far, the Icelandic authorities have generally applied the same criteria as Norway to decide if a certain conduct could be considered as a threat to public policy or public security. Since the relevant Norwegian internal guidelines are no longer made public, the Icelandic authorities are progressively developing their own criteria. Examples of crimes that are still considered serious enough to justify expulsion include the import of drugs (depending on the type and quantity of drugs), serious drug-related crimes, and serious assaults against police officers or others. In 2014, 17 expulsion decisions were taken based on drugs-related crimes, and in 2015 (up to 15 September), 8 expulsion decisions based on this type of crimes were taken.¹³⁰⁰

3.2.3.3 Re-entry bans

According to article 42A(1) of the Act on Foreigners, a re-entry ban is the automatic consequence of an expulsion decision. For EEA/EFTA citizens and their family members, the duration of re-entry bans varies between two and thirty years, depending on the seriousness of the conduct that led to the expulsion decision, and on the length of the prison sentence imposed for this conduct. Here too, the Icelandic authorities used to apply the norms laid down in the relevant Norwegian internal guidelines, and these norms -even though the latest versions thereof are not publicly available -, are still used as guidance in Iceland.

Some examples in this regard are the following:

- For crimes subject to a prison sentence of 1-3 months, a re-entry ban of 2 - 3 years may be imposed;
- For crimes subject to a prison sentence of 4-6 months, the re-entry ban may be 5 years
- For crimes subject to a prison sentence of 6-9 months, the re-entry ban may be 7 years

¹²⁹⁸ *Idem*, at paragraph 108

¹²⁹⁹ For further details on this case, see Annex 2 to this country study

¹³⁰⁰ Information provided by representatives from the Directorate of Immigration, during a meeting held on 15 September 2015

- For crimes subject to a prison sentence of 9 months - 3 years, the re-entry ban may be 10 years;
- For crimes subject to a prison sentence of more than 3 years, the re-entry ban may be 30 years.

However, decisions on re-entry bans, also take account of the degree of integration of the person concerned in Iceland, and on the specific circumstances of each individual case. The same rules apply for EEA/EFTA nationals and for their TCN family members.

In this regard, the length of the person's stay in Iceland will be taken into consideration, as required by the directive (article 28). For example, repeated minor crimes have led to expulsion of persons who had resided in Iceland for less than five years, whereas expulsion on this ground is possible, but less likely for a person who has acquired a permanent right of residence. On the other hand, organised crime, rape or murder, are very likely to lead to expulsion, also when the person has resided in Iceland for more than five years. For example, in practice, there have been two cases of expulsion of persons who had acquired a permanent right of residence in Iceland, and who were convicted for rape.¹³⁰¹

In accordance with article 42A(2) of the Act on Foreigners, a person can apply for the re-entry ban to be lifted if new circumstances recommend so and it is reasoned that significant changes have been on the conditions (situation) that justified the decision on re-entry ban.

There is no national case law on expulsion.

3.2.3.4 Abuse or fraud: Article 35 of the directive

Article 35 of the directive has been incorporated into Icelandic law in article 40, paragraphs 1 and 2 of the Act on Foreigners, which are formulated in a general manner, and also refer to marriages of convenience as a form of abuse. This article has also been introduced into the Act on Foreigners as part of the 2014 legislative amendments. The use of a false identity to enter the country or to obtain a right of residence may be considered as a threat to public order, and lead to a refusal of entry or expulsion, depending on the specific circumstances of the case. However, there is no specific practice in this respect, and there have been no court cases on such an abuse.

3.2.4 Case study

In order to clarify and illustrate the practice in the different countries considered in this study, the Norwegian Directorate of Immigration (UDI), has presented a set of facts that occurred in Norway. These facts involved a TCN immigrant who had been expelled on grounds of public order, and who requested the lifting of his re-entry ban after he had entered into a durable relationship with a Swedish citizen, with whom he lived in another EEA/EFTA state before returning to Norway. In this section, the facts of the case will first be set out (a), followed by a brief description on how Belgium would deal with this situation, had it occurred within its jurisdiction (b).

a) Facts of the case: example from Norway

Rejected asylum seekers have the obligation to leave Norway. An asylum seeker stays illegally in Norway for 3 years, and then marries a Norwegian citizen. The rejected asylum seeker is then expelled and imposed a 5 years entry ban in conformity with Norwegian legislation (The Immigration act, provisions relevant for third country nationals). The new formed couple travels to

¹³⁰¹ *Idem*

Sweden, lives there for 7 months, and returns to Norway shortly after. The third country national/former asylum seeker, now a family member of a EEA citizen, requires to be registered in Norway as a family member of a EEA citizen. Norwegian authorities refuse to lift the re-entry ban due to his adverse immigration history. The administrative decision of refusal to lift the entry ban merely points to the fact that person committed a grave violation of the provisions in the Immigration Act.

b) Iceland

The Icelandic Directorate of Immigration has so far not dealt with a case exactly like this one but when the situation would come up the authorities would examine it very closely. There are several different aspects that would need to be weighed together before taking the decision. It would for example have to be evaluated whether a denial would impose infringement of their right for family life according to Art. 8 of the ECHR. The authorities would in that respect consider the guidelines presented in the case law of the European Court of Human Rights and other relevant case law of the European Court of Justice, as applicable. However, it would probably also be looked into whether the fact that his spouse has activated her right of free movement in another EEA state should affect the re-entry ban. In this case the right of free movement is activated after the re-entry ban was imposed. In other non EEA cases where family relations are founded after a re-entry ban was imposed it has generally not affected the re-entry ban. In order to affect the re-entry ban exceptional grounds would be required. In this case it is very likely that a similar evaluation would be conducted.

4 Conclusion

In Iceland directive 2004/38/EC has, for the most part, been incorporated into national law, especially after a legislative revision in 2014, by which several new provisions were included into the Act on Foreigners, including on 'other family members' as mentioned in art. 3(2)a of the directive, and on the conditions for expulsion on grounds of a threat to public order or security. Some provisions, including those regarding the definition of family members, have been interpreted more broadly than the minimum criteria of the directive itself, for example by granting to cohabitants the same rights as spouses. In Iceland, administrative practice will take account, where relevant, of the Judgments of the Court of Justice of the European Union (CJEU) and of the EFTA Court. However, due to Iceland's geographic situation and, as a consequence thereof, the relatively small number of applications for residence from EEA/EFTA nationals, the Icelandic authorities have not been confronted with all situations covered by the CJEU's jurisprudence. In particular, applications for residence such as those covered by the cases *Zhu and Chen* and *Alokpa* (concerning a right of residence for TCN parents of a minor EU citizen, involving a cross-border element) or by *Zambrano*, *McCarthy* and *Dereci* (concerning similar cases, but then in purely internal situations, without any cross-border element), have not been submitted to the Icelandic immigration authorities, so far. The same is true for situations as those underlying the *Carpenter* case (concerning the rights of family members of commuters against both the home and the host State). Also applications for a right of residence by family members of persons who return to Iceland after a stay in another EEA/EFTA State have, to date, never been introduced in Iceland, and there are no specific legislative provisions, nor policy guidelines for such situations. Since these situations fall outside the scope of directive 2004/38, the EFTA Surveillance Authority did not have any reason to examine the Icelandic legislation or practice with regard to such situations in the context of its review that led to the Reasoned Opinion of 2012. A detailed account of how the various points raised by the Authority in this Reasoned Opinion have been incorporated into Icelandic law is presented in Annex 1.

Finally, additional legislative proposals are currently being prepared as part of a general revision of the Act on Foreigners, which will be used to review the EEA chapter again to see if any further amendments are needed to further adapt the relevant legal framework to the requirements of the

directive. In particular, it will be proposed to include some provisions that were introduced into the Regulation on Foreigners in December 2014 (which did not require approval from the Parliament), into the Act on Foreigners.

Country Study Iceland - Annex 1

Incorporation into Icelandic law of the points raised by the EFTA Surveillance Authority in its Reasoned Opinion of December 2012¹³⁰²

In this overview, the points raised by the Authority in its Reasoned Opinion will first be cited, followed by information on how they have been taken into account in the legislative amendments adopted in 2014.¹³⁰³ They are presented in the same order, and according to the same categories as in the Reasoned Opinion.

Chapter I General provisions

– Article 3(2)(a) and (b) - facilitation of the entry and residence of other family members

The Authority's assessment:

14. Article 3(2)(a) and (b) of the Directive require the EEA States to facilitate the entry and residence of other family members, *i.e.* those family members which are not listed in Article 2(2) of the Directive as immediate family members. The term other family members refers to members of the household, dependents, persons who for health reasons need the EEA national's care *cf.* point (a) and partners in a durable relationship *cf.* point (b).

15. According to Article 3(2) second subparagraph of the Directive, EEA States shall undertake an extensive examination of the personal circumstances and shall justify any denial of entry or residence to the individuals classified as other family members under Article 3(2)(a) and (b).

16. According to Guidelines issued by the Commission in 2009¹³⁰⁴ Member States have a certain degree of discretion in laying down the criteria to be taken into account when deciding whether to grant the rights under the Directive to other dependent family members including partners, *cf.* Article 3(2). However, Member States do not enjoy unrestricted liberty in laying down such criteria.

17. In order to maintain the unity of the family in a broad sense, the national legislation must provide for a careful examination of the relevant personal circumstances of the applicants concerned, taking into consideration their relationship with the EU citizen or any other circumstances, such as their financial or physical dependence, as stipulated in Recital 6 of the Directive. Furthermore, any negative decision had to be subject to all the material and procedural safeguards of the Directive. It must be fully justified in writing and open to appeal.

¹³⁰² See above, note 1001

¹³⁰³ The information reflected in this overview was provided during a meeting with representatives of the Icelandic Ministry of the Interior, on 15 September 2015

¹³⁰⁴ 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. Brussels, 2.7.2009, COM(2009) 313 final, page 4

18. The Authority notes that in Case C-83/11 *Rahman*, the Court of Justice of the European Union ("Court of Justice") held that the words in Article 3(2) of the Directive "*in accordance with its national legislation*" did not provide Member States with the discretion to omit transposing this obligation.¹³⁰⁵ However, the Court held that Member States are not required to grant every application for entry or residence submitted by family members of a Union citizen who do not fall under the definition in Article 2(2) of the Directive, even if they show, in accordance with Article 10(2),¹³⁰⁶ that they are dependents of that citizen. It is, however, incumbent upon the Member States to ensure that their legislation contains criteria which enable those persons to obtain a decision on their application for entry and residence that is founded on an extensive examination of their personal circumstances and, in the event of refusal, is justified by reasons.

19. The Court of Justice noted some examples for factors to be taken into account, i.e. the extent of economic or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join.¹³⁰⁷ The Court however insists on the discretion of the Member States in choosing criteria in national legislation and in applying them. Effectively, applicants are thus not entitled to rely on the provision directly, but to judicial review which verifies whether this discretion has been used within the limits the Directive prescribes.¹³⁰⁸

20. The Court further stated that "*an examination procedure must be one which is readily accessible, can be completed within a reasonable period, and, if it leads to a refusal, the decision of refusal must be open to challenge before the courts.*"¹³⁰⁹

21. In its correspondence with the Authority, the Icelandic Government does not indicate specific measures transposing Article 3(2)(a) and (b) of the Directive. The national measures referred to by Iceland merely authorize the competent Minister to issue further regulations. Reference is also made to the pending revision of the Regulation on Foreigners. Accordingly, the Authority must conclude that Iceland has not transposed Article 3(2)(a) and (b) of the Directive.

Incorporation in Icelandic law:

A new provision, art 70, was included in the Regulation on Foreigners, in December 2014. This provision covers all the categories mentioned in article 3(2) a of the Directive (for more details, see above, Section 3.1.2.). However, the category mentioned in article 3(2) b, referring to the 'partner with whom the Union citizen has a durable relationship, duly attested' has not been incorporated in the same terms as the Directive. It is envisaged to include this provision also in the Act on Foreigners in the upcoming revision of the Act, to be submitted to the Parliament in the winter of 2015/16, or shortly thereafter.

Chapter II of the Directive - Right of exit and entry

¹³⁰⁵ Case C-83/ 11 *Secretary of State for the Home Department v Muhammad Sazzadur Rahman and Others*, ECR [2012], not yet reported, paragraph 21

¹³⁰⁶ Article 10(2)(e), on the issue of residence cards to third country family members, reads: "in cases falling under Article 3(2)(a), a document issued by the relevant authority in the country of origin or country from which they are arriving certifying that they are dependants or members of the household of the Union citizen, or proof of the existence of serious health grounds which strictly require the personal care of the family member by the Union citizen."

¹³⁰⁷ Case C-83/11 *Rahman*, cited above, paragraph 23

¹³⁰⁸ Case C-83/11 *Rahman*, cited above paragraph 25

¹³⁰⁹ Case C-83/11 *Rahman*, cited above paragraph 50

– **Article 5(2) of the Directive - entry of third country family members**

The Authority's assessment:

25. Article 5(2) of the Directive provides that EEA States may require third country family members moving with or joining an EEA national to whom the Directive applies to have an entry visa. These family members have not only the right to enter the territory of the EEA State, but also the right to obtain an entry visa. Third country family members should be issued with a free of charge short term entry visa as soon as possible and on the basis of an accelerated procedure.

26. The right to be issued with an entry visa is derived from his or her family ties with the EEA national. It follows that Iceland may require only the presentation of a valid passport and evidence of the family link (and also dependency, serious health grounds, durability of partnerships, where applicable). No additional documents, such as a proof of accommodation, sufficient resources etc. can be required.

27. Article 5(2) of the Directive furthermore provides that residence cards issued under Article 10 of the Directive to a family member of an EEA national residing in the host EEA State, including those issued by other EEA States, exempt their holders from the visa requirement when they travel together with the EEA national, or join him or her in the host EEA State.

28. As for national measures transposing Article 5(2) of the Directive, the Icelandic Government refers to Article 6(1) and 7 of the transposing Act. Iceland refers also to the pending revision of the Regulation on Foreigners, in particular Article 17 and Annex 3 thereof.

29. Article 6(1), second sentence, of the transposing Act states that the visa requirement for entry into Iceland does not apply to a foreigner possessing a "*permit to stay issued by a State taking part in Schengen*". The same applies to any foreigner possessing a provisional permit to stay issued by a State taking part in Schengen, provided the foreigner in question also possesses a travel document issued by the same State.

30. Article 17 of the Regulation on Foreigners provides that a foreigner holding a valid passport, issued by a State, listed in Part I of Annex 3 of that Regulation, shall be exempt from the visa requirement. The same applies to those holding the types of travel documents listed in Part II of Annex 3. Article 17 of the Regulation furthermore provides that a foreigner holding a residence permit issued by a Schengen State shall be exempt from the visa requirement.

31. The Authority notes that there is no indication that Iceland provides for an accelerated procedure in respect of applications for entry visas for third country nationals who are not in possession of such visas, as required by Article 5(2) of the Directive. Furthermore, the national provisions referred to by Iceland do not address the situation of persons holding residence cards issued under Article 10 of the Directive.

32. The reference in Article 17 of the Regulation on Foreigners to permits to stay issued by a Schengen State is not sufficient in this respect, taking into account the fact, *inter alia*, that not all EEA States are members of Schengen. For sake of clarification, the type of residence card referred to in Article 10 of the Directive may be issued by any of the other EEA States. Therefore, Article 5(2) of the Directive is not to be understood as exempting from the visa requirement only those third country nationals who hold residence cards issued by Iceland.

33. In its letter of 7 July 2011, the Icelandic Government confirmed that Article 5(2) of the Directive had not been transposed adequately. However, the Government intended to make certain amendments to the Regulation on Foreigners in order to better reflect Article 5(2) of the Directive.

34. With regard to the accelerated procedure prescribed by Article 5(2), the letter of 7 July 2011, explained that the rules under Regulation No. 116012010 on visa applications can be applied to cases falling under Article 5(2) of the Directive. Article 35 of that Regulation states that a person can apply for a visa at the borders in Iceland, *i.e.* at the Keflavik Airport, or with the Directorate of Immigration.

35. In the view of the Authority, the above rules do not indicate in clear terms that persons covered by Article 5(2) of the Directive are guaranteed an accelerated procedure with regard to obtaining the necessary visa. Furthermore, in terms of charges, no exemptions from visa fees appear to apply under the national provisions.

36. The Authority has not received any further information from the Icelandic Government concerning this matter. The Authority must therefore conclude that Iceland has failed to correctly transpose Article 5(2) of the Directive.

Incorporation in Icelandic law:

A new provision was included in the Act on Foreigners: article 35A paragraph 5, according to which TCN family members shall be exempted from the visa requirement if they hold a residence card in accordance with article 39A of this same Act; otherwise a visa shall be issued for free as soon as possible and shall be submitted to the accelerated procedure.

– Article 5(3) of the Directive - entry/exit stamp

The Authority's assessment:

37. Article 5(3) of the Directive prohibits EEA States from placing a stamp in the passport of non-EEA family members of an EEA national if they present the residence card for a family member of an EEA national referred to in Article 10 of the Directive.

38. The Icelandic Government refers to Article 7(2) of Regulation No. 1212/2007 on movement across borders as the transposing measure. This provision states that EEA foreigners shall be subject to what is termed in the Regulation as "a minimum check".

39. In its letter of 7 July 2011, the Icelandic Government explained that Article 12(2) of Regulation No. 1212/2007 provides that the travel documents of non-EEA family members of an EEA national shall be stamped upon arrival or departure if the person in question cannot present a residence card. The same shall apply to travel documents of foreigners who are related to that foreigner. The Icelandic Government considers this to be a sufficient transposition of Article 5(3) of the Directive.

40. The Authority notes that the transposing measure does not specifically state that the person holding a Residence card of a family member of an EEA national, as provided for in Article 10 of the Directive, shall be exempt from having his or her passport stamped. It is moreover unclear from the wording of the transposing measure what type of residence card it refers to. As noted above, the "Residence card of a family member of a EEA national" is in many cases issued, not by the receiving state, but by the EEA State where the EEA national and his third country family

members come from. For the sake of legal certainty it is therefore necessary that the national rules reflect this clearly. Accordingly, the Authority must conclude that Iceland has failed to correctly transpose Article 5(3) of the Directive.

Incorporation in Icelandic law:

This was not included in the amendments of the Act on Foreigners in 2014 since the rules governing crossing of borders and therefore also stamping of travel documents are laid down in Regulation No. 1212/2007 on crossing of borders (Regulation implementing Schengen Borders Code). Article 12 paragraph 2 is based on Article 10, paragraph 2, of the Schengen Borders Code No. 562/2006. The wording of Article 12 was considered to be sufficient even though it does not refer directly to the residence card in Article 10 of the Directive. The wording of Article 12 paragraph 2 apparently still needs to be amended slightly and that will probably be done in the coming months when Regulation 1212/2007 will next be amended.¹³¹⁰

– Article 5(4) - opportunity to obtain necessary documents

The Authority's assessment:

41. Article 5(4) of the Directive introduces the guarantee for EEA nationals, and third country family members, who do not have the necessary travel documents to obtain these documents before being turned back. EEA States need to give these persons every reasonable opportunity to obtain the documents within a reasonable period of time and allow them to prove by any other means that they are covered by the right of free movement.

42. The Icelandic Government notes that the Directorate of Immigration may in special cases, according to Article 5(3) of the transposing Act, exempt a foreigner from the requirement of possessing a passport, or recognise a document other than ordinarily required. In its letter of 7 July 2011, the Icelandic Government stated that it intended to adopt further measures transposing this provision, either in the Regulation on Foreigners, or in the Regulation of movement across borders No 1212/2007.

43. The Authority has not received further information from the Icelandic Government concerning this matter.

44. In the view of the Authority, the measure referred to by Iceland does not reflect in full the administrative guarantees laid down in Article 5(4) of the Directive, in particular the protection from being turned back from the country. Furthermore, it is not clear from the information provided what the term "special cases" means for the purposes Article 5(4).

45. The Authority adds that according Article 41(1) of the transposing Act, an EEA national may be refused entry into the country on the day he sets foot, or within the next 7 days, if he does not comply with rules on travel documents, or rules regarding entry into the country. Furthermore, Article 41(2) of the transposing Act provides that it is the National Commissioner of the Icelandic Police who takes decisions concerning refusal of entry for reasons relating to lack of necessary travel documents. In this regard, the Authority notes, however, that it is the Directorate of Immigration which, according to Article 5(3) of the transposing Act, may exempt a foreigner from the requirement of possessing a passport, or recognise a document other than those which

¹³¹⁰ Information provided by a senior legal expert at the Ministry of the Interior

would ordinarily be required. Based on the above, the Authority must conclude that Iceland has failed to correctly transpose Article 5(4) of the Directive.

Incorporation in Icelandic law:

This was incorporated in Art. 35 a, Paragraph 5, which states that if an EEA or EFTA national, or a TCN family member, does not have the required travel documents or visa, he or she shall be given an opportunity to obtain the necessary documents or have them sent or have his/her statement confirmed or otherwise have it recognised that he/she is entitled to right of free movement, before a decision is taken to deny entry.

Chapter III - Right of residence

– Article 6(2) of the Directive - right of residence for up to three months

The Authority's assessment:

46. Article 6 of the Directive grants EEA nationals an initial right of residence for up to three months with no conditions or formalities other than holding a valid identity card or passport. This provisions applies also to family members in possession of a valid passport who are not nationals of an EEA State, accompanying or joining the EEA national, *cf.* Article 6(2).

47. According to the Article 35(1) of the transposing Act, an EEA foreign national may enter Iceland without a special permit and live or work in Iceland for up to three months from the date of his arrival, or up to six months if he is looking for employment.

48. In the view of the Authority, Article 6(1) of the Directive is in principle implemented by Article 35(1) of the transposing Act. However, with regard to the rights of third country family members, the transposing Act states that family members of an EEA foreign national who is legally resident in Iceland shall be entitled to reside with him in Iceland. Further explanation is not provided, in particular with regard to the conditions (passport) or to the length of stay (three months). (...)

49. Moreover, the wording seems to indicate that the family member has no right of residence unless the right of residence of the EEA national to whom they have family ties has already been established in Iceland *cf.* the words "who is legally resident in Iceland." In this regard, the Authority recalls that according to Article 6(2) of the Directive, the family member of an EEA national may either accompany or join him, thus denoting two different scenarios.

50. The Authority furthermore refers to the second sentence of Article 35(1) of the transposing Act which states that "*periods of residence in another Nordic country shall not be deducted from this residence period*". To the Authority it is not clear what effect this sentence has on the application of the first sentence of Article 35(1).

51. In its letter of 7 July 2011, the Icelandic Government stated that it had considered Article 6(2) of the Directive to be adequately transposed. However, the letter stated that the Government would look further into the matter and draft necessary amendments in order to ensure that the transposing Act reflected better the wording in the Directive.

52. The Authority has not received further information from the Icelandic Government concerning the matter. Accordingly, the Authority must conclude that Iceland has failed to correctly transpose Article 6(2) of the Directive.

Incorporation in Icelandic law:

Article 35B of the Act on Foreigners has been amended in order to ensure that no difference is made between accompanying or joining the EEA/EFTA citizen; both possibilities are now explicitly foreseen.

– Article 7(3)(c)(d) - retention of the status of a worker/self-employed*The Authority's assessment:*

53. Article 7(3) of the Directive provides that for the purposes of paragraph 1(a), an EEA national who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

- (a) he/she is temporarily unable to work as the result of an illness or accident;*
- (b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;*
- (c) he/she is in duly recorded involuntary unemployment after completing a fixed term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;*
- (d) he/she embarks on vocational training. Unless he/she is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment.*

54. According to the information provided by the Icelandic Government, this provision has been transposed by Articles 38 and 40(2) of the transposing Act. Reference is also made to the pending revision of the Regulation on Foreigners.

55. Article 38 of the transposing Act authorizes the competent Minister to issue regulations providing for the retention of the right of residence of persons covered by Article 36(1) point (a) and (b), following cessation of employment, and on his family members' right to a continued stay in accordance with Article 37. The information provided by Iceland does not indicate that a particular Regulation has been adopted on the basis of this provision.

56. Article 40(2) of the transposing Act states that the right of residence under point (a) or (b) of Article 36(1) of the same Act shall not be lost due to temporary illness, an accident or because the EEA national becomes unemployed against his will after working in Iceland for more than one year.

57. Based on the above information, the Authority takes the view that points (a) and (b) of Article 7(3) of the Directive have been transposed by Article 40(2) of the transposing Act. However, the Authority has received no information indicating that points (c) and (d) of Article 7(3) of the Directive have been transposed.

58. In its letter of 7 July 2011, the Icelandic Government acknowledged that the right of retention as prescribed by Article 7(3)(c) of the Directive is only partly transposed. The intention was to further transpose this provision in the Regulation on Foreigners.

59. The Authority has not received further information from the Icelandic Government concerning the matter. Accordingly, the Authority must conclude that Iceland has not transposed Article 7(3)(c) and (d) of the Directive.

Incorporation in Icelandic law:

Art 7(3)c and d of the Directive have now been included in article 36A of the Act on Foreigners, so the omission highlighted by the Authority has been corrected.

– Article 8(3) of the Directive - self-employed persons*The Authority's assessment:*

60. Article 8(1) of the Directive states that for periods of residence longer than three months, the host EEA State may require EEA nationals to register with the relevant authorities.

61. Article 8(3) of the Directive lists the documents which must be submitted in order to obtain the registration certificate. According to Article 8(3), first point, workers or self-employed persons, *cf.* Article 7(1) (a), must present a valid identity card or passport, a confirmation of engagement from the employer or a certificate of employment, or proof that they are self-employed persons.

62. Article 71(2)(a) of the Regulation on Foreigners prescribes that an applicant for a resident permit as a self-employed person must demonstrate that he will engage in "*permanent*" activity as a self-employed person.

63. In its letter of 7 July 2011, the Icelandic Government stated that according to the registration form provided by the Registers Iceland, a self-employed person is requested to submit a copy from the company registrar in Iceland, and other documents regarding the business in order to prove that he is in fact self-employed.

64. As regards Article 71(2)(a) of the Regulation on Foreigners concerning the particular requirement that the activity must be permanent, the letter of 7 July 2011 confirms that it is outdated and is not applied in practice. The letter states that this requirement will be repealed in the next revision of the Regulation.

65. The Authority has not received further information from the Icelandic Government concerning the matter. The Authority notes that according to established case law administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, do not guarantee the correct transposition of a directive.¹³¹¹ Accordingly, the Authority must conclude that Iceland has failed to correctly transpose Article 8(3) of the Directive.

Incorporation in Icelandic law:

The condition that the self-employment must be permanent has been repealed from the Regulation.

– Article 8(5) of the Directive - registration of EEA family members*The Authority's assessment:*

66. Article 8 of the Directive concerns administrative formalities for EEA nationals and their family members who are themselves EEA nationals. Article 8(5) states that a registration

¹³¹¹ See for example, Case C-197/196 *Commission v France* [1997] ECR I- 1489, paragraphs 14-15

certificate shall be issued to family members when they produce a valid passport/ID and a document attesting to the existence of a family relationship with the EEA national.

67. The Icelandic Government refers to Article 37(5) of the transposing Act which states that the Minister of Justice shall lay down more detailed rules on residence by family members of EEA nationals. A reference is also made to the pending revision of the Regulation on Foreigners.

68. The Authority notes that Article 72 of the Regulation on Foreigners titled "Requirements for a permit to stay issued to a family member of an EEA or EFTA foreigner" appears in principle to transpose Article 8(5) of the Directive. However, Article 72(2) provides that the foreigner must demonstrate that he has lodgings available in order for his family members to be granted a right of residence. This requirement is not derived from Article 8(5) of the Directive. It is repeated in paragraph 3 of Article 72 in respect of other family members.

69. In its letter of 7 July 2017, the Icelandic Government informed that the requirement regarding lodgings in Article 72 of the Regulation on Foreigners was outdated and not applied in practice.

70. The Authority notes that even though a national provision, identified as being in breach of EEA law, is not applied by the national authorities does not absolve the EEA State of its obligation to take steps to amend or repeal it in order to bring the legal situation in conformity with EEA law (see also paragraph 65 above). Based on the above, the Authority must conclude that Iceland has failed to correctly transpose Article 8(5) of the Directive.

Incorporation in Icelandic law:

The requirement of having lodging available is still in the Regulation, but it only applies to TCN 'other family members' as defined in article 3(2)a of the Directive.

– Article 10 - residence cards to third country family members

The Authority's assessment:

71. According to Article 10 (1) of the Directive, the right of residence of third country family members shall be evidenced by the issuing of a document called "Residence card of a family member of a EEA national". This residence card exempts its holder from the visa requirement under Article 5(2) of the Directive. The residence card must be issued within six months from the date of application. The list of documents, referred to in Article 10(2) of the Directive, to be presented with the application is exhaustive, as confirmed by Recital 14 to the Directive.

72. The denomination of this residence card must not deviate from the wording prescribed by the Directive as different titles would make it difficult for the residence card to be recognised by other EEA States as exempting its holder from the visa requirement under Article 5(2).¹³¹²

73. According to the information received from Iceland, Article 10(1) of the Directive has been transposed by Article 37(4) of the transposing Act. This provision states that family members

¹³¹² 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, page 7

who are not EEA nationals shall be obliged to apply for residence cards within three months of arriving in Iceland.

74. In the view of the Authority, this provision does not transpose in full Article 10 of the Directive, *i.e.* the specific name of the card is not identified, the timeframe within which the card must be issued, or the different type of documents/evidence depending to which category the relevant person belongs to under the Directive, cf. Article 10(2)(a)-(f).

75. In the letter of 7 July 2011, the Icelandic Government stated that the intention was to transpose Article 10 of the Directive partly in the Act on Foreigners and partly in the Regulation on Foreigners.

76. The Authority has not received further information from the Icelandic Government concerning this matter. Based on the above, the Authority must conclude that Iceland has failed to correctly transpose Article 10 of the Directive.

Incorporation in Icelandic law:

The requirements enumerated by the Authority have been included in article 39A of the Act on Foreigners.

– Article 11 - validity of the residence cards

The Authority's assessment:

77. According to Article 11(1) of the Directive, a residence card issued under Article 10 of the Directive shall be valid for 5 years from the date of issue, or for the envisaged period of residence of the EEA national, if this period is less than five years. Certain temporary absences will not render the card invalid, cf. Article 11(2).

78. According to Article 37(5) of the transposing Act, the Minister of Justice is authorized to introduce more detailed rules on residence by family members of EEA nationals. Iceland refers also to Chapter XII of the Regulation on Foreigners.

79. In the view of the Authority, a reading of those measures does not confirm a complete transposition of Article 11 of the Directive.

80. In its letter of 7 July 2011, the Iceland Government stated that the intention was to transpose Article 11 of the Directive partly in the Act on Foreigners and partly in the Regulation on Foreigners. The Government, however, stated that in practice all residence cards for non- EEA family members have a validity for 5 years.

81. The Authority has not received further information from the Icelandic Government concerning this matter. In the view of the Authority, a mere reference to administrative practices is not sufficient in order to constitute as full transposition of a particular provision in a directive. As consistently ruled by the Court of Justice, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the requirement of legal certainty. Mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, do not

guarantee the correct transposition of a directive.¹⁰ Based on the above, the Authority must conclude that Iceland has failed to correctly transpose Article 11 of the Directive.¹³¹³

Incorporation in Icelandic law:

This was changed; article 39A now mentions the 5- year validity of the residence card.

– Article 12 - retention of the right of residence by family members in the event of death or departure of the EEA national

The Authority's main considerations and conclusion:

82. According to Article 12(1) of the Directive, the death of an EEA national or departure from the host State shall not affect the right of residence of his/her family members who are also EEA nationals. Furthermore, according to the second subparagraph of Article 12(1), before acquiring the right of permanent residence, the persons concerned must meet the conditions laid down in points (a), (b), (c) or (d) of Article 7(1).

83. Article 12(2) of the Directive states that in the event of a death of the EEA national, the family members, who are not EEA nationals, who lived with him in the host EEA State for at least one year will retain their right of residence. Furthermore, a family member may acquire a permanent right of residence in such situations, on condition that he meets the requirements laid down in Article 7(1Xa) and(b) of the Directive.

84. Article 12(3) of the Directive states that where an EEA national leaves the EEA State and the non-EEA parent has custody of the children who are enrolled at an educational establishment, the parent may remain with them for the duration of their studies.

85. The Icelandic Governments refers to Articles 37(5), 39(IX4X5) of the transposing Act, as measures transposing Article 12 of the Directive.

86. Article 37(5) of the transposing Act states that a family member of an EEA national has the right to reside with him in Iceland. Article 39(1) provides that an EEA national who has resided legally in Iceland continuously for five years shall be entitled to reside in the country for an unlimited period of time. The same applies to family members who have resided with the EEA nationals in the country for five years. Article 39(4) states that the right to unlimited residence shall be confirmed officially on the basis of an application. Finally, Article 39(5) provides the competent Minister with the authority to issue further regulations.

87. In the view of the Authority, the above measures do not provide for transposition of Article 12 of the Directive. This provision essentially concerns the right of family members to retain their right of residence in the event of death or departure of the EEA national whom they derive their right of residence from. The Authority adds that other parts of the transposing measures do not indicate a transposition of Article 12 of the Directive.

88. In its letter of 7 July 2011, the Icelandic Government stated that the intention was to transpose Article 12 of the Directive in the Regulation on Foreigners.

¹³¹³ See to that effect, Case C-197/196 *Commission v France*, referred to above, paragraphs 14- 15

89. The Authority has not received further information from the Icelandic Government concerning this matter. Accordingly, the Authority must conclude that Article 12 of the Directive has not been transposed by Iceland.

Incorporation in Icelandic law:

Article 37A of the Act on foreigners now includes the same content as article 12 of the Directive.

– Article 13 - retention of the right of residence by family members in the event of divorce, annulment of marriage or termination of registered partnership

The Authority's main considerations and conclusion:

90. Article 13(1) of the Directive regulates the retention of the right of residence of family members of an EEA national in the case of divorce or annulment of marriage or termination of the registered partnership.

91. With regard to third country family members, Article 13(2) of the Directive states that if their relationship with the EEA nationals ends by annulment or termination, the family member will not lose the right of residence where:

(a) prior to divorce or annulment, the marriage or registered partnership lasted for 3 years and 1 year was spent in the EEA State; or

(b) by agreement between the spouses/partners or by Court order, the non- EEA national spouse/partner has custody of their children; or

(c) there are particularly difficult circumstances, for example where the non- EEA national spouse is the victim of domestic violence; or

(d) by agreement between the spouses/partners or by Court order, the non- EEA national is granted a right of access to the children provided that access must be in the host EEA State.

92. With regard to Article 13 of the Directive, Iceland refers to Article 37(5) of the transposing Act and the pending revision of the Regulation on Foreigners.

93. In the view of the Authority, a reading of these provisions does not confirm transposition of Article 13 of the Directive.

94. In its letter of 7 July 2011, the Icelandic Government stated that the intention was to transpose Article 13 of the Directive in the Regulation on Foreigners.

95. The Authority has not received further information from the Icelandic Government concerning this matter. Accordingly, the Authority must conclude that Article 13 of the Directive has not been transposed by Iceland.

Incorporation in Icelandic law:

The terms of article 13 of the Directive have now been included in article 37A.

Chapter IV – Right of permanent residence

– Article 17(1) of the Directive - acquisition of the right of permanent residence for workers/self-employed person and their family members

The Authority's assessment:

96. Article 17 regulates the conditions under which workers and self-employed persons and their family members will acquire the right of permanent residence before the completion of five years of residence. This right was formerly laid down in Regulation 1251/70/EEC on the right of workers to remain in the territory of a Member State after having been employed in that State ("Regulation 1251/70/EEC"). This Regulation was repealed by Regulation 635/2006/EC which states in its preamble that Article 17 of the Residence Directive now includes the main elements of Regulation 1251/70/EEC, and amends them by granting beneficiaries of the right to remain a more privileged status, namely that of the right of permanent residence.

97. According to the information provided by Iceland, Article 17 of the Directive is transposed by Articles 38 and 39(5) of the transposing Act, and Articles 76, 77 and 78 of the Regulation on Foreigners.

98. The provisions of the Regulation on Foreigners, referred to above, appear to reproduce the wording of Articles 2 and 3 of Regulation 1251/70/EEC. However, the words in Article 17 (1) second subparagraph "*periods not worked for reasons not of the person's own making [...] shall be regarded as periods of employment*", are not reflected in Article 78(2) of the Regulation on Foreigners.

99. The Authority must therefore conclude that Iceland has failed to correctly transpose Article 17(1) second subparagraph of the Directive.

Incorporation in Icelandic law:

The omission highlighted by the Authority has been corrected by including the words of Article 17(1) second subparagraph into article 38 of the Act on Foreigners.

– Article 18 of the Directive - acquisition of the right of permanent residence by non- EEA family members

The Authority's main considerations and conclusion:

100. Article 18 of the Directive provides that where third country family members retain their right of residence by (i) the death of the EEA national, *cf.* Article 12(2) of the Directive, or (ii) by divorce, annulment or termination of a registered partnership, *cf.* Article 13(2) of the Directive, such persons shall be entitled to acquire the right of permanent residence after residing legally in the host State for a period of five consecutive years.

101. Article 39(1) of the transposing Act provides that family members who have lived with the EEA national in Iceland legally for five years shall be entitled to a permanent residence. However, this right shall be contingent on the EEA national having resided legally in Iceland continuously for five years. In the view of the Authority, Article 39(1) of the transposing Act does not reflect the wording of Article 18 of the Directive, in particular with regard to requirement that the EEA national must have resided in Iceland continuously for five years, which is not in compliance with the Directive.

102. The Authority notes that Article 18 of the Directive does not make it a requirement for the acquisition of the right of permanent residence that the non-EEA family member has resided "with the EEA national" throughout the five year period. Based on the circumstances, the five year period may be divided into two, the first part occurring during the relationship with the EEA national, and latter after the relationship ended, *cf.* Article 12 (2) or Article 13(2) of the Directive.

103. In its letter of 7 July 2011, the Icelandic Government informed the Authority that the intention was to transpose Article 18 of the Directive in the Regulation on Foreigners or make amendments to the Act on Foreigners.

104. The Authority notes that certain amendments were made to Article 39(1) of the transposing Act by Act No. 83/2012. However, the amendment does not alter the requirement under the Act that the family member must have resided with the EEA national throughout the five year period.

105. The Authority has not received further information from Iceland regarding the matter. Based on the above, the Authority must conclude that Iceland has failed to correctly transpose Article 18 of the Directive.

Incorporation in Icelandic law:

The point raised by the Authority has been addressed by amending article 38 and 38 a of the Act on Foreigners, and by removing the reference to the condition that the TCN family must have resided "with the EEA national."

– Article 20(3) of the Directive - interruption in residence

The Authority's main considerations and conclusion:

106. Article 20(3) of the Directive states that interruption in residence not exceeding two consecutive years shall not affect the validity of the permanent residence card issued to third country family members.

107. The Icelandic Government refers to Article 39(3) of the transposing Act. as the transposing measure. According to this provision the right of permanent residence shall be forfeited if continued residence in another country lasts longer than two years.

108. In the view of the Authority, Article 39(3) of the transposing Act does not constitute a correct transposition of Article 20(3) of the Directive. The latter provision determines that interruption in the residence of no more than two consecutive years shall not affect the validity of the "residence card" issued to third country family members. However, this does not refer to the right of residence as such on the territory of the host EEA State. Article 16(4) of the Directive allowing for loss of the right of permanent residence through absence of more than two years provides for this last issue (and is transposed by Article 39(3) of the transposing Act into Icelandic legislation).

109. Based on the above, the Authority must conclude that Iceland has failed to correctly transpose Article 20(3) of the Directive.

Incorporation in Icelandic law:

This has been corrected in article 38 a of the Act on Foreigners, which now explicitly states that the validity of the residence card of TCN family members is not affected by an interruption of residence for less than two consecutive years.

– Article 21 of the Directive - continuity of residence

The Authority's assessment:

110. Article 21 of the Directive states that for the purpose of the Directive, continuity of residence may be attested by any means of proof in use in the host EEA State.

Furthermore, continuity of residence is broken by any expulsion decision duly enforced against the person concerned.

111. In respect of Article 21 of the Directive, the Icelandic Government refers to Article 36(3) of the transposing Act which authorizes the competent Minister to issue further regulations on the right of residence of EEA nationals.

112. The Authority has not been able to identify in the text of Regulation on Foreigners the relevant measure transposing Article 21 of the Directive, and must therefore conclude that Iceland has failed to transpose Article 21 of the Directive.

Incorporation in Icelandic law:

The content of article 21 of the Directive has now been included in article 38 of the Act on Foreigners.

– Article 27(1) of the Directive - restriction on the freedom movement and residence based on public policy

The Authority's assessment:

113. Article 27(1) of the Directive states that subject to the provisions of Chapter VI, EEA States may restrict the freedom of movement and residence of EEA nationals and their family members, irrespective of nationality, on grounds of public policy, public security or public health. These grounds shall not be invoked to serve economic ends.

114. The Icelandic Government refers with respect to Article 27(1) of the Directive to Articles 41(d), 42(1-2), 43(2-3) and 52(1) of the transposing Act.

115. According to Article 41(d) of the transposing Act, titled "Refusal to entry", an EEA national may be refused entry to the country if necessary for reasons relating to security of the State, imperative national interests, or public health.

116. Article 52(1) of the transposing Act adds that a foreigner may be refused the right to enter the country and his application for a residence permit denied, or made subject to restrictions or conditions if considered necessary on the basis of the State's foreign policy, the security concerns of the State or important national interests. Article 52(1) is placed under Chapter VIII of the Act which apply equally to third country nationals and to EEA nationals and their family members.

117. The Authority recalls that the terms "foreign policy of the State" and "important national interests" in Article 52(1) of the transposing Act are not derived from Article 27(1) of the Directive.

118. The Court of Justice of the EU has held that while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must nevertheless be interpreted strictly, so that their

scope cannot be determined unilaterally by each Member State without any control by the institutions of the European Union.

119. In the view of the Authority, the additional reasons provided under Article 52(1) of the transposing Act may be understood as widening the scope for restricting the right of entry of EEA nationals beyond what is laid down in Article 27(1) of the Directive. In that regard, the Authority notes that the reasons laid down in Article 27(1) of the Directive are exhaustive. Adding new grounds would therefore appear to be in breach of the Directive.

120. The Icelandic Government has not provided the Authority with any clarifications concerning the scope of Article 52(1) of the transposing Act or its relationship with Article 41(d). The Authority must therefore conclude that Iceland has failed to correctly transpose Article 27(1) of the Directive.

Incorporation in Icelandic law:

A new special provision was included in the Act on Foreigners: article 42, which states that:

- Art. 42(1): an EEA national or a family member can be expelled on grounds of public policy, public security or public health.
- Art 42(2): an expulsion can be decided if the conduct of the person implies a real, imminent and sufficiently serious threat against the interest of the society. A decision on expulsion shall not be based solely on preventative reasons. If the person has been convicted/sentenced, a decision can only be applied if the conduct implies that the person may repeat criminal conduct. Previous sentences are not sufficient as a basis for expulsion.
- Art 42(3): it is allowed to expel an EEA national or his family member if the requirements regarding the stay are not fulfilled.
- Art 42(4) - A person can be expelled if necessary to protect public health.
- Art. 43(3) states that expulsion shall not be automatic consequence of receiving social assistance and expulsion shall never be based on the sole ground that a travel document has expired.

However, expulsion based on article 42(3) is not applied in practice.¹³¹⁴

– Article 27(2) of the Directive - assessment of conduct

The Authority's assessment:

121. Article 27(2) of the Directive states that 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. 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.

122. Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted.

¹³¹⁴ Information provided by a senior legal expert at the Ministry of the Interior during a meeting on 15 September 2015

123. The Icelandic Government refers with respect to Article 27(2) of the Directive to Articles 42(2) of the transposing Act, and Article 12 of the Act of Administrative Procedures.

124. Article 42(2) of the transposing Act, titled "Expulsion", states that an expulsion may be carried out if the foreigner demonstrates, or it may be presumed that he will demonstrate, a personal behaviour which constitutes real and sufficiently serious threat to fundamental interests of society. If the foreigner has been subject to penal sanctions or special arrangements decided, an expulsion decision can only be made on the basis of this reason if it involves behaviour which may indicate that the foreigner will commit a criminal act again.

125. The Authority notes that the requirement in Article 27(2) of the Directive "*Justifications that are isolated from the particulars of the case or that rely on considerations of general prevention shall not be accepted*" has not been transposed.

126. In its letter of 7 July 2001, the Icelandic Government explained, as regards the above sentence, that according to the wording of Article 42(2) of the transposing Act, a decision on expulsion must be based on personal conduct, and therefore such a decision cannot be based on considerations of general prevention and never are. However, the letter stated that the Icelandic Government was willing to take the comments of the Authority into consideration and would review whether it may be necessary to amend Article 42(2) to better reflect Article 27(2) of the Directive.

127. The Authority has not received further information from the Icelandic Government concerning this matter. In the view of the Authority, full transposition of Article 27(2) of the Directive is not achieved without the inclusion of the specific limitations, referred to above. The purpose of this requirement is to prevent a too wide interpretation by the national authorities of the grounds for restricting freedom of movement and residence of EEA nationals and their family members. Accordingly, the Authority must conclude that Iceland has failed to correctly transpose Article 27(2) of the Directive.

Incorporation in Icelandic law:

This has been corrected in the new article 42, mentioned above, in which the specific limitations of article 27(2) of the Directive have been included.

– Article 31(2) of the Directive - suspension of the order of expulsion

The Authority's assessment:

128. According to Article 31(2) of the Directive, when the application for appeal against or judicial review of the expulsion decision is accompanied by an application for an interim order to suspend enforcement, actual removal may not take place until such decision on the interim order is taken. This shall however not apply;

*where the expulsion decision is based on a previous judicial decision; or
where the persons concerned have had previous access to judicial review; or
where the expulsion decision is based on imperative grounds of public security under Article 28(3).*

129. The Icelandic Government refers to Articles 10 and 29(2,4) of the Administrative Procedures Act, and Article 33 of the transposing Act, as measures transposing Article 31(2) of the Directive.

130. Articles 10 of the Administrative Procedures Act contains the general principle that the competent administrative authority shall ensure that the facts of a case are adequately disclosed before a decision is taken regarding it. Article 29(1) states that an appeal of an administrative decision does not suspend enforcement of that decision. However, under Article 29(2), an appellate administrative authority may suspend the enforcement of that decision during the period the appeal is being handled, provided that there are reasons for such a decision.

131. Article 33 of the transposing Act provides that a decision involving a deportation of a foreigner shall be enforced by ordering the foreigner to leave the country immediately or within a certain time frame.

132. In the view of the Authority, the above national measures do not transpose the administrative guarantees prescribed by Article 31(2) of the Directive.

133. Firstly, Article 29 of Administrative Procedures Act does not reflect the principle prescribed by Article 31(2) of the Directive that actual removal from the territory of Iceland may not take place until a decision on the interim order to suspend the enforcement, where relevant, has been made. In fact Article 29(1) of the Act provides as a matter of principle that an appeal of an administrative decision does not suspend enforcement of that decision.

134. Secondly, while a reading of Article 29(2) of the Administrative Procedures Act appears to provide that the relevant appeal administrative authority may suspend the enforcement of an expulsion order, the discretion does not reflect the level of protection laid down in Article 31(2) of the Directive. In fact, the specific reasons listed in 31(2) of the Directive, which incidentally have not been transposed either, aim to demonstrate the narrow scope for refusing to suspend enforcement of an expulsion order.

135. Based on the above, the Authority must conclude that Iceland has failed to correctly transpose Article 31 (2) of the Directive.

Incorporation in Icelandic law:

The general procedural safeguards of Art 31(1) are incorporated in Art 31(1) of the Act on Foreigners: a decision on expulsion of an EEA citizen cannot be carried out until the decision is final (i.e. after the Appeals Board has decided on a first appeal); if the person then wants to appeal this latter decision before a court, the expulsion decision is not automatically suspended, but the person can apply for this further suspension.

– Article 33(2) of the Directive - material change in circumstances

The Authority's main considerations and conclusion:

136. Article 33(2) of the Directive prescribes that if an expulsion order, as provided for in paragraph 1, is enforced more than two years after it was issued, the EEA State shall check that the individual concerned is currently and genuinely a threat to public policy or public security and shall assess whether there has been any material change in the circumstances since the expulsion order was issued.

137. The Icelandic Government refers to Article 42(2) in the transposing Act, as a measure transposing Article 33(2) of the Directive. Article 42(2) states that an expulsion may be carried out if the foreigner demonstrates, or it may be presumed that he will demonstrate, a personal behaviour which constitutes real and sufficiently serious threat to fundamental interests of society. The provision does not address the matter referred to in Article 33(2) of the Directive.

138. Based on the above, the Authority must conclude that Iceland has failed to transpose Article 33(2) of the Directive.

Incorporation in Icelandic law:

This point has not been reflected in the Act on Foreigners.

After examining the legislative amendments as outlined above, the EFTA Surveillance Authority officially closed the case in January 2015.

Country Study Iceland - Annex 2

EFTA Court judgments in Cases E-15/12 *Wahl* and E-26/30 *Gunnarsson*

1 Case E-15/12 *Wahl*

1.1 Facts of the Case

A Norwegian citizen, Jan Anfinn Wahl, arrived in Iceland on 5 February 2010 by a flight from Oslo. During a search by customs officers, clothing marked "Hells Angels" was found in his luggage. He was then detained and interviewed by the police. Mr Wahl stated that he was a member of the Hells Angels motorcycle club in Drammen, Norway, and that he held a clean criminal record. He mentioned that the purpose of his visit to Iceland was sightseeing and to engage in social contact with befriended members of an Icelandic motorcycle club, Fáfñir (subsequently renamed MC Iceland). He also said he had a return flight to Oslo booked for 8 February 2010.

Mr Wahl was denied entry to Iceland by a decision of the Directorate of Immigration, based on a "threat assessment" requested by the police, and prepared by the National Security Unit. According to this assessment there was every indication that Mr Wahl's arrival in Iceland was related to the pending membership of MC Iceland to the Hells Angels motorcycle organization. The admission process had been directed from Norway and was its final stage. Upon such membership the Icelandic group would become a full and independent chapter within Hells Angels. The cooperation of MC Iceland and foreign chapters of Hells Angels, as well as the pending membership of the Icelandic MC in the organization were considered to create a threat of increased organized crime in Iceland, and hence a threat to the Icelandic community.

1.2 National Legal Proceedings

The denial of entry was based on article 41(1) c of the Act on Foreigners, No. 96/2002, and it was deemed necessary with reference to public policy. Mr Wahl launched an appeal to the Ministry of the Interior, which upheld the decision in a ruling of 16 June 2010. The Ministry of the Interior stated that:

- Under the EEA Agreement and Directive 2004/38/EC it is permissible to refuse an EEA national entry into Iceland if he is a member of a society or association that threatens public policy or public security, and
- It is not necessary for the society or organization to be prohibited;
- The decision had taken due account of the case law of the CJEU and was further supported by a communication from the Commission to the EP and the Council of 2 July 2009.

Mr Wahl appealed this decision of the Ministry before the Reykjavik District Court, claiming compensation for financial loss and non-financial damage. The District Court rejected the appellant's claims in a judgment of 22 December 2010 (Reykjavik District Court Judgment: Jan Anfinn Wahl vs. the Icelandic State, Case No. E-6159/2010).

The matter was then brought before the Supreme Court of Iceland, which decided to stay the proceedings and request an Advisory Opinion from the EFTA Court on the interpretation of certain rules of EEA law.

1.3 Questions Included in the Request for an Advisory Opinion and Answers from the EFTA Court

The following five questions were presented to the EFTA Court, and the Court's conclusions are mentioned after each question.

1) Do Member State which are parties to the Agreement on the European Economic Area have, with regard to article 7 of the Agreement, the choice of form and method of implementation when making the provisions of Directive 2004/38/EC (...) part of their internal legal order?

Conclusion EFTA Court (paragraph 56):

Under Article 7 EEA, an EEA/EFTA State has the choice of form and method when implementing an act corresponding to Directive 2004/38/EC into its legal order. Depending on the legal context, the implementation of a directive does not necessarily require legislative action, as long as it is implemented with unquestionable binding force and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty.

2) Should paragraph 1 of Article 27 of Directive 2004/38/EC be interpreted as meaning that the mere fact, by itself, that the competent authorities in an EEA Member State consider, on the basis of a danger assessment, that an organisation to which the individual in question belongs, is connected with organised crime and the assessment is based on the view that where such organisations have managed to establish themselves, increased and organised crime has followed, is sufficient to consider a citizen of the Union to constitute a threat to public policy and public security in the state in question?

Conclusion EFTA Court (paragraph 92:)

(...) (It is sufficient for an EEA State to base a decision under Article 27 of the Directive not to grant an individual who is a national of another EEA State leave to enter its territory on grounds of public policy and/or public security only upon a danger assessment, which assesses the role of the individual in the accession of a new charter to an organisation of which the individual is a member and which concludes that the organisation is associated with organised crime and that where such an organisation has managed to establish itself, organised crime has increased. It is further required that the assessment is based exclusively on the personal conduct of the individual concerned. Moreover, this personal conduct must represent a genuine, present and sufficiently serious threat to one of the fundamental interests of society, and the restriction on the right to entry must be proportionate. In the light of the relevant matters of fact and law, it is for the national court to determine whether those requirements are met.

3) For answering the second question, is it of significance whether the Member State has outlawed the organisation of which the individual in question is a member and membership of such organisation is prohibited in the state?

Conclusion EFTA Court (paragraph 108):

(...) (A)n EEA State cannot be obliged to declare an organisation and membership therein unlawful before it can deny a member of that organisation who is a national of another EEA

State leave to enter its territory pursuant to Article 27 of the Directive if recourse to such a declaration is not thought appropriate in the circumstances. However, the EEA State must have clearly defined its standpoint as regards the activities of that organisation and, considering the activities to be a threat to public policy and/or public security, it must have taken administrative measures to counteract those activities.

4) Is it sufficient grounds for considering public policy and public security to be threatened in the sense of paragraph 1 of Article 27 of Directive 2004/38/EC that a EEA Member State, party to the Agreement on the European Economic Area, has in its legislation defined as punishable, conduct that consists of conniving with another person on the commission of an act, the commission of which is part of the activities of a criminal organisation, or is such legislation considered as general prevention in the sense of paragraph 2 of Article 27 of the Directive? This question is based on the fact that 'organised crime' in the sense of domestic law refers to an association of three or more persons, the principle objective of which is, for motives of gain, directly or indirectly, deliberately to commit a criminal act, or when a substantial part of the activities involves the commission of such an act.

Conclusion EFTA Court (paragraph 118):

The Court (...) concludes that in order to invoke a public policy and/or public security threat under Article 27(1) of the Directive it does not suffice that an EEA State has defined as punishable, conduct that consists of conniving with another person in the commission of an act, the commission of which is part of the activities of a criminal organisation.

5) Should paragraph 2 of Article 27 of Directive 2004/38/EC be understood meaning that a premise for the application of measures under paragraph 1 of Article 27 of the Directive against a specific individual is that the Member State must adduce a probability that the individual in question intends to indulge in activities comprising a certain action or actions, or refraining from a certain action or actions, in order for the individual's conduct to be considered as representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society?

Conclusion EFTA Court (paragraph 130):

The Court (...) holds that the national administrative authorities must ensure that there is sufficient evidence to conclude under Article 27(2) of the Directive that the individual concerned was likely to engage in personal conduct that represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. It is for the national court to determine, in compliance with the principles of equivalence and effectiveness, whether this is the case.

1.4 Consequences for the Present Case and for Iceland's Future Practice

The Icelandic Supreme Court then re-opened its proceedings and considered, in its Judgment of 17 October 17, 2013 (Jan Anfinn Wahl vs. the Icelandic State, Case No. 191/2012), that:

(Information based on a Briefing Note provided to the author by a representative of the Icelandic Ministry of the Interior):

- The risk assessment by the Police based on which the government had decided to deny Mr Wahl's entry had not been faulty;

- The Icelandic authorities were not under an obligation to declare that an organisation or the membership of an organisation were illegal for the purpose of denying entry to a citizen of another EEA member state based on article 27(2) of the Directive, provided that such an action would be considered appropriate in light of the circumstances;
- The Icelandic authorities, on the other hand, need to, and they already had, defined their position regarding the Hell's Angels in an unambiguous way and had taken administrative measures with the intent to counteract the activities of this organisation as it was considered to constitute a threat to public order and public security;
- Furthermore the authorities had ensured that there was sufficient evidence available that would enable the authorities to assess whether Mr Wahl had engaged in or if he was liable to engage in conduct that would be considered a threat against the basic interests of the Icelandic society;
- The Advisory Opinion of the EFTA Court indicates that a person's membership of a motorcycle organisation which has a connection to organised crime could, if other conditions are fulfilled, be considered to be conduct which purports a real, imminent and sufficiently serious threat to one of the society's fundamental principles. In addition the EFTA Court had also indicated that it would be enough to base a decision of denial of entry according to article 27 of the Directive solely on a risk assessment on the condition that four prerequisites were met, which in the view of the Supreme Court had been met in this case.

This case has had a significant influence, in Icelandic practice, on the interpretation of the conditions of article 27 of the Directive, in particular on the question of what constitutes a 'real, imminent and sufficiently serious threat' to one of the society's fundamental principles.

2 Case E- 26/30 Gunnarsson (Case E- 26/30 Gunnarsson [2014] EFTA Ct. Rep. 254)

2.1 Facts of the Case

Mr Gunnarsson and his wife are both Icelandic citizens who were resident in Denmark from 24 January 2004 to 3 September 2009. During that period, the couple's total income consisted in unemployment benefit which Mr Gunnarsson's wife received in Iceland until 1 May 2004 and of Mr Gunnarsson's own disability pension from the Icelandic Social Insurance Administration, together with benefit payments he received from two Icelandic pension funds.

Mr Gunnarsson paid tax on his income in Iceland. He claims that he was overcharged in the period from 1 May 2004 to 1 October 2009 because he was prevented from utilising his wife's personal tax credit while they resided in Denmark. Under the Icelandic tax legislation applicable at the time, the couple had to reside in Iceland for Mr Gunnarsson to be entitled to use his wife's personal tax credit in addition to his own.

2.2 National Legal Proceedings

- On 22 December 2006, Mr Gunnarsson and his wife applied to the Icelandic Directorate of Internal Revenue asking that they be allowed to use to utilise his wife's tax credit in respect of his income in Iceland.
- On 9 January 2007, the Directorate turned down the request. It was denied on the grounds that such transfer was only possible between taxpayers with unlimited tax liability in Iceland

(essentially resident taxpayers) or where both spouses were in receipt of an Icelandic pension.

- As Mr Gunnarsson and his wife were neither resident in Iceland nor both in receipt of a pension pursuant to Icelandic law during the relevant period, the conditions authorising the transfer of unused personal tax credits between spouses were not fulfilled.
- In February 2008, Mr Gunnarsson complained to ESA. In July 2010, ESA issued a letter of formal notice to Iceland, stating that Iceland had failed to fulfil its obligations under Article 28 EEA and Article 7 of the Directive by refusing to allow pensioners who were resident in another EEA State to utilise their spouses' personal tax credit, as they would have been able to do if they had been resident in Iceland.
- The Income Tax Act was amended in December 2010 to allow spouses who receive at least 90% of their total annual joint income in Iceland to request the transfer tax credits between spouses. Had this provision been in force at the time in question, Mr Gunnarsson would, under such conditions, have been able to make use of his wife's unused tax credits.
- In July 2010, Mr Gunnarsson demanded repayment of the income tax he had paid on his income during the relevant period that would not have been payable had he been able to use his wife's tax credits, referring to ESA's letter of formal notice. In August 2010 the Directorate of Internal Revenue refused to adopt a position on the claim, considering that it was not possible to do so, because the formal notice did not constitute a final conclusion on the matter.
- In November 2010, Mr Gunnarsson brought the present action before the District Court, claiming annulment of the decision of the Directorate of Internal Revenue, and repayment of the alleged excess taxes paid. In the alternative, he claims damages for the Icelandic's State failure to fulfil its obligations under the EEA Agreement.
- The Reykjavik District Court, in a judgment of November 13, 2012 (*Atli Gunnarsson vs. the Icelandic State*, Case No. E-6728/2010), upheld the claim for annulment and the repayment of taxes, except for the part of his claim that related to taxes due prior to November 2006, which had lapsed because of expiry of the period of prescription. The District Court held that the decision by the Directorate of Internal Revenue was incompatible with the obligations imposed by the EEA Agreement.
- Both Mr Gunnarsson and the Icelandic State appealed to the Supreme Court of Iceland.
- In the view of the Supreme Court, there was doubt about whether Mr Gunnarsson's position should be assessed pursuant to article 28 EEA and/or Article 7 of the Directive, individually or together, or to other EEA rules.
- The Supreme Court decided to seek an Advisory Opinion from the Court.

2.3 Questions Included in the Request for an Advisory Opinion and Answers from the EFTA Court

1) Is it compatible with Article 28 of the Agreement on the European Economic Area and/or Article 7 of Directive 2004/38/EC that a State (A), which is party to the Agreement, does not give spouses the option of pooling their personal tax credits in connection with the assessment of income tax in

circumstances in which both spouses move from State (A) and live in another State (B) in the European Economic Area and one of them receives a pension from State (A) while the other has no income, if the tax position of the couple would be different if both lived in State (A), including the fact that they would be entitled to pool their personal tax credits?

2) When Question 1 is answered, is it of significance that the Agreement on the European Economic Area does not contain any provision corresponding to Article 21 of the Treaty on the Functioning of the European Union?

Conclusion of the EFTA Court (paragraphs 92, 93):

The reply to the questions from the Supreme Court must therefore be that it is not compatible with Article 1 of Directive 90/365/EEC and Article 7(1)(b) and (d) of Directive 2004/38/EC that an EEA State does not give spouses who have moved to another EEA State the option of pooling their personal tax credits in connection with the assessment of income tax, whereas they would be entitled to pool their personal tax credits if they lived in the home State, in a situation where one of them receives a pension from the home State, and that pension constitutes all or nearly all of that person's income, while the other spouse has no income. In these circumstances, there is no need to rule on the applicability of Article 28 EEA.

The Supreme Court took these answers into account in its judgment of October 2, 2014 (The Icelandic State vs. Atli Gunnarsson, Case No. 92/2013).

Country Study The Netherlands*

1 Introduction

1.1 General public attitude towards immigration and free movement

In the Netherlands, public opinion has considered immigration as one of the main national concerns since the beginning of this century. However, while in 2002, the year of the assassination of the politician Pim Fortuyn, about half the population thought that there were too many immigrants in the Netherlands this percentage is much lower in recent years (31% in 2014).¹³¹⁵ According to this same survey, in 2014 there was more concern about immigrants from outside the EU (56%) than from within the Union (49%).¹³¹⁶ Nevertheless, immigration is still considered as one of the main national problem areas, after the economic crisis and public healthcare.¹³¹⁷

Moreover, in the last few years, there has been increasing public and media attention for EU migrants and the free movement of workers. The concerns expressed are narrowly focused on two groups – third country family members of EU citizens who have exercised their free movement rights, and citizens of member states that joined the EU in 2004 and 2007.¹³¹⁸ In this context, in 2013 much attention was given, first in the media and then in public discourse, to a welfare benefit-draining scheme, in which Bulgarian nationals were transported to the Netherlands in order to falsely obtain a residence number. Subsequently, they were transported back to Bulgaria, while the schemers used their residence number to claim welfare benefits antedate. This fraud led to the near-downfall of the deputy minister of finance and to a project to revise the Dutch welfare benefit system. However, as noted by J. Lange and A. Schrauwen, "(i)t seems that the focus of the national public discourse did quickly turn away from EU citizenship rules as source of the fraud towards political responsibility of Dutch politicians and badly designed and complicated Dutch legislation on welfare benefits."¹³¹⁹ At the same time, according to the same surveys as mentioned above, the Dutch concerns about immigration are more directed more towards Muslims, problems of integration and, to a lesser extent, fears of terrorism, than to EU migrants and their family members.

* The author would like to thank the representatives of the Migration Policy Department at the Ministry of Security and Justice, and of the Immigration and Naturalization Service (IND) for the substantial information they provided during and after an interview held on 3 March 2015, and Prof. Annette Schrauwen, University of Amsterdam, for her advice in the early stage of the research. However, the full responsibility for the content of this study remains with the author

¹³¹⁵ German Marshall Fund, *Transatlantic Trends: Mobility, Migration and Integration, Key Findings of 2014 and Selected Highlights from Transatlantic Trends: Migration 2008-13*, http://trends.gmfus.org/files/2014/09/Trends_Immigration_2014_web.pdf

¹³¹⁶ *Idem*

¹³¹⁷ Sociaal en Cultureel Planbureau, *Continu Onderzoek Burgerperspectieven*, 2015/1, according to which 31% of respondents chose issues in the field of immigration and integration to be among the principal concerns at the national level

¹³¹⁸ European Commission, *European Report on Free Movement of Workers in Europe 2011-2012*, p. 3

¹³¹⁹ Jurian Langer and Annet Schrauwen, 'The Netherlands', in Ulla Neergaard, Catherine Jacqueson and Nina Holst-Christensen (eds.), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen, 2014*, Congress Publications Vol. 2, pp. 453-479 (hereafter: 'FIDE Report on the Netherlands'), at p. 98

1.2 Summary of main Conclusions

As will be shown in this report, in the Netherlands the incorporation of Directive 2004/38/EC (hereafter: 'the directive') into national law is to a large extent completed and on some points, such as the definition of family members, Dutch law goes beyond the minimum requirements of the directive. The Netherlands has regularly adapted its legislation and administrative practice to take account of the Judgments of the Court of Justice of the European Union (CJEU).

At the same time, the Netherlands has adopted a rather restrictive approach towards granting residence rights based on primary EU law on the free movement of persons in situations that do not fall within the scope of the directive, such as purely internal situations, where there is no cross-border element. A cautious attitude is also adopted with regard to granting residence rights to Third Country National (hereafter: 'TCN') family members who join or accompany a Dutch national who returns to the Netherlands after a temporary stay in another EU/EEA State.

2 Implementation of Directive 2004/38/EC: General Assessment

2.1 National implementing legislation

The relevant legal framework consists of the Aliens Act 2000 (*Vreemdelingenwet 2000*), Aliens Decree 2000 (*Vreemdelingenbesluit 2000*), and the Aliens Circular (*Vreemdelingencirculaire*), with further amendments.¹³²⁰ In particular, Articles 8.7-8.25 of the Aliens Decree 2000 are intended to implement Directive 2004/38/EC.

2.2 Institutional context and complaint procedures

The Immigration and Naturalisation Service (*Immigratie en Naturalisatiedienst*, hereafter: 'IND') implements the policy on foreign nationals on behalf of the Ministry of Security and Justice. The State Secretary for Security and Justice is responsible for the implementation of, *inter alia*, the Aliens Act. The IND assesses all residence permit applications of people who intend to live in the Netherlands or who want to obtain Dutch citizenship, including applications falling within the scope of the directive and primary EU law. Complaints against rejections and other decisions by the IND can be made to the courts of the regular judicial system, and court decisions can subsequently be appealed before the Council of State, the highest court of appeal for citizens against executive branch decisions.

2.3 Administrative policies and guidelines

The Dutch Ministry of Justice issues detailed policy guidelines on the application of the applicable laws in individual situations. The Ministry of Foreign Affairs, which is responsible for coordinating and monitoring the national implementation of EU law, organises regular interdepartmental meetings and its legal service issues explanatory notes on the implications of significant judgments from the CJEU. The competent Ministries are then responsible for ensuring that this case law is taken into account in the national policies and practice. Sometimes the government -either the competent Minister or even the Prime Minister- issue a Press release or make public statements about judgments or preliminary rulings from the CJEU, when they are considered to have significant

¹³²⁰ Aliens Act (*Vreemdelingenwet*) 23.11.2000, BWBR0011823 (last amended on 19.06.2013); Aliens Decree (*Vreemdelingenbesluit*) BWBR0011825 (last amended on 19.11.2014), and Aliens Circular (*Vreemdelingencirculaire*), BWBR0012287 (last amended on 10-12-2014). Dutch versions available at www.overheid.nl. An English version is only available of the original Aliens Act, without amendments

effects at the national level. This was the case, for example, with regard to the *Dano* judgment.¹³²¹ However, there does not seem to be a systematic practice of publishing briefing notes or other public statements on how the government interprets the European case law.

3 Specific Assessment: Interpretation of the Individual Provisions of the Directive

3.1 Personal Scope - To whom does it apply?

3.1.1 *EU/EEA citizens*

In the Dutch Aliens Act, Community citizens are defined, in essence, as: (1) nationals of EU member states who are entitled to enter and reside in another Member State under primary EU law; (2) family members of the persons referred to at 1 who have the nationality of a third state and who are entitled to enter and reside in a Member State under secondary EU law; (3) nationals of EEA states, who enjoy rights equal to those of the citizens of EU member states as regards entry into and residence in a Member State; (4) family members of the persons referred to at (3) who have the nationality of a third state and who are entitled to enter and reside in a Member State under the Treaty establishing the European Economic Area; (5) nationals of the Swiss Confederation, based on the Agreement concluded between the Swiss Confederation and the European Union on 21 June 1999; and (6) family members of the persons mentioned under (5) and who are entitled to enter and reside in a Member State under the Agreement mentioned under (5).¹³²² More specifically, Article 8(7) of the Aliens Decree states that this Decree, which explicitly implements the directive, is applicable to the nationals of EU member states, EEA states and Switzerland, who move to, or reside in the Netherlands, and their family members as defined in Art 2(2) and 3(2) of the directive.

3.1.2 *Definition of family members*

In the Netherlands, all categories of family members included in the directive are incorporated into the implementing legislation (Aliens Decree, Art. 8.7).

- *Spouse*: a broad interpretation has been adopted, since civil marriage includes also same-sex marriages. Moreover, a legally registered partnership gives rise to the same rights as those of a spouse.¹³²³
- *De facto partners*: In addition, the Netherlands has extensively interpreted Art 3(2)b of the directive by granting the same rights as a spouse or a registered partner also to de facto partners and, going beyond the directive, direct descendants of such a partner who are younger than 18 years of age are recognised as 'other family members' as well.¹³²⁴ Until January 2009, the Court's requirement of non-discriminatory access for EC workers was used as a basis to grant unmarried and unregistered partners of EU citizens a right of residence by complete analogy to the immigration facilities offered under Dutch immigration law to de facto partners of Dutch citizens and TCNs. In January 2009, the government introduced a new policy rule, changing the basis of rights from the non-discrimination

¹³²¹ Letter from the Minister for Social Affairs and Employment to the President of the Dutch Parliament (Tweede Kamer) of 26 November 2014, Meeting year 2014-2015, Kamerstuk 34000-XV nr. 55, <https://zoek.officielebekendmakingen.nl/dossier/34000/kst-34000-XV-55?resultIndex=179&sorttype=1&sortorder=4>.

¹³²² Aliens Act 2000, see above, note 1323, Article 1

¹³²³ Aliens Act, art. 8(7)

¹³²⁴ Aliens Act, Art 8(7) under 4

principle to the directive provision, Art. 3(2)(b) regarding 'durable relationship(s), duly attested'.¹³²⁵ The Council of State has been critical in its case law on the new policy rules on evidence of a 'durable relationship', leading to another change in the Aliens Circular in June 2013. The same policy is still in force, but it has been added that 'in all matters of EU law, the relevant authorities will not limit the means of evidence that can be used (freedom of evidence).' The Aliens Circular (Chapter B10, 2/2) determines, that the IND assumes that a durable relationship exists when the EU citizen and the unmarried partner, either (i) have had a common household, and have actually lived together for a period of 6 months prior to their request for an assessment under EU law; or (ii) have a child together.

- *Other family members*: all categories of persons mentioned in Art 3(2)a of the directive have been included in Dutch law (dependent descendants over 21 years old, dependent family members in the ascending line, dependent members of the household of the EU citizen, and family members who on serious health grounds require personal care).¹³²⁶ The assessment whether a family member requires personal care on serious health grounds is done on a case-by-case basis, applying the abovementioned principle of 'freedom of evidence'.

3.1.3 Definition of economically active persons

The Aliens Circular states that the IND considers a EU citizen as a worker or a self-employed person, if he/she performs real (*reële en daadwerkelijke*) work. The condition of 'real work' is fulfilled, in any case, when (i) the income from work constitute more than 50% of the applicable amount of eligibility for social assistance (*Bijstandnorm*); or (ii) the EU citizen works at least 40% of a habitual full time occupation.

3.1.4 Definition of 'self-sufficiency'

The criterion of having 'sufficient resources' for non-economically active persons is interpreted as the amount equivalent to that of the legal minimum wage.¹³²⁷ This is a maximum amount. If the EU citizen does not have this amount at his disposal the personal situation of the individual concerned must be taken into account. If the EU citizen applies for social assistance (*Bijstand*), it will be examined if he/she still complies with the criteria of the directive, or if the condition of having sufficient resources is no longer fulfilled. If this is not the case, the person's right to residence may be terminated, in order to prevent that he/she becomes a burden on the social assistance system. In order to establish if all conditions are fulfilled, including the criterion of sufficient resources, exchange of information between different government agencies is extremely important, in particular with the agencies responsible for decisions on social benefits. Only if there are indications that an EU citizen does not fulfill the conditions of the directive, or there will be an unreasonable burden on the social assistance system, the agencies inform the IND. This exchange of information is currently subject to improvement in the Netherlands.¹³²⁸ There are two agencies that notify the IND:

Firstly, the *police* notify the IND about EU-citizen who are causing nuisance to the public order (begging, sleeping in parks, drunk in public, minor shoplifting). From the type of nuisance, the IND can reasonably suspect that these persons do not possess sufficient resources. The IND and Police

¹³²⁵ Aliens Circular, as amended on 31 January 2009, Ch B10/1.7

¹³²⁶ Aliens Act, Art 8(7) under 3

¹³²⁷ Information provided during an interview held with representatives of the Migration Policy Department at the Ministry of Security and Justice, of the Department of Legal Affairs (*Juridische Zaken, Procesvertegenwoordiging*) at the Immigration and Naturalization Service (IND), and of the Direction Implementation Policy (*Uitvoeringsbeleid*) of the IND, on 3 March 2015

¹³²⁸ *Idem*

have cooperated closely to streamline the exchange of information in order for the IND to have all the information required to establish that there are no residency rights for these EU citizens. The persons concerned are then assisted in their voluntary return. Also the *Dienst Terugkeer en Vertrek*, (Repatriation and Departure Service) is committed to this project and arranges for the return of the EU citizens that do not leave voluntarily.

Secondly, *Municipal Social Services* (responsible for providing social assistance (*Bijstand*) report to the IND cases of migrants (EU citizens and third country nationals) of whom they expect that their application for social assistance has consequences for their residency rights. They do not send all applications of EU citizens to the IND, but only if there is a reasonable doubt that they do not fulfill the criteria of Directive 2004/38. Here as well, it is crucial that the municipal social services provide the IND with all necessary information to enable it to make a swift decision if there is in fact reason to withdraw the residency right. Since there are almost 400 municipalities in NL, it is hard to streamline this cooperation into a single uniform working method.¹³²⁹

When assessing if a person complies with the criterion of self-sufficiency, any resources that he/she has received or is still receiving in the form of social benefits from the Dutch State (non-contributory, contributory or 'mixed' forms), are not taken into account, with the exception of pensions (received from the Dutch State or from the home State). In other words, if a person receives any other type of social benefits from the Dutch State in the period between 3 months and 5 years since the person's entry, the amount of these benefits will *not* be counted as resources that the person has at his/her disposal; the person needs to show that he/she has the minimum level of resources required to be considered as self-sufficient, *in addition* to these social benefits. In this context, it is important to note that generally, the eligibility for receiving social benefits only arises when it becomes apparent that the available resources of the persons concerned would otherwise fall below the minimum level of subsistence. It is not excluded that persons who have a temporary right of residence are eligible for additional social benefits.

With regard to *students*, the exception of Article 24(2) of the directive (on equal treatment) is included, inter alia, in Art. 3a(1) of the Student Finance Decree (2000): EU students can only obtain student maintenance aid after they have stayed in the Netherlands for a period longer than 5 years (Art. 16, directive.) Moreover, the Commission has launched an infringement procedure before the CJEU against the Netherlands regarding discrimination of students not having the Dutch nationality (both EU and TCN students), since they cannot benefit from a student allowance for free transport, which is granted only to Dutch students. This procedure is currently pending.

3.1.5 *Establishing 'dependency'*

Dependency by family members or members of the household from the EU citizen who exercises his rights under the directive, is established through an evaluation of the specific circumstances of each case. The criteria for establishing dependency are set out in the Aliens Circular (*Vreemdelingencirculaire*). If a family member as defined in Article 8.7 (2), preamble, and under c and d, or in Article 8.7(3) of the Aliens Decree (*Vreemdelingenbesluit*), states to be dependent on a EU citizen, the IND will examine if this family member, at the moment when this family member requests to be reunited with the EU citizen, in the country of origin or the country from where the family member came (i.e. not the Netherlands), was financially supported by the EU citizen. This financial support must be necessary and real. The IND presumes that the material support is necessary when the family member due to his economic and social situation does not (fully) cover

¹³²⁹ Information received from representatives of the Policy Department at the Ministry of Security and Justice, of the Department of Legal Affairs at the Immigration and Naturalization Service (IND), and of the Direction Implementation Policy (*Uitvoeringsbeleid*) of the IND

his own basic needs. The reason why the family member has asked for/receives financial support is not relevant. The IND will presume that the financial support is real when the EU citizen has paid to the family member for a period of at least one year without interruption, a financial sum which is necessary for the family member to provide for his basic needs in the country of origin, or the country of prior residence.¹³³⁰

For other family members, economic dependency must in principle have existed already in the country of origin, but it is also possible that such dependency only arises upon arrival in the host state. The specific circumstances of each case are considered on an individual basis.

3.2 Material scope - Which rights are covered, to whom do they apply and what do they entail?

3.2.1 Rights against the host state

3.2.1.1 Right of entry, right of residence for up to 3 month: Arts 5 and 6, directive¹³³¹

The right of entry for EU citizens and their family members is included in the Aliens Decree, Art. 8.11, in the same term as the directive (Art 5(1). Moreover, going beyond the directive, Art. 8.11(1)(b) provides that proof of a EU citizen's identity and nationality can be provided by means other than a passport or an identity card. This is based on Judgments of the CJEU such as in the cases C-215/03 *Oulane*¹³³² and C-459/99 *MRAX*.¹³³³ Also with regard to the right of entry or TCN family members, the Aliens Decree transposes, in its art 8.9, the same conditions as the directive's Art. 5(2).

In 2014, the obligation to register (with the IND) after the first 3 months of their stay was abolished for EU citizens. There is still an obligation for third country nationals to obtain an EU residence permit. Everyone (EU citizens and TCN's alike) needs to register with the authorities (*Basis Registratie Personen*) after 3 months.¹³³⁴

3.2.1.2 Right of residence between 3 months and 5 years: Art 7, directive

The right of temporary residence is implemented through the Aliens Decree, Article 8.12, which covers all the elements of Article 7 of the directive. The right to residence ceases to exist if the conditions of Article 8.12 are no longer fulfilled.

3.2.1.2.a. Relevant national case law

There has been limited national case law on expulsion of persons who did not (or no longer) comply with the criterion of having sufficient resources. As noted by J. Langer and A. Schrauwen:

¹³³⁰ Information provided by representatives of the Dutch Ministry of Security and Justice and the IND following the interview held on 3 March 2015

¹³³¹ The implementation of the right of exit, laid down in Article 4 of the directive, is not considered here since the focus of this study is on the rights to entry and residence

¹³³² Case C-215/03 *Oulane* [2005] I-01215

¹³³³ Case C-459/99 *MRAX* [2002] I-06591

¹³³⁴ Information provided during interview with representatives of the Ministry of Security and Justice and of the IND, see above, note 1330

The District Court of Amsterdam ruled on 21 February 2013 in a case concerning the request for allowance by a Bulgarian national that municipalities are under an obligation to assess themselves whether the EU citizen has a right of residence. They cannot rely on the residence status as recorded by the immigration authorities (IND).¹³³⁵ According to the Court, this obligation derived from the fact that the right of residence of EU citizens flows directly from the Treaty. Therefore, it ruled that in the case at hand, the Bulgarian citizen did not have a right of residence based on Article 7 of the Directive. Consequently, he was not entitled to an allowance. The Court refrained from ruling on alternative grounds for the residence status. On 18 March 2013, however, the Administrative High Court (the highest court in social security matters) ruled that municipalities, when deciding on allowances, may not refuse these allowances with the argument that the recourse to social assistance is proof of the absence of the right to stay in the Netherlands.¹³³⁶ The Court stressed that the recourse to social assistance cannot automatically result in expulsion: the IND decides on the residence status and the municipalities decide on allowances.

In mid-2013, a pilot project was launched in Rotterdam, in which local authorities and immigration authorities will collaborate closely in cases where a EU citizen applies for social assistance.

3.2.1.2.b. Retention of residence rights (Articles 12 and 13, directive)

The conditions of retention of residence, as provided for in Articles 12 and 13 of the directive, are incorporated in the Aliens Decree, in Article 8.14 (for EU/EEA citizens) and 8.15 (for TCN family members), respectively. These provisions transpose the relevant Articles of the directive in equivalent terms.

In the case of a *de facto* separation, i.e. when a relationship has ended, the right of residence of the spouse or partner will also be terminated. This is also the case when a marriage is still valid and divorce proceedings have not been initiated, or where a registered partnership is still in force. In the Netherlands, the factual situation will be considered in this respect. However, in practice the authorities are seldom aware of a *de facto* separation, unless the spouse/partner applies for social benefits.

Text box 1 - Art. 13, directive and *de facto* separation

<p>Art. 13(2), directive: <i>Retention of the right of residence of family members in the case of divorce, annulment of marriage or termination of registered partnership</i></p>	<ul style="list-style-type: none"> – <i>De facto</i> separation will lead to a termination of the right of residence of a TCN spouse or registered partner – The factual situation will be considered
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3.2.1.3 Right of permanent residence: Art 16, directive

The directive's provisions on the right of permanent residence are transposed in the Aliens Decree, Arts 8.17(1) and (2) and 8.18(a). A right to permanent residence is acquired when the conditions of

¹³³⁵ Rechtbank Amsterdam, 21 February 2013, ECLI:NL:RBAMS:2013:BZ5689

¹³³⁶ Centrale Raad van Beroep, 18 March 2013, ECLI:NL:CRVB:2013:BZ3853, BZ3854, BZ3855, see also Centrale Raad van Beroep, 19 March 2013, ECLI:NL:CRVB: 2013:BZ3857

Article 8.17 of the Aliens Act are fulfilled.¹³³⁷ National courts have, in certain situations, decided that persons could obtain the right of permanent residence even before having completed the five-year term of legal residence. For example, a Ghanaian applicant who had been in a registered partnership with a EU citizen for more 3 years had gained a right to permanent residence, even though she had not resided in the Netherlands for five consecutive years.¹³³⁸ Continuity of residence is broken from the moment the alien has left the Netherlands. No means of proof are mentioned; the liberal rules on evidence generally adhered to apply. In practice, the registration in a municipal register for an uninterrupted period of 5 years is sufficient proof of continued residence.¹³³⁹

Time spent in prison in the Netherlands following a conviction by a Dutch court is *not* considered as lawful residence. The same applies to time spent in a psychiatric hospital as an alternative to a prison sentence.

Text box 2 - Time spent in prison: legal residence?

Practice in the Netherlands:	<ul style="list-style-type: none"> – Time spent in prison is <i>not</i> considered as lawful residence – Time spent in a psychiatric hospital as an alternative to a prison sentence is <i>not</i> considered as lawful residence either
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3.2.2 *Rights against the home state*

3.2.2.1 Rights of persons returning to the home State after a stay in another EU/EEA Member State and their family members - family reunification

3.2.2.1.a. *Administrative guidelines and 'Europe-routes'*

According to the Aliens Circular (Chapter B.10, 2.2.), for a TCN family member of a Dutch citizen, a derived right of residence arises on the basis of Article 21, paragraph 1, TFEU, if the Dutch citizen and the family member:

- have genuinely (*daadwerkelijk*) stayed in another member state of the EU;
- have fulfilled, during the entire period of the genuine stay in the other member state, the conditions mentioned in paragraph 1 or 2 of Article 7 of Directive 2004/38/EU; and
- during their stay in the other member state, have created or strengthened a family life.¹³⁴⁰

This same provision stipulates that the IND assumes that a family life is created or strengthened when the EU citizen and the family member have genuinely and actually stayed in the host State for a period of at least six months. It is up to the returning EU citizen and the family members who wish to join or accompany him/her to prove this by transmitting lease contracts or any other means

¹³³⁷ Centrale Raad van Beroep, 18 March 2013, ECLI:NL:CRVB:2013:BZ3857

¹³³⁸ Rechtbank Amsterdam, 27 march 2013, ECLI:NL:RBAMS:2013:4271

¹³³⁹ FIDE report on the Netherlands, see above, note 1322, at p.699

¹³⁴⁰ Unofficial translation by the author

(principle of freedom of evidence). It is however possible to diverge from this rule if circumstances so require.¹³⁴¹

3.2.2.1.b. *Relevant jurisprudence*

There is some national case law in relation to family members of Dutch citizens being denied a right of residence after the Dutch citizen involved has made use of his mobility rights within the EU and returned to the Netherlands. Courts have denied analogous application of Directive 2004/38/EC for the following reasons: the use of Treaty rights was not permitted since the residence in the host state was considered too short-term, usually less than 3 months; or the Dutch citizen had not furnished convincing proof of 'genuine and effective residence' in the host member state.¹³⁴²

For example, in 2012, the Council of State confirmed a decision of a lower court concerning a family member of a Dutch national who claimed to have made use of his free movement rights by having resided in Belgium. The Council of State considered that the fact that the Belgian authorities had granted a residence card to the Dutch citizen and his family member after having checked whether they actually lived in Belgium, does not prejudice the discretion of the Dutch Secretary of State to decide whether the persons concerned were entitled to a right of residence in the Netherlands based on an analogous application of Directive 2004/38/EC. The Council of State confirmed that the applicants had not provided sufficient proof of a real and actual stay in Belgium, since the Dutch citizen had also rented an apartment in Tilburg (the Netherlands) during the period of the claimed residence abroad, and that he had not provided convincing evidence that this apartment had been sub-rented.¹³⁴³

In other cases, Dutch courts considered that in the following situations the condition of a real and genuine stay was *not* fulfilled either:

- A Dutch citizen who had resided in Belgium for twelve months with her Tunisian partner, whereas she had also worked for Dutch employment agencies during seven months within that same period, and she had declared to have lived with her parents in the Netherlands for a while after giving birth to her child, also in this period of time. Therefore, the court considered that the stay in Belgium was not actual and genuine.¹³⁴⁴
- A Dutch citizen who had resided in Greece for a period of four years (2001-2005) with her Greek husband, then divorced, and subsequently lived in the Netherlands for three years, after which she resided again in Greece for a period of six weeks in 2008 with another partner (Tunisian nationality). The court considered that there was insufficient connection between the stay of the Dutch citizen in Greece until 2005 and her current situation, and that her second stay in Greece was too short to be considered as a real and genuine stay which could, upon return to the Netherlands, give rise to a right of residence for her Tunisian partner based on Article 20 TFEU and an analogous application of Directive 2004/38/EC.¹³⁴⁵

¹³⁴¹ Information provided by representatives of the Dutch Ministry of Security and Justice and the IND following the interview held on 3 March 2015

¹³⁴² Rechtbank 's Gravenhage, zittingsplaats Amsterdam, 13 September 2010, ECLI:NL:RBSGR:2010:B07110; Raad van State, 17 December 2012, ECLI:NL:RVS:2012:BY7401, and Rechtbank 's Gravenhage, zittingsplaats Zwolle, 9 March 2012, ECLI:NL:RBSGR:2012:BV8504.

¹³⁴³ Raad van State, 17 December 2012, ECLI:NL:RVS:2012:BY7401

¹³⁴⁴ Rechtbank 's Gravenhage, Case No.11/4873, 9 March 2012, ECLI:NL:RBSGR:2012:BV8504 (*Summary and translation by the author*)

¹³⁴⁵ Rechtbank 's Gravenhage, zittingsplaats Amsterdam, 13 September 2010, ECLI:NL:RBSGR:2010:B07110 (*Summary and translation by the author*)

- The Thai partner of a Dutch citizen who regularly resided in Germany for short periods of time for the purpose of economic activities, could not rely on Article 21 TFEU and analogous application of Directive 2004/38/EC to claim a right of residence in the Netherlands, since the short-term stays in Germany do not constitute an actual and genuine stay. The Dutch citizen could not rely on the CJEU judgment in Case C-60/00 *Carpenter*, since the short-term stays in Germany were not for the purpose of providing services, as in the *Carpenter* case, but rather for buying goods, which she then sold in the Netherlands, *i.e.* an activity that falls under the free movement of goods. The court also considered that the denial of a derived right of residence for the Thai partner would not result in impeding the enjoyment of the free movement of goods by the Dutch citizen, since she also carried out these economic activities while her partner still resided in Thailand.¹³⁴⁶

In 2012, the Council of State has asked preliminary questions to the CJEU to clarify what is the minimum duration of a stay in a Host member State, and under what circumstances long-term, but intermittent residence in a host member State can be considered to constitute the necessary use of Treaty rights by a Union citizen, and how long after the return of the EU citizen the family member can still derive rights from EU law.¹³⁴⁷ The CJEU has delivered its ruling in these cases, C-456/12 *O. and Others*¹³⁴⁸ and C-457/12 *S. and Others*¹³⁴⁹ on 12 March 2014. Subsequently, the Dutch Council of State has delivered its final judgments in the two cases concerned, deciding that (i) a stay in the host Member State must have a duration of at least three months; (ii) the stay, together with the family member concerned, must have been continuous, and (iii) during the stay, the reference person must have created or strengthened family life with the family member concerned, to justify the granting of residence based on Treaty rights. Moreover, the Council of State concluded that a stay only during weekends in the host state does not meet the required threshold.¹³⁵⁰ There has been some criticism by academic experts in the Netherlands on the interpretation of the ruling in *O. and Others* by the Council of State, arguing that the CJEU does not, in its ruling, explicitly state that a stay of three months in the host state is too short in all circumstances to qualify as 'actual and genuine' residence, as the Council of State seems to conclude from the ruling.¹³⁵¹ This ruling is considered as the state of the law. In general, a longer stay in a third country will be required, unless the TCN provides evidence that in his/her case another measure should be applied, because application of the general rule would lead to an unreasonable outcome.

In some recent judgments, the Council of State has confirmed and/or further elaborated on the criteria to be fulfilled in order to comply with the criteria of an 'actual and genuine' stay in another member State:

- In November 2014, the Council of State held that an Iraqi spouse of a Dutch citizen, who had resided together in Belgium for a period of less than three months, even though the Dutch referent had already resided in Belgium for several years, could not be granted a derived right of residence. The Council of State confirmed its earlier decisions¹³⁵² based on

¹³⁴⁶ Rechtbank te 's Gravenhage, 26 April 2011, ECLI:NL:RBSGR:2011:BQ5774 (*Summary and translation by the author*)

¹³⁴⁷ Raad van State, 5 October 2012 ECLI:NL:RVS:2012:BX9567

¹³⁴⁸ Case C-456/12 *O. and Others*, ECLI:EU:C:2014:135

¹³⁴⁹ Case C-457/12 *S. and Others* ECLI:EU:C:2014:136

¹³⁵⁰ Raad van State, 20 August 2014, 201011889/1/V2 and 201108529/1/V2

¹³⁵¹ Thomas Spijkerboer, Free University of Amsterdam

¹³⁵² See above, note 1350

the prejudicial ruling of the CJEU in *O. and Others*, that a stay of less than three months in another Host Member State will under no circumstances be sufficient to be granted a derived right of residence under EU law.¹³⁵³

- In February 2015, the Council of State confirmed a decision of the Hague District Court according to which a Dutch citizen who resided in Belgium together with his Moroccan partner, had not provided convincing proof of an actual and genuine stay, since he did not transmit sufficient evidence of a *factual* nature, in addition to administrative evidence such as a Belgian EU-residence permit and a rental contract. The Council of State confirmed that there must be convincing proof that, in addition to having rented an apartment in Belgium together with his partner for a continuous period of at least three months, the reference person's 'center of interests' (*centrum van belangen*) was also moved to Belgium. In this case, this was not established. An important factor in this regard was that the Dutch citizen had worked for several employers in the Netherlands during the period of the claimed stay in Belgium.¹³⁵⁴
- In another recent judgment, concerning a Dutch citizen who had resided in Spain together with his TCN partner (of Ghanaian nationality) for thirteen months, the Council of State confirmed that the referent person must present *both administrative, and factual evidence* to prove that the stay in Spain was 'actual and genuine'. The Council of State also considered that the referent person had not provided exhaustive administrative evidence (e.g. no rental contract was submitted), and that not all of the factual evidence provided was independently verifiable (e.g. statements by the priests of the TCN partner, a statement by the landlord of the reference person and his partner in Spain, a statement from the family doctor of the reference person in the Netherlands). Nevertheless, the Council of State also considered that the Secretary of State has neither determined any policy rules on how to demonstrate the plausibility of an actual and genuine stay, nor which type of documents constitute sufficient proof in this regard. Therefore, and taking account of the principle 'of freedom of proof' (*vrije bewijsleer*), emphasised by the Secretary of State himself, the Council of State held that the factual evidence provided, taken together with evidence with a stronger strength of evidence, cannot be considered meaningless. It concluded that the Secretary of State had not duly motivated why the alien (the Ghanaian partner) had not plausibly demonstrated that she and the reference person had resided in Spain for a period longer than three months and that they had created or strengthened family life.¹³⁵⁵

3.2.2.2 Rights of caretakers of minor citizens (involving cross-border element)

In the Netherlands, a residence right for a TCN parent who is the primary caretaker of a minor EU citizen who has made use of his/her free movement rights (or where another cross-border element is involved) can be derived from Articles 20 and/or 21 of the TFEU, and the relevant jurisprudence of the CJEU. The relevant CJEU's case law, in particular case C-413/99 *Baumbast and R*,¹³⁵⁶ and case C-200/02 *Zhu and Chen*,¹³⁵⁷ has been interpreted and applied as follows.

¹³⁵³ Raad van State, 4 November 2014, 201400005/1/V3, available (in Dutch) at https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=81410&summary_only=&q=Richtlijn+2004%2F38

¹³⁵⁴ Raad van State, 201209532/1/V2.19 February 2015

¹³⁵⁵ Raad van State, 201306220/1/V2.19, February 2015, https://www.raadvanstate.nl/uitspraken/zoeken-in-uitspraken/tekst-uitspraak.html?id=82726&summary_only=&q=Richtlijn+2004%2F38

¹³⁵⁶ Case 413/99 *Baumbast and R*, ECLI:EU:C:2002:493

¹³⁵⁷ Case 202/02 *Zhu and Chen*, ECLI:EU:C:2004:639

The Council of State has confirmed that a decisive factor to grant residence to the TCN parent in such a situation is whether he/she actually (*daadwerkelijk*) takes care of the minor EU citizen. Moreover, when assessing if the TCN parent has sufficient resources in the sense of Article 7(1) of the directive, the origin of these resources is irrelevant, and can also consist in regular gifts.¹³⁵⁸

To date, there is very little national case law interpreting the CJEU's judgment in case C-86/12 *Alokpa*.¹³⁵⁹ The Hague District Court, in a judgment of March 2014, held that in accordance with *Alokpa* and the other cases referred to by the CJEU in that case (*Zhu and Chen, Baumbast and R*),¹³⁶⁰ for the assessment if the right of residence (based on Article 21 TFEU) in the host state of a young minor EU citizen of another EU/EEA state remains without any effect, a decisive element is whether the parent on who he is dependent actually and effectively (*daadwerkelijk*) takes care of the EU citizen child. This case concerned a minor having the Italian nationality, who had moved from Germany to the Netherlands with his TCN mother, (of Ghanaian nationality). The Immigration authorities (IND) had refused a right of residence for the mother, because the child's father, an Italian national who also lived in the Netherlands, did not have a 'factual impossibility' to care for the child. It seems as if the IND had applied the criteria developed in Dutch case law for *Zambrano* claims (see below, paragraph 3.2.2.3, which concern cases without any cross-border element and are centered around the rights of the child as a EU citizen based on Article 20 TFEU), also to this situation, in which the derived residence right is rather based on Article 21 TFEU, guaranteeing the right of free movement within the EU.

In another case of November 2014,¹³⁶¹ the Hague District Court has confirmed its position that different criteria apply, as set out above, for a situation where the legal basis of a derived right of residence for the parent is Article 21 TFEU (as clarified in *Baumbast and R, Alokpa*, and *Iida*), or rather Article 20 TFEU (as clarified by the CJEU in *Zambrano* and *Dereci*).

The Council of State has not yet had the opportunity to express itself on this question.

3.2.2.3 Cases with no cross-border element (*Zambrano* case)

3.2.2.3.a. Administrative guidance

The Aliens Circular provides the following guidance (Chapter B 10, 2.2. Residence of a custodian parent with a Dutch minor child). This provision was introduced into the Aliens Circular to incorporate the CJEU's judgment in case C-60/100 *Zambrano*.¹³⁶²

An alien has lawful residence based on Article 8, sub e, Aliens Act¹³⁶³, if all the following conditions are fulfilled:

¹³⁵⁸ E.g. Raad van State, judgment of 3 September 2013, ECLI:NL:RVS:2013:2820

¹³⁵⁹ Case C-86/12 *Alokpa* ECLI:EU:C:2013:645

¹³⁶⁰ Rechtbank Den Haag, ECLI:NL:RBDHA:2014:3821, 26 march 2014

¹³⁶¹ Rechtbank Den Haag, ECLI:NL:RBDHA:2014:15288, 13 November 2014. This case concerned a Philippine mother of a Dutch child, both residing in the Netherlands, without any cross-border element. Therefore, the Court held that the criteria developed in Dutch case law for *Zambrano* claims apply, and not the criteria that follow from the CJEU case law on Article 21, as the appellant had argued

¹³⁶² Case C-34/09 *Zambrano* [2011] ECR I-01177

¹³⁶³ This provision refers to 'a Community citizen as long as this citizen is resident on the grounds of an arrangement under the Treaty establishing the European Community or the Treaty establishing the European Economic Area'. This must be understood, in the context of the present provision of the Aliens Act (Ch B.10, 2.2.), to cover also family members of EU/EEA citizens in the sense of Directive 2004/38

- The alien has a minor child that has the Dutch nationality;
- This child is dependent on the alien and lives together with this alien; and
- If the alien is deprived of his right of residence, this child must follow the alien and leave the territory of the EU.

The IND assumes in any case that the child does not need to follow the alien and leave the territory of the EU when there is another parent who has lawful residence in the Netherlands, or who has the Dutch nationality, and this parent can factually care for the child.

The IND assumes in any case that the other parent can factually care for the child if:

- The other parent has custody (guardianship) over the child, or can obtain this custody;
- The other parent can benefit from help and support for care and education offered by the state and societal organisations. The IND considers that also the provision of a financial allocation by the state, from which also Dutch citizens in the Netherlands can in principle benefit, falls within the scope of such support.

The IND assumes in any case that the other parent cannot factually care for the child if this parent:

- Is serving a prison sentence; or
- Proves that the custody cannot be awarded to him.¹³⁶⁴

3.2.2.3.b. Administrative practice

Government officials have confirmed that there must be a "factual impossibility" (feitelijke onmogelijkheid) for the child to remain in the Netherlands, unless the TCN parent is granted residence. At first, only situations in which the facts are directly comparable to those in the Zambrano case were to be considered to give rise to a residence right of the TCN parent. This policy has been amended under pressure of national jurisprudence, and currently also cases with other sets of facts, where the decision not to allow a third country national the right of residence will force the Dutch minor to leave the union with that parent, may fall under the 'Zambrano-criterion'. However, if the fact that the minor will follow the TCN parent is a result from a choice of the parents (e.g. a choice not arrange custody with the other parent, being a EU citizen) this choice of the parent will not force the government to legalise the stay of the third country national.¹³⁶⁵ Also in situations similar to those in the CJEU's judgment in the case C-256/11 Dereci,¹³⁶⁶ in which the CJEU considered, inter alia, that economic reasons and/or the wish to stay in the host state are not sufficient grounds to grant a residence right for a TCN parent of a EU citizen child, the Dutch authorities will examine if there is a "factual impossibility" for the EU citizen child to remain in the Netherlands, which is line with national case law.¹³⁶⁷

3.2.2.3.c. Relevant case law

¹³⁶⁴ Translation by the author

¹³⁶⁵ See also Aliens Circular, B10/2.2

¹³⁶⁶ Case C-256/11ECLI:EU:C:2011:734

¹³⁶⁷ Interview with representatives of the Ministry of Security and Justice and of the Immigration and Naturalization Service (IND), see above, note 1010

So-called '*Zambrano* claims', introduced by a TCN parent of a EU citizen child to claim a derived right of residence based on the CJEU judgment in case C-60/100 *Zambrano*,¹³⁶⁸ in which no cross-border element is involved, have been denied in several cases.

For example, a Bosnian woman had to leave the Netherlands having no residence permit, but after she gave birth to a child, she was allowed to stay for another 6 weeks. She never left, and had a second child with a Dutch partner, who then made a declaration of paternity for the two children. The mother claimed a right of residence based on the *Zambrano* judgment, but this was refused, on the ground that her children could still enjoy residency in the EU, with their father, who had the Dutch nationality.¹³⁶⁹

Other cases involve situations where the Dutch parent is unable to take care of a child. For example, a Moroccan father did not have the right to stay in the Netherlands, while the mother was not able to take care of the children and therefore the children had to stay in a foster home. According to the Court, the children were thus not forced to leave the EU.¹³⁷⁰ In a similar case, a Dutch parent was mentally ill and could not take care of the children; no derived right of residence for the TCN father was accepted.¹³⁷¹

Indeed, in cases where both a TCN parent and a EU citizen parent provide care to the minor EU citizen, the Council of State (Administrative Department), in its constant case law, has first examined whether the EU citizen parent can factually provide for the financial and affective care of the EU citizen child, possibly with the support from the government or a societal organisation (or other family members). Only when this is not the case, then the Council of State has accepted the possibility for the TCN parent to successfully rely on a derived right of residence.¹³⁷² In this regard, the Council of State has found in some recent cases that the following factors were not sufficient grounds to establish that the EU parent was not factually able to care for the child: a serious muscular disease from which the parent suffered since his birth,¹³⁷³ and the fact that the EU parent was attending a professional training program.¹³⁷⁴ On the other hand, in a judgment of April 2015, the Council of State found that proven domestic violence by the EU parent must be taken into account in this evaluation.¹³⁷⁵

3.2.2.4 Rights against home- and host state of commuters and their family members

Whether residence rights are granted to persons who live in the Netherlands and work in another EU/EEA State (*or vice versa*) depends on the specific circumstances of each case. It is not excluded, but it is not a very common situation.¹³⁷⁶

¹³⁶⁸ Case C-34/09 *Zambrano* [2011] ECR I-01177

¹³⁶⁹ Rechtbank s'Gravenhage, zittingsplaats Roermond, 28 March 2011, ECLI:NL:RBSGR:2011:BQ0062

¹³⁷⁰ Rechtbank s'Gravenhage, 11 July 2011, ECLI:NL:RBSGR:2011:BR1625LJN

¹³⁷¹ Rechtbank 's Gravenhage, 31 August 2011, ECLI:NL:RBSGR:2011:BR7035

¹³⁷² See Monique Watchman, *Het Zambrano-criterium: Een kritische analyse van de toepassing van het Zambrano-criterium door de Afdeling Bestuursrechtspraak van de Raad van State*, 6 December 2013, available at <http://njb.nl/blog/het-zambrano-criterium-een-kritische-analyse-van.12844.lynkx>

¹³⁷³ Raad van State, judgment of 21 March 2014, ECLI:NL:RVS:2014:1094

¹³⁷⁴ Raad van State, judgment of 14 March 2014, ECLI:NL:RVS:2014:960

¹³⁷⁵ Raad van State, judgment of 20 April 2015, ECLI: NL:RVS:2015:1349

¹³⁷⁶ *Idem*

3.2.3 *Restrictions on the freedom of movement and residence: refusal of entry or residence; expulsion measures; re-entry bans*

3.2.3.1 Refusal of entry or residence

3.2.3.1.a. *Refusal of entry*

According to Article 8.8 (1) of the Aliens Decree, entry in the Netherlands can only be refused to EU/EEA citizens and their TCN family members (as defined in Article 8.7) having a valid travel document, on grounds of public order, public security or public health, under the following conditions:

- If the person concerned constitutes, based on his personal conduct, a present, real and serious threat to a fundamental interest of society;
- In the case of potentially epidemic diseases as defined in the relevant instruments of the World Health Organisation, or other infectious, or contagious parasitic diseases, with regard to which protective measures are taken in the Netherlands;
- If he was expelled from the Netherlands on grounds of public order, public security or public health, and if since the expulsion a reasonable time period has not yet passed.¹³⁷⁷

A person who does not possess the required travel document to cross the border will not be expelled before he has been given a reasonable period of time to obtain this document or to provide other evidence that he enjoys a right to free movement and residence (Article 8.8.(4), Aliens Decree). For a more detailed analysis of the interpretation of the terms public order, public security, and the related conditions, see paragraph (3.2.3.2.).

3.2.3.1.b. *Refusal of residence*

The Dutch Aliens Decree (Article 8.22(1)) stipulates that residence can be denied or terminated on grounds of public order or public security, if the personal conduct of the person concerned constitutes a present, real and serious threat to a fundamental interest of society. The principle of protection set out in Article 28(1) of the directive, is transposed in this same provision, determining that before taking a decision in this regard, the authorities shall take into account the duration of the residence of the person concerned in the Netherlands, the age, health situation, family- and economic situation and the social and cultural integration in the Netherlands and the degree to which he has links with his country of origin.

The possibility of refusal or termination of residence on grounds of public health is included in Article 8.23(1) of the Aliens Decree, in the same terms as with regard to the refusal of entry (see above, paragraph 3.2.3.1.a). However, a decision to terminate a right of residence cannot be taken if the disease occurs more than three months after the person's entry into the Netherlands (art. 8.23(2), Aliens Decree).

¹³⁷⁷ Translation by the author

3.2.3.2 Expulsion measures

Based on Article 8.22 of the Aliens Decree, a person who has resided in the Netherlands for more than ten years, cannot be expelled, unless this is required on imperial grounds of public security. Also a minor citizen cannot be expelled, unless expulsion would be in the minor's best interest based on applicable international conventions (as required by Article 28(3) of the directive). EU citizens who have acquired a permanent right of residence can only be expelled on serious grounds of public order or public security, as laid down in the Aliens Decree, Article 8.18. This provision also states that a permanent residence right may be terminated when the person concerned has left the Netherlands for a continuous period of two years.

When applying the public order and security exceptions, Dutch courts often refer to the 2009 Commission guidelines on the implementation of the directive. Indeed, the Council of State has confirmed¹³⁷⁸ that according to its own consistent case law, these Commission guidelines are frequently used to interpret the terms of the directive, and in particular paragraph 3.2. of these guidelines, which states that

In certain circumstances, persistent petty criminality may represent a threat to public policy, despite the fact that any single crime/offence, taken individually, would be insufficient to represent a sufficiently serious threat as defined above. National authorities must show that the personal conduct of the individual concerned represents a threat to the requirements of public policy¹³⁷⁹. When assessing the existence of the threat to public policy in these cases, the authorities may in particular take into account the following factors: the nature of the offences; their frequency; and damage or harm caused.¹³⁸⁰

In 2011, the Minister of Security and Justice changed its policy to bring it more in line with the guidelines. Since that time, the accumulation of offences (that individually would not reach the threshold of constituting a serious threat to a fundamental interest of society) can together be considered to meet this threshold, taking due account of the nature of the offences, their frequency and damage or harm caused.¹³⁸¹

3.2.3.2.a. *Relevant national case law*

The judiciary has been careful to check whether the behavior of the individual indeed constitutes a genuine and sufficiently serious threat to a fundamental interest of society to justify expulsion.

For example, the District Court of The Hague held in 2011, that certain multiple minor offences, committed by a EU citizen who had acquired a permanent right of residence, could not be seen as justifying expulsion for serious reasons of public policy. The court considered that the offences consisted mostly in shoplifting, and that the police judge, who is in charge of adjudicating cases involving such offences, did not see in the nature or frequency of the committed crimes any reason to impose a higher penalty than two weeks imprisonment. Therefore, the Court concluded that in these circumstances, the position of the Dutch Ministry of Security and Justice, according to which this

¹³⁷⁸ Raad van State, 18 June 2013, ECLI:NL:RVS:2013:62

¹³⁷⁹ Case C-349/06 *Polat* [2007] I-08167, at para 35

¹³⁸⁰ 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, 2 July 2009

¹³⁸¹ FIDE Report on the Netherlands, see above, note 1322 at p. 702, referring to a letter of 14 April 2011, Parliamentary Documents II 2010/11, 29407, nr. 118

behavior constitutes a serious threat to public policy, could not be upheld. The expulsion order had to be suspended indefinitely given that the effectiveness of EU law was to be respected.¹³⁸² This judgment confirms that petty criminality can only represent a crime justifying expulsion for serious reasons of public policy, when certain conditions are met, as outlined in the above mentioned 2009 Commission guidelines.

Nevertheless, it seems as if, in the Dutch case law, the distinction between the existence and degree of the threat to the public order and the existence of personal conduct constituting a sufficiently serious threat is sometimes still blurred.¹³⁸³ In this regard, the Council of State held that when an expulsion order is issued in case of multiple minor offences, the competent authorities must duly motivate what the concrete threat to society is, why expulsion is necessary despite the fact that minor penalties were imposed, and they must take into account the circumstances under which the offences were committed.¹³⁸⁴

Another example of a decision regarding multiple offences that was considered not duly motivated is the following:

- In a case concerning multiple offences committed by a Czech citizen who resided in the Netherlands between 1995 and 2005, who was expelled from the Netherlands in 2005 following a drug-related crime for which she was convicted with a prison penalty of three years in 2002, and who was subsequently found to be back in the Netherlands in 2009, and committed multiple minor offences, the Hague District court ruled that the authorities did not duly motivate, in a decision of 2010, that the Czech citizen posed an actual, current and serious threat to the public order. Factors that led the court to this conclusion, include: (i) the fact that the authorities combined elements pertaining to different offences in order to prove that all elements of the threat against the public order were present (by arguing that the crime committed in 2002 was of a serious nature, while considering that the minor offences committed in 2009 constituted evidence that the Czech citizen posed a current threat); and (ii) the authorities had not taken account of the damage caused by the multiple minor offences (theft).¹³⁸⁵

On the other hand, decisions that were considered *duly motivated*, include the following:

- The Dutch authorities decided to expel a Moroccan citizen, who had legally resided as a family member of a (German) EU citizen in the Netherlands for a period between 3 months and 5 years, based on the fact that he had committed a drugs-related crime for which he was convicted to a prison sentence of 8 years in Germany, which he also served there. The Dutch authorities argued that the person posed a threat to the Dutch public order, firstly because of the seriousness of the crime for which he was convicted, and secondly, because he had committed multiple other drugs-related crimes prior to this conviction, so that there was a danger of recidivism. The existence of a present and actual threat was therefore considered to persist after the prison sentence was served. The national court confirmed the authorities' position that good behavior during detention cannot be considered as sufficient evidence that

¹³⁸² Rechtbank s'Gravenhage, 21 March 2011, ECLI:NL:RBSGR:2011:BP8895

¹³⁸⁴ Raad van State, 18 June 2013, ECLI:NL:RVS:2013:62

¹³⁸⁵ Rechtbank 's Gravenhage, 13 January 2011, ECLINL:RBSGR:2011:BP2584

the person has ceased to pose a threat to the public order, since this behavior did not take place in society.¹³⁸⁶

- In a case involving a French citizen who was convicted to a prison sentence of six years for illegal trade in cocaine, the Dutch authorities duly motivated why they considered that there was a risk of recidivism, taking into account (i) the intensity and magnitude of the crime, (ii) the apparent financial dependency of the EU citizen on trade in drugs, since he was not able to demonstrate that he had any other sources of income, and (iii) the fact that he did not return to prison after a probation leave. These factors that led the court to conclude that a present threat to the public order persisted, even though he had committed the crime for which he was convicted five years earlier.¹³⁸⁷

When considering whether a person poses an actual (genuine), present and sufficiently serious threat to the public order to justify expulsion, the Dutch courts take into account the nature of the offence committed, the penalty imposed, and the time-span in which offences have been committed. Reference has been made to the CJEU's judgment in case C-145/09 Tsakouridis¹³⁸⁸, to reaffirm the need for imperative grounds of public policy in case of expulsion of a EU citizen with a permanent residence right and the fact that organized drug trade can be considered as such a ground.

Regarding the principle of proportionality (art. 28, directive), Dutch courts review the decision in light of art. 28(1) of their own motion, but the individual is expected to demonstrate elements that can support an argument that the decision is disproportionate. If no elements linking the individual to Dutch society are brought forward,¹³⁸⁹ or if the individual explicitly stated that there is no reason for staying in the Netherlands,¹³⁹⁰ national courts generally consider that the principle of proportionality was respected.¹³⁹¹ When elements are brought forward, individuals must provide sufficient evidence to support the claim. No examples were found where the elements brought forward were found sufficient to squash the decision. Considerations that were not found sufficient, include: having a relationship with a person living in the Netherlands; the desire to work in the Netherlands; good behavior in prison; birth of a child; desire to stay in the Netherlands pending criminal trial; light forms of medical treatment; economic situation in country of origin; no longer being welcome with relatives in country of origin.¹³⁹²

Finally, Dutch courts also check whether the expulsion is respecting fundamental rights, almost exclusively referring to art. 8 ECHR, while they do not (yet) make any reference to the EU Charter of Fundamental Rights.¹³⁹³

3.2.3.3 Re-entry bans

A re-entry ban will only be imposed when the EU citizen (or his family member) has been declared 'undesirable' (*ongewenst verklaard*), which amounts to an expulsion decision. In accordance with

¹³⁸⁶ Rechtbank 's Gravenhage, 14 September 2012, ECLI:NL:RBSGR:2012:BX9061

¹³⁸⁷ Rechtbank 's Gravenhage, 8 July 2008, ECLI:NL:RBSGR:2008: BD7243

¹³⁸⁸ ECLI:EU:C:2010:708

¹³⁸⁹ Rechtbank Den Haag, 11 June 2013, ECLI:NL:RBDHA:2013:CA3247

¹³⁹⁰ Rechtbank 's Gravenhage, 23 September 2008, ECLI:NL:RBSGR:2008:BF3214

¹³⁹¹ Rechtbank 's Gravenhage, 8 July 2008, ECLI:NL:RBSGR:2008:BD7243

¹³⁹² Rechtbank 's Gravenhage, 18 March 2010, ECLI:NL:RBSGR:2010:BL9840

¹³⁹³ FIDE report on the Netherlands, see above, note 1322, at p. 701

Article 8.22, paragraphs 4,5 and 6 of the Aliens Decree, a request to lift such a 'declaration of undesirability' can only be introduced when a reasonable period of time has passed since the expulsion of the person concerned on grounds of public order or public security, or when the expulsion has occurred at least three years before the introduction of such a request (paragraph 4). A decision regarding a request as mentioned above will be taken within six months. If a 'declaration of undesirability' is lifted, this also leads to a lifting of the re-entry ban.

3.2.3.4 Abuse or fraud: Article 35 of the directive

Article 35 of the directive is partly implemented in Article 8:25 of the Aliens Decree. Only fraud is at present included in the legislation, while 'abuse of rights' will be added through a forthcoming legislative amendment. However, in practice, the courts may not accept abuse of rights as a ground to limit the rights granted under Directive 2004/38, due to the emphasis on proportionality.¹³⁹⁴

In this context, it should be mentioned that in the Netherlands, there has been considerable political attention for possible abuse through the so-called '*Europe-route*'. This consists in using the rights under 2004/38 to live in a host country with a partner for a short period before re-entering the Netherlands claiming continuation of the rights under 2004/38, thus evading more strict Dutch rules aimed at avoiding a burden on public resources. The IND reported to the Dutch Parliament that 240 cases of such abuse were discovered in 2014, which is relatively speaking not a large portion of the total migration flow.

Moreover, *fraudulent use of procedures* (deliberate deception, false representation, illegal entrance, attempting to obtain residence permits on the basis of deliberate deception), would – under current policy and jurisprudence – not constitute sufficient grounds for an expulsion decision on grounds of public order or public security.¹³⁹⁵ If no expulsion decision has been taken against the person concerned, the EU/EEA citizens and their (TCN-) family members can re-enter the country and enjoy the rights of Article 6 and 7 of the directive.

3.2.3.4.a. *Marriages of convenience*

With regard to marriages of convenience, no information is available on the extent of this form of abuse in the Netherlands. It is very difficult to prove, but it was considered important enough to develop a special way of hearing the couple: simultaneously but separated from each other, asking the same questions. The IND then looks for differences in the answers of very specific personal questions. This is a time consuming (and thus costly) affair.¹³⁹⁶ Dutch courts have pronounced themselves in several cases on marriages (or partner relationships) of convenience,¹³⁹⁷ and also the Council of State has provided further guidance in this regard.

For example, in a judgment of 7 October 2014,¹³⁹⁸ the Council of State has confirmed that for answering the question if a marriage can be qualified as a 'marriage of convenience', the *intention* of the spouses is the deciding factor. In this case, the competent Secretary of State had denied an

¹³⁹⁴ Information provided by representatives from the Ministry of Security and justice and of the IND, following the interview held on 3 March 2015

¹³⁹⁵ *Idem*. However, Article 8.25 of the Aliens Decree states: "The Minister can refuse or terminate the lawful residence if the alien has provided false information, or has withheld information that would have led to a refusal of entry or residence."

¹³⁹⁶ *Idem*

¹³⁹⁷ For example, Rechtbank Den Haag, judgment of 30 April 2015, Case No. AWB 14/24152.

¹³⁹⁸ Raad van State, judgment of 7 October 2014, ECLI:NL:RVS:2014:3755

application for residence of a TCN spouse (a Turkish citizen) of a EU citizen (of Greek nationality), based on the conclusion that the marriage in question was a marriage of convenience. Following a complaint by the applicant in first instance, the Hague District Court annulled the decision refusing the residence right, on the ground that the Secretary of State had failed to grant a hearing to the applicants, who claimed that they had entered into a genuine partner relationship *after* the marriage. The Council of State annulled this judgment, considering that the Secretary of State was not under an obligation to hear the applicant in an administrative appeal against its refusal to grant a derived right of residence, in order to take account of new facts that occurred *after* the decision on the initial application.

In a judgment of 31 May 2013,¹³⁹⁹ the Council of State confirmed that the Secretary of State is not under an obligation to hear the applicant in an administrative appeal against a refusal to grant a residence right, *if there cannot reasonably be any doubt, beforehand, that the objections cannot lead to a different decision.*¹⁴⁰⁰ In this case, the Secretary of State had refused to grant a derived residence right to a TCN spouse of a EU citizen, on the ground of a marriage of convenience, based on a large number of contradictory declarations by the two spouses on essential subjects (such as the place where they had first met, the place where the husband had asked the wife to marry him, the ownership of the car that the wife uses, the daily working hours of the wife, etc). On appeal against this decision, the applicant had presented general objections, which -as the Council of State confirmed- were such that there could not reasonably be any doubt, beforehand, that the objections could not lead to a different decision.

In an earlier judgment of 2012,¹⁴⁰¹ the Council of State considered that if a second administrative decision is taken based on the same facts -in this case a second refusal by the Secretary of State of a derived right of residence for a TCN spouse of a EU citizen on the ground of existence of a marriage of convenience, who had applied for such a residence right again one year after the first refusal-, new facts that occurred after the first decision was taken, must be taken into account. In this case, the new fact presented by the applicant was that the marriage had evolved into a 'real relationship', but the only evidence provided to support this, was administrative proof that the spouses still shared the same address. This was not considered sufficient to require that the Secretary of State should have made a new assessment of the situation.

The main points that emerge from this case law, as well as from other judgments on this question, are:

- In the assessment of whether a marriage is genuine, or whether it should be qualified as a 'marriage of convenience', the decisive element is the *intention* of the spouses;
- When assessing the nature of the marriage through interviews with each of the spouses, differences in their replies must be *multiple* and concern *essential subjects*;
- The Secretary of State is not obliged to hear the applicant in an administrative appeal against a refusal to grant a derived right of residence, to take account of new facts (such as that a marriage of convenience has later evolved into a genuine relationship), that occurred *after* the decision on the initial application;

¹³⁹⁹ Raad van State, judgment of 31 May 2013, ECLI:NL:RVS:2013:3256

¹⁴⁰⁰ Unofficial translation by the author. (The original Dutch phrase reads: "(...) indien er op voorhand redelijkerwijs geen twijfel over mogelijk is dat de bezwaren niet kunnen leiden tot een andersluidend besluit.")

¹⁴⁰¹ Raad van State, ECLI:NL:RVS:2012:36

- However, when a *second application* for a residence right is introduced, new facts can be brought forward, (including a change in the relationship since a first refusal), but the Secretary of State is not obliged to take these new facts into account when the evidence provided is clearly insufficient;
- The Secretary of State is not obliged to hear the applicant in an administrative appeal against a refusal to grant a residence right on the ground of a marriage of convenience, *if there cannot reasonably be any doubt, beforehand, that the objections cannot lead to a different decision.*

Finally, a recent case by the Hague District Court should be mentioned, which considers a number of grounds relied on by the Secretary of State to support its conclusion that a marriage of convenience existed, referring to the Commission's guidelines on the implementation of Directive 2004/38/EU.¹⁴⁰² In paragraph 4.2, these Guidelines state: "Member States may rely on previous analyses and experience showing a clear correlation between proven cases of abuse and certain characteristics of such cases." The Hague District Court considered that the Secretary of State was entitled to rely on previous analyses that followed from a pilot project carried out in the Netherlands, which concluded that certain circumstances (such as marriages between persons of specific combinations of nationalities), were likely to indicate the existence of a marriage of convenience. In this regard, the District Court did not have any objections against the use, by the Secretary of State, of circumstances such as: the spouses had the Turkish and Greek (of Georgian origin) nationality, which was considered not to be a likely combination for cultural/religious reasons; and the fact that the husband came from the dominantly Islamic state Turkey, whereas the wife originated from Georgia, where the Russian Orthodox religion was the most widespread. According to the District Court, these factors could be taken into account in the decision to undertake a more thorough examination of the individual marriage. This type of considerations has not been tested, so far, by the Council of State.

3.2.4 Case study

a) Facts of the case: example from Norway

Rejected asylum seekers have the obligation to leave Norway. An asylum seeker stays illegally in Norway for 3 years, and then marries a Norwegian citizen. The rejected asylum seeker is then expelled and imposed a 5 years entry ban in conformity with Norwegian legislation (The Immigration act, provisions relevant for third country nationals). The new formed couple travels to Sweden, lives there for 7 months, and returns to Norway shortly after. The third country national/former asylum seeker, now a family member of a EEA citizen, requires to be registered in Norway as a family member of a EEA citizen. Norwegian authorities refuse to lift the re-entry ban due to his adverse immigration history. The administrative decision of refusal to lift the entry ban merely points to the fact that person committed a grave violation of the provisions in the Immigration Act.

*b) The Netherlands*¹⁴⁰³

¹⁴⁰² 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, of 2 July 2009

¹⁴⁰³ Information provided by representatives of the Dutch Ministry of Security and Justice and of the IND

In the following description on how such a situation would be handled in the Netherlands, all references to 'Norway' and 'Norwegian' nationality will be replaced by 'the Netherlands' and 'Dutch' nationality.

In the Netherlands, the person concerned, who is a third country national, would be given a re-entry ban. The IND would have to consider if this person, who as a spouse of a EU citizen enjoys the same rights as EU citizens, constitutes a present, real and serious threat to a fundamental interest of society. If that is the case, the person may be declared "undesirable", and an expulsion decision may be taken. In this case that might be possible, but it depends on the criminal record of the person concerned. In the Netherlands the threshold for being declared "undesirable" is quite high; an abuse of immigration laws will certainly not be sufficient in that respect. Therefore, it seems unlikely that the person concerned would be declared "undesirable" and that he would be expelled from the Netherlands.

4 Conclusion

The implementation of Directive 2004/38/EC into Dutch national law is considered to be complete - with perhaps some minor exceptions¹⁴⁰⁴ and on some points, including the definition of family members, the Dutch interpretation goes beyond the minimum criteria of the directive. The Netherlands regularly adapts its legislation and administrative practice to judgments of the CJEU, although it tends to do so in a restrictive manner, in particular regard to situations, which do not fall within the scope of the directive. This is especially the case with respect to 'purely internal situations' and to family reunification of TCN family members with Dutch or other EU citizens who return to the Netherlands after having resided in another EU/EEA Member State.

In general, the Netherlands has adopted a relatively generous approach towards granting residence rights to EU citizens, in accordance with the conditions laid down in the national implementing legislation. On the other hand, policies and practice regarding residence rights for TCN family members are stricter, especially with a view to avoiding abuse, for example by 'sham marriage'. Also the use of the so-called '*Europe-routes*', whereby Dutch citizens take up temporary residency in another EU/EEA State with the purpose of bringing TCN family members to the Netherlands upon their return is being closely watched, since it could undermine the Dutch migration policy as a whole, if left unchecked.¹⁴⁰⁵

¹⁴⁰⁴ Interview with Prof. A. Schrauwen, University of Amsterdam, on 2 March 2015. In her view, perhaps Article 35 of the Directive is not fully implemented into national law. A modification of the Aliens Act with regard to the implementation of Article 35 is currently underway

¹⁴⁰⁵ Information provided during interview with representatives of the Ministry of Security and Justice and of the IND, see above, note 1010

Country Study Sweden*

1 Introduction

1.1 General public attitude towards immigration and free movement

In Swedish public opinion, immigration was not considered as a major concern in the last few years. According to the *Eurobarometer*, in 2013 only 13% of respondents mentioned it amongst the two main concerns faced by their country.¹⁴⁰⁶ According to a 2014 survey, 82 % of Swedes responded that they were not concerned by immigration from within the EU; 68% of the respondents described immigration as more of an opportunity than a problem, while only 28% said it was more of a problem.¹⁴⁰⁷ There is also a high level of approval of the way Government handles immigration (60% in 2014).¹⁴⁰⁸ However, this generally tolerant attitude towards immigrants seems to be changing in response to the current migration crisis and the important influx of migrants to Sweden, which accepted the highest number of asylum immigrants per capita in the European Union last year. According to an opinion poll from YouGov, published on 20 August 2015, the anti-immigration party Sweden Democrats would become the country's largest party if elections were held, with 25 percent support.¹⁴⁰⁹

As noted by H. Bernitz and J. Paju, "Swedish media has a pretty accurate reporting explaining the underlying EU principles and objectively showing the tension that the Union citizenship might cause vis-à-vis the national welfare state. There are no major or local newspapers painting a picture of Union citizens coming to Sweden to take jobs, steal, and beg."¹⁴¹⁰ The only political party that has made immigration a major theme is the abovementioned party Sweden Democrats, but it focuses especially on Third Country National immigrants, rather than EU citizens. Up to now, the party has remained isolated in the *Riksdag* as the other parties have maintained a policy of refusing to cooperate with it.

1.2 Summary of main conclusions

Sweden has incorporated all the main provisions of Directive 2004/38/EC (hereafter 'the directive') into its national law. On some points the Swedish interpretation goes beyond the criteria set out in the directive, including the definition of family members. Also with regard to the principle of

* The author would like to thank the representatives of the Swedish Migration Agency, for their precious help in assembling the information for this study and for their comments on previous versions, and Jaan Paju, University of Stockholm, for the information he provided in the early stage of the research. However, the full responsibility for its contents remains with the author

¹⁴⁰⁶ European Commission, Standard Eurobarometer 80, Autumn 2013, *Public opinion in the European Union*, p. 12

¹⁴⁰⁷ *Transatlantic trends: Mobility, Migration and Integration, Key findings from 2014 and selected highlights from Transatlantic Trends: Immigration 2008-13*, German Marshall Fund of the United States, http://trends.gmfus.org/files/2014/09/Trends_Immigration_2014_web.pdf, p.7

¹⁴⁰⁸ *Idem*, p. 6

¹⁴⁰⁹ <http://uk.reuters.com/article/2015/08/20/uk-sweden-politics-poll-idUKKCN0QP0Q120150820>

¹⁴¹⁰ Hedvig Bernitz and Jaan Paju, 'Sweden', in Ulla Neergaard, Catherine Jacqueson and Nina Holst-Christensen (eds.), *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen, 2014*, Congress Publications Vol. 2, pp. 453-479 (hereafter: 'FIDE Report on Sweden'), at p. 815

equality, the Swedish interpretation is broader than foreseen in the directive, since migrants are entitled to certain social benefits, also before having been granted a permanent right of residence.

Sweden systematically adjusts its legislation and administrative practice to take account of the Judgments of the Court of Justice of the European Union (CJEU).

However, the report also shows that the institutional context for the implementation of the directive is quite complex, and involves a large number of different agencies with far-reaching independency. This leads to a lack of coordination and exchange of information on the rights of migrants, including on social benefits.

Moreover, in recent years the criterion of having sickness insurance as a condition for being granted a temporary residence right (between 3 months and 5 years) is being applied more strictly, and non-compliance with this criterion may have led to expulsion in a few cases.

2 Implementation of Directive 2004/38/EC: General Assessment

2.1 National implementing legislation

In Sweden, the Aliens Act (2005:71) and the Aliens Decree (2006/97) constitute the main implementing laws of Directive 2004/38/EC, together with some specific provisions in other laws, e.g. on social benefits and study maintenance. In particular, a new Chapter 3A was introduced into the existing Aliens Act with a view to implementing the directive. In 2012 a Commission of Inquiry (SOU 2012:57) has proposed a new grouping of the provisions concerning entry, stay, work, retained residence rights, refused entry, and expulsion. This has resulted in two government bills, which led, *inter alia*, to the replacement of several provisions from the Ordinance to the Aliens Act, thereby reinforcing their status within the national legal order. For example, the rules on the retention of rights were put into the Aliens Act.¹⁴¹¹ Most recently, some amendments to the Aliens Act were made in 2014 on the following points:

- 1) The possibility to grant a residence right to a (TCN) family member who accompanies or joins a Swedish citizen returning to Sweden after a stay in another EU/EEA State, has been incorporated into the Aliens Act (Chapter 3A, para 2), following in essence the approach adopted by the CJEU in case C-456 *O. and Others*,¹⁴¹²
- 2) The concept of marriages of convenience was introduced (Ch 3A para 4), as a ground for denial of a right of residence;
- 3) The obligation to register upon entering Sweden was cancelled for EU citizens, but TCN family members still need to apply for a residence card (Ch 3A, para 10)
- 4) Some minor amendments were made on administrative procedures.

2.2 Institutional context and complaint procedures

The Swedish institutional framework responsible for implementing the directive is rather complex, since these tasks are divided over several Ministries. There are separate agencies working under each

¹⁴¹¹ Bills 2013/14:81 and 2013/14/82. Information provided during an interview with representatives from the Swedish Migration Agency, held on 13 May 2015

¹⁴¹² Case C-456/12 *O. and Others* ECLI:EU:C:2014:135

Ministry. The Ministry oversees especially the budget, but with regard to the concrete policies adopted there is not much coordination; the agencies have far-reaching independence. Several authorities will consider if a person has a right to certain social benefits (e.g. one authority is responsible for student loans, another for social assistance, a third for social security). Moreover, there is very limited exchange of information, due to strict privacy laws.

In the Swedish Migration Agency's 6 regions, there are approximately 30 regional migration offices of which around 12 are dealing with free movement matters.

Complaints against decisions on rights covered by the directive can be brought before the Migration Court, and subsequently an appeal can be made to the Migration Appeals Court, which is the final instance. The Migration Appeals Court will only take a case if it is considered of interest, if there are special circumstances, or if a legal principle is at stake.¹⁴¹³

2.3 Administrative policies and guidelines

The Government and the competent Ministries do not issue any instructions on how to interpret new amendments of the laws, or new judgments of the CJEU. The Swedish Migration Agency and the other competent agencies interpret the law and new Judgments themselves and issue instructions to their own staff.

3 Specific Assessment: Interpretation of the Individual Provisions of the Directive

3.1 Personal Scope - To whom does it apply?

3.1.1 Definition of EU/EEA citizens

The Aliens Act lacks provisions that are applicable only to Union citizens. Consequently, there is no definition of 'Union Citizen' in the Act. The provisions implementing the directive are instead applicable to all EEA citizens. According to the Aliens Act (Chapter 1, Sect. 3b) an EEA citizen is every alien who is a national of an EEA state.¹⁴¹⁴

3.1.2 Definition of family members

The definition of a family member of an EEA citizen is defined in the Aliens Act (Chapter 3a, Sect. 2), and it includes all the categories mentioned in Art 2(2) of the directive. The definition of 'family members' also includes cohabiting partners of EEA nationals. The most important condition to be considered 'cohabitants' is found in the Cohabitees Act (SFS 2003:376), where the definition of cohabitees is "two people who live together on a permanent basis as a couple and who have a joint household". Moreover, since 2009 same sex marriages are treated equally as marriages between man and woman.¹⁴¹⁵

Furthermore, since May 2014 Article 3(2)a of the directive concerning 'other family members' is implemented in Chapter 3 a, Section 2 paragraph 4 of the Aliens Act.¹⁴¹⁶ All the categories of 'other

¹⁴¹³ Interview with representatives from the Swedish Migration Agency held on 13 May 2015

¹⁴¹⁴ FIDE Report on Sweden, see above, note 1413, at p. 799

¹⁴¹⁵ Marriage Code (*Äktenskapsbalken 1987:230*), Government proposition 2008/09:80

¹⁴¹⁶ As explained by a representative of the Swedish Migration Service, before that the article was not explicitly implemented in the national legislation. Although, in the Government bill (2005/06:77) implementing Directive 2004/38/EC, there is a reference to Chapter 5, Section 3 (which at that time was the national legislation concerning family reunification), stating that Chapter 5, Section 3 would be

family members' mentioned in the directive will have the same rights as family members according to Article 2(2), when they are considered to be covered by Chapter 3 a, Section 2 para 4 of the Aliens Act. According to Chapter 3a Section 4 of this Act, these 'other family members' will receive a *residence card* according to Article 10 of the directive, implemented in Chapter 3 a Section 10 of the Aliens Act.¹⁴¹⁷

The Migration Court of Appeal has ruled on several cases regarding family relationships. Some of these cases concern the definition of 'cohabitant'. In for example MIG 2011:17 a person who became cohabitant with a foreign EEA citizen after the arrival in Sweden was considered to be a family member according to the definition. Marriage after the arrival has also been accepted (Migration Court of Appeal, case No UM 3289-08 (2009-01- 29). In MIG 2009:11 a pro forma marriage was, however, not accepted and the person in question was not considered to be a family member.¹⁴¹⁸ As already mentioned above, the Migration Court of Appeal is the final instance in migration cases.

3.1.3 *Definition of economically active persons*

In Sweden, economically active persons include workers and self-employed persons. There is no definition in the Aliens Act or in the Ordinance.

3.1.4 *Definition of 'self-sufficiency'*

Sweden used to have a fixed amount for 'sufficient resources', but this was changed after the Commission started a notification procedure on this point in 2000. Now the amount is compared with the norm in Sweden that gives a right to social assistance.¹⁴¹⁹ The reference amount concerning social assistance is determined by adding up two components. One component is an amount that is determined by law and ordinance and at present it is SEK 3 380 a month. The other component is composed of the additional costs for living, travelling to and from the job, insurances etc. This second component will be determined by the actual costs of the individual. Therefore, the reference amount is calculated on an individual basis, and will vary from one person to another.

As for the question whether social benefits that the person receives are taken into account when assessing self-sufficiency, the situation is the following. If a migrant receives a contributory assistance, *e.g.* a pension, this is not a problem. Only when a person receives comprehensive assistance or assistance for a long period of time based on the Social Assistance Law, he/she could be considered to be 'a burden on the social assistance system'. Even though the strict Swedish privacy laws make it difficult for government agencies to exchange information, some information can still be exchanged. For example, during the evaluation of the income situation of the person concerned information cannot be exchanged, but when this evaluation is finished, the competent agencies can inform each other.¹⁴²⁰ Another example can be seen in the Aliens Act Chapter 17 section 1, which states that the Swedish Migration Agency could request the social welfare

applicable upon the categories mentioned in Article 3(2)a of the directive. However, Chapter 5, including the provision mentioned above (Section 3 a para 2) is national legislation and normally applied only if the person living in Sweden is resident in Sweden according to national practice, which means that he or she is a Swedish citizen or a foreigner with a permanent residence permit. That means that the statement in the Government bill express a clear exception from practice since it refers to Chapter 5 of the Aliens Act as applicable in cases concerning Directive 2004/38/EC.

¹⁴¹⁷ Information received from a representative of the Swedish Migration Service in July 2015.

¹⁴¹⁸ FIDE Report on Sweden, see above, note 1410, at p. 800

¹⁴¹⁹ Information provided during an interview with representatives from the Swedish Migration Agency, held on 13 May 2015.

¹⁴²⁰ *Idem*

committee to provide information under certain conditions. It would seem that this nevertheless limits the possibilities for a comprehensive review of the person's situation.

An issue that is specific for Sweden is the importance attached to the criterion included in Article 7(1) b of the directive, that a person needs to have a 'comprehensive sickness insurance cover in the Host Member State' in order to have a temporary right of residence (3 months to 5 years). The application of the relevant criterion has over time become stricter. With the 2014 amendments of the Aliens Act, there is no longer a registration of EU/EEA citizens and their family members (Article 8 of the directive) at the Swedish Migration Agency. However, EU/EEA citizens who intend to stay in Sweden for more than one year need to apply to be registered in the Swedish Population Register at the Swedish Tax Agency.¹⁴²¹ A factor that may have influenced this change of attitude is that in Sweden everyone has, in principle, a right to State health insurance. Before the abovementioned amendments of 2014, any person who was registered with the Tax Agency, which is responsible for registration of all citizens in Sweden, was automatically entitled to such State health insurance. The granting of this same right to all EU/EEA migrants would obviously have significant financial consequences for the State, which the Tax Authority may want to avoid by requiring proof from migrants that they have their own sickness insurance as foreseen in the directive.

Textbox 1 - Comprehensive sickness insurance

Before 2014 legislative amendments	After 2014 legislative amendments
Registration of EU/EEA citizens and their family members at Swedish Migration Agency	Registration of EU/EEA citizens and their family members at Swedish Tax Agency (For an intended stay > 1 year)
General check of comprehensive sickness insurance carried out as part of evaluation of compliance with criteria of Article 7(b), directive	Stricter checks on comprehensive sickness insurance, to avoid 'automatic' eligibility for state health insurance
See Migration Court of Appeal, judgment of 4 June 2012, MIG:2012:15; expulsion on ground of not having comprehensive sickness insurance ¹⁴²²	

3.1.5 *Establishing 'dependency'*

There are no specific guidelines on how to establish dependency, neither in the law itself,¹⁴²³ nor at the administrative level; this assessment is made on a case-by-case basis. Normally it is required to have some kind of documents showing that the family member's dependency of the EU/EEA citizen existed already in the country of origin. For example, proof of money transfer or certificates from authorities in the country of origin could be required.¹⁴²⁴

¹⁴²¹ Interview with representatives from the Swedish Migration Agency, see above, note 1413.

¹⁴²² Judgment discussed below, in paragraph 3.2.2.2

¹⁴²³ It may appear as if Chapter 5, Section 3a, paragraph 2 provides some conditions for establishing dependency. However, as explained by a representative of the Swedish Migration Service, "(t)his provision is national legislation concerning other family members than spouse, cohabitant and children under the age of 18. This provision is not used to determine the criteria for dependency according to free movement of EU/EEA citizens."

¹⁴²⁴ Information received from a representative of the Swedish Migration Service, in July 2015.

There have been several CJEU Judgments on the question of dependency, two of which concerned questions transmitted by Swedish courts, namely case C-1/05 *Jia*,¹⁴²⁵ and case C-423/12 *Flora May Reyes*.¹⁴²⁶ In *Jia*, the Court confirmed, *inter alia*, that it was not necessary to have proof from the home country. In *Flora*, one of the points that the ECJ affirmed was that there must have been dependency when the migrant applies for residence in the host country. Swedish practice was considered to be already in line with these judgments.¹⁴²⁷

3.2 Material scope - Which rights are covered, to whom do they apply and what do they entail?

3.2.1 *Rights against the host state*

3.2.1.1 Right of entry, right of residence for up to 3 month: articles 5 and 6, directive¹⁴²⁸

The right of entry of EEA citizens' family members is regulated in Chapter, 2, Sect. 1 of the Aliens Act, according to which an alien entering or staying in Sweden must have a passport. However, EEA citizens may instead of a passport provide an ID-card (Aliens Ordinance, Chapter, 2 Sect. 17). This possibility is not offered to Third Country National (TCN) family members.

3.2.1.2 Right of residence between 3 months and 5 years: Art 7, directive

Article 7 of the directive has been implemented through Chapter 3a of the Aliens Act.

3.2.1.2.a. *Expulsion on grounds of non-compliance with Article 7, directive*

The possibility to expel a person on the ground that he/she does not comply with the conditions of Article 7 of the directive, or to refuse his/her entry, is implemented through Chapter 8 of the Aliens Act. It has been noted that in decisions on expulsion because of non-compliance with the conditions set out in Article 7 of the directive, the grounds for expulsion have not always been clearly discussed from a EU perspective.¹⁴²⁹ There are situations where Union citizens have been expelled from Sweden because of begging¹⁴³⁰ or prostitution,¹⁴³¹ in both cases because of dishonest self-support. Yet, neither begging nor working as a prostitute is criminal in Sweden. There have been discussions especially after decisions from the Parliamentary Ombudsman in 2011 and 2012 that concern the situations described above. It should be noted that the Ombudsman did not criticise the Swedish Police's refusal decision in the second case.¹⁴³²

The Swedish Migration Agency recognises that neither begging nor prostitution are crimes or otherwise prohibited according to Swedish law, and therefore a person should not be rejected solely because of this. Begging and prostitution may however be punishable in conjunction with other

¹⁴²⁵ Case C-1/05 *Jia* ECR [2007] I-00001

¹⁴²⁶ Case C-423/12 *Flora Reyes* ECLI:EU:C:2013:719

¹⁴²⁷ Interview with representatives from the Swedish Migration Agency, see above, note 1413

¹⁴²⁸ The implementation of the right of exit, laid down in Article 4 of the directive, is not considered here since the focus of this study is on the rights to entry and residence

¹⁴²⁹ FIDE Report on Sweden, see above, note 1410, at p.801

¹⁴³⁰ The Parliamentary Ombudsmen (Justitieombudsmannen), Dnr 6340-2010 (2011-06- 28)

¹⁴³¹ The Parliamentary Ombudsmen (Justitieombudsmannen), Dnr 4468-2011 (2012-11- 01)

¹⁴³² *E.g.* Decision of the Parliamentary Ombudsman of 28 June 2011 (Dnr 6340-2010)

circumstances. An assessment should therefore be made in each individual case, taking into account Article 27 (2) of the directive when assessing whether the behavior of the person in question constitutes a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. When the question of rejection on grounds of public policy and security arises, the person's connection with Sweden shall be taken into account.¹⁴³³

3.2.1.2.b. *Retention of a residence right, Articles 12, 13, directive*

The provisions contained in articles 12 and 13 regarding the retention of a right of residence in the case of death or departure of the EU/EEA citizen (reference person), or in case of divorce, annulment of a marriage or a termination of a registered partnership, are transposed in Swedish law in equivalent terms as the above mentioned articles of the directive (Chapter 3A of the Aliens Act).

However, there are no specific guidelines concerning situations of de facto separation, for example when no divorcement proceedings have been initiated, but the spouses no longer live together, and/or one of them lives together with another partner. In Sweden, a de facto separation has no effect on the retention of residence. The directive and the legislation (Chapter 3 a, Section 5 d of the Aliens Act) mention divorce or annulment of marriage, and a de facto separation is not considered to fall within that scope.

Text box 1: Art. 13, directive and *de facto* separation

<p>Art. 13(2), directive: <i>Retention of the right of residence of TCN family members in the case of divorce, annulment of marriage or termination of registered partnership</i></p>	<ul style="list-style-type: none"> – <i>De facto</i> separation does <i>not</i> have any impact on the right of residence of a TCN spouse or registered partner – As long as the spouses are married or the registered partnership is in force, Article 13 does not apply even if the spouses/partners do not/no longer live together.
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3.2.1.3 Right of permanent residence: Art 16, directive

Art 16-21 of the directive are implemented through the Aliens Act (Chapter 3a, Sect. 6-9), and the Aliens Ordinance (Chapter 3a). The Aliens Act (Chapter 3a, Sect. 6), states that an EEA national who has stayed at least five years in Sweden legally and without interruption has the right of permanent residence.

H. Bernitz and J. Paju have noted that there is some case law from the Migration Court of Appeal concerning permanent residence: "According MIG 2012:10 a third country family member must have fulfilled the conditions for right of residence for five years to have a permanent right of residence. In MIG case No. 10802-10 (2012-05-10) a family member did not fulfill the five-year requirement because of a divorce. He did not fulfill the conditions for a derived right of residence nor for retention of the right of residence. In MIG 2010:8 a man who had failed to pro- long his EEA-permit was still considered to fulfill the requirement of legal stay and was entitled to permanent

¹⁴³³ Information provided by representatives of the Swedish Migration Agency

residence. In MIG 2010:14 a man whose EEA-permit had expired before the implementation of Directive 2004/38/EC was considered having a right to permanent residence."¹⁴³⁴

Finally, time spent in prison is not considered as lawful residence in this respect. The Swedish Migration Agency is not aware of any case where the question of time spent in a psychiatric hospital has come up in this context, and this possibility is not foreseen in the current administrative guidelines.

Text box 1 - Time spent in prison or in a psychiatric hospital

Swedish practice:	<ul style="list-style-type: none"> – Time spent in prison is <i>not</i> considered as lawful residence – There is no practice, and no specific rule regarding time spent in a psychiatric hospital as an alternative to a prison residence.
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3.2.2 *Rights against the home state*

3.2.2.1 Rights of persons returning to the home State after a stay in another EU/EEA Member State and their family members - family reunification

The CJEU's judgment in *Surinder Singh* case was implemented in May 2014.

There are no exact criteria set up and no specific guidelines in this respect, except that the stay in the other member state normally should last for at least three months. Otherwise the circumstances in the actual case are taken into account, as well as relevant judgments from the ECJ.¹⁴³⁵

3.2.2.2 Rights of caretakers of minor citizens (involving cross-border element) (*Alokpa, Zhu Chen*)

There are several judicial cases with regard to the rights of caretakers of minor citizens.¹⁴³⁶ In 2009, the Migration Court of Appeal found that the Migration Court in first instance has not taken into account the conclusions of the CJEU in the case C-200/02 *Zhu and Chen*,¹⁴³⁷ when deciding, in the case MIG 2009:22,¹⁴³⁸ whether (in the relevant Swedish case) a Japanese citizen could have a derived right of residence through her daughter. The Migration Court had decided on eviction upon the fact that the Japanese citizen was now divorced from a migrating Union Citizen. However, the Migration Court of Appeal (final instance) held that their mutual child could have a residency permit on her own and thereby providing the mother with a residency permit.

Moreover, in MIG 2012:15¹⁴³⁹ the Migration Court of Appeal found that a family (mother and minor daughter) irrespective of sufficient resources could not be found having a residency permit since they

¹⁴³⁴ FIDE Report on Sweden, see above, note 1410, at p. 803

¹⁴³⁵ Information received from representatives of the Swedish Migration Service, July 2015

¹⁴³⁶ These cases are mentioned in the FIDE Report on Sweden, see above, note 1410, at p. 807

¹⁴³⁷ Case C-200/02 *Zhu and Chen* [2004] ECR I-09925

¹⁴³⁸ Available, in Swedish, at <https://lagen.nu/dom/mig/2009:22>. (This case concerned, indeed, a Japanese citizen; whereas in C-200/02 *Zhu and Chen*, the migrant concerned had the Chinese nationality)

¹⁴³⁹ Migration Court of Appeal, judgment of 4 June 2012, available at <https://lagen.nu/dom/mig/2012:15>

did not have comprehensive sickness insurance. The Migration Court of Appeal therefore held that the family was to be expelled. Referring to case C-34/09, *Zambrano*,¹⁴⁴⁰ the court held that eviction was not possible to the mother's state Colombia, since the daughter had become a Spanish citizen by birth. Therefore, the family was to be evicted to Spain in order not to deprive the daughter of her Union citizen's rights.

3.2.2.3 Cases with no cross-border element (*Zambrano* case)

Swedish courts also ruled in several cases in which there was no cross-border element. For example, in MIG 2011:17 the issue was whether a Pakistani citizen could derive a residence permit from his wife who had dual citizenship (Swedish & Polish). The Migration Court of Appeal referred to the CJEU's judgment in case C-434/09 *McCarthy*¹⁴⁴¹ and found that the situation was purely internal as the wife had not been crossing a border of another Member State, but been living in Sweden her whole life.¹⁴⁴² According to Swedish academic experts in the field, there does not seem to have been any case law where Swedish national courts distinguish between rights acquired under the Directive and the TFEU.¹⁴⁴³

3.2.2.4 Rights against home- and host state of commuters and their family members

On the other hand, the judgments in the cases C-60/100 *Carpenter* and C-456/12 and C-457/12 *O. and S.*¹⁴⁴⁴ are not implemented into the Swedish law, but they are mentioned in the internal guidelines and in practice all the judgments from CJEU are taken into account. Whether derived rights of residence for commuters are acceptable, will depend on the specific circumstances of each case.¹⁴⁴⁵

3.2.3 *Restrictions on the freedom of movement and residence: refusal of entry or residence; expulsion measures; re-entry bans*

3.2.3.1 Refusal of entry or residence

As already mentioned above (Section 3.2.1.1.), EU/EEA citizens and their family members may be refused entry if they don't have passport or visa required for entering Sweden, if they are an unreasonable burden on the social assistance system or if they pose a threat to public order or security (Chapter 8 sections 8, 9 and 11 of the Aliens Act).

Moreover, persons with an adverse immigration history (*e.g.* abuse and/or fraud, deliberate deception, making a false representation, illegal entrance, attempting to obtain asylum or other permits of stay on the basis of deliberate deception) generally do not qualify for a residence permit under Directive 2004/38/EC. However, with respect to EU/EEA citizens and their family members who have already been granted a right of residence, the question will be considered of whether the behavior mentioned above is considered to be such a threat to public order that it justifies expulsion. This must be assessed in every single case, but most likely such behavior, unless it is very grave and/or repeated, would not be considered as a threat to public order.¹⁴⁴⁶ With respect to marriages of

¹⁴⁴⁰ Case C-34/09 *Zambrano* [2011] ECR I-01177

¹⁴⁴¹ C-434/09 *McCarthy* [2011] I-03375

¹⁴⁴² FIDE Report on Sweden, see above, note 1410 at p. 807

¹⁴⁴³ *Idem*

¹⁴⁴⁴ Case C-456/12 *O. and Others*, ECLI: EU:C:2014:135 and Case C-457/12 *S. and Others* ECLI:EU:C:2014:136

¹⁴⁴⁵ Information provided by representatives of the Swedish Migration Agency,

¹⁴⁴⁶ *Idem*

convenience, in MIG 2009:11 a *pro forma* marriage was not accepted and the person in question was not considered to be a family member.

3.2.3.2 Expulsion measures

In accordance with the proportionality principle included in articles 27(2) and 28 of the directive, as transposed in Chapter 8, Sect. 7a of the Aliens Act, the longer a person resides in Sweden, the higher the threshold is to expel him/her. There are not many cases of EU/EEA citizens being expelled.¹⁴⁴⁷

In the national case law, the Migration Court of Appeal has understood the concept of ‘public security’ in its widest sense in MIG 2009:21.¹⁴⁴⁸ The case concerned a Croatian citizen who had a residence permit in Denmark since 1995, and who was sentenced to 3,5 years prison in 2004 for a drug related crime. In 2006 the Croatian citizen was evicted to Croatia, but he came back to Sweden, married a Danish citizen having a residence permit in Sweden, after which he was granted a derived right of residence under EU law. The Migration Court of Appeal ruled that the crime, which was committed five years earlier, proved that the Croatian citizen was a serious threat against public security, and that this was a sufficient ground for his expulsion. The court did not take account of the circumstances that the Croatian citizen had been living in Sweden for more than two years without having committed any further crimes, and that his wife was expecting their first child. As noted by Bernitz and Paju, "(t)he ECJ case law as well as the directive 2004/38/EC (Article 28(1) and the European Convention and Human Rights (Article 28(1)) points in a different direction where eviction should not be carried out in such circumstances."¹⁴⁴⁹

On the other hand, there has been case law of the appellate criminal courts, in which the courts required serial crimes and seriousness combined with crimes committed in Sweden not too long ago, as criteria for establishing that a person can be considered as a serious threat to public security.¹⁴⁵⁰

3.2.3.3 Re-entry bans

Regarding re-entry bans, EU/EEA citizens only receive re-entry bans on serious grounds of public order or security and such bans are only given in connection with criminal convictions delivered by a court. The bans are seldom lifted. If that should happen it would probably be if a long time has passed since the expulsion and the person concerned has very strong family ties to Sweden. A re-entry ban can be indefinitely or for a limited time.¹⁴⁵¹

3.2.3.4 Abuse or fraud: Article 35 of the directive

In Sweden, Article 35 of the directive is incorporated in Chapter 3a, Section 4, Para 3 the Aliens Law as far as marriages of convenience is concerned. Otherwise there is no explicit implementation of this article.¹⁴⁵²

¹⁴⁴⁷ *Idem*

¹⁴⁴⁸ FIDE Report on Sweden, see above, note 1410, at p. 805

¹⁴⁴⁹ FIDE Report on Sweden, see above, note 1410, at p. 806, also referring to the Judgments of the ECJ in Case 41/74 Van Duyn, Case 36/75 Rutili, and Case 30/77 R v Bocheran, in which the Court held that eviction based on public security grounds has to be proportionate and of essential importance to uphold a society, that the threat has to be real and serious, and that eviction based on public security grounds is an exception

¹⁴⁵⁰ *Idem*, referring to the following national cases: Court of Appeal (Hovrätten för Västra Sverige), 24 May 2006, B 2390-06, Court of Appeal (Hovrätten för Västra Sverige), 6 May 2013, B 2067-13, and Court of Appeal (Svea Hovrätt), 13 August 2013, B 6770-13

¹⁴⁵¹ *Idem*

¹⁴⁵² Information received from representatives of the Swedish Migration Service, July 2015

3.2.4 Case study

a) Facts of the case: example from Norway

Rejected asylum seekers have the obligation to leave Norway. An asylum seeker stays illegally in Norway for 3 years, and then marries a Norwegian citizen. The rejected asylum seeker is then expelled and imposed a 5 years entry ban in conformity with Norwegian legislation (The Immigration act, provisions relevant for third country nationals). The new formed couple travels to Sweden, lives there for 7 months, and returns to Norway shortly after. The third country national/former asylum seeker, now a family member of a EEA citizen, requires to be registered in Norway as a family member of a EEA citizen. Norwegian authorities refuse to lift the re-entry ban due to his adverse immigration history. The administrative decision of refusal to lift the entry ban merely points to the fact that person committed a grave violation of the provisions in the Immigration Act.

b) Sweden¹⁴⁵³

In the following description on how such a situation would be handled in Sweden, all references to 'Norway' and 'Norwegian' nationality will be replaced by 'Sweden' and 'Swedish' nationality.

The re-entry ban does not automatically mean that an application for a residence card shall be rejected. The Migration Agency must first consider if the third country citizen has a right of residence as a family member of an EU/EEA citizen. If so, the Agency must assess if that means that the re-entry ban should be lifted. The same procedure applies if a third country citizen - who is not a family member of an EU/EEA citizen - with a re-entry ban applies for residence permit according to national legislation.

The assessment of the Migration Agency must take into account the reason for the re-entry ban and how strong the alleged family connection is. It's therefore not possible to say how this particular case would be judged. However, according to practice, an earlier illegal stay alone is normally not an obstacle to receive a residence card or a residence permit.

4 Conclusion

Sweden has incorporated all the main provisions of Directive 2004/38/EC into its national law. On some points, the Swedish interpretation goes beyond the criteria set out in the directive, such as the definition of family members. Moreover, regarding the principle of equality, the Swedish interpretation is broader than foreseen in the directive, since migrants are entitled to certain social benefits, also before having been granted a permanent right of residence.

Sweden regularly adjusts its legislation and administrative practice to take account of the Judgments of the Court of Justice of the European Union (CJEU).

On the other hand, the institutional context for the implementation of the directive is very complex, and involves a large number of Authorities with far-reaching independency. This leads to a lack of coordination and exchange of information on the rights of migrants, including on social benefits.

The report has also shown that, in recent years, the criterion of having sickness insurance as a condition for having a temporary residence right (between 3 months and 5 years) is being applied more strictly, and non-compliance with this criterion may have led to refusal of residence. With the

¹⁴⁵³ *Idem*, August 2015

2014 amendments of the Aliens Act, there is no longer a registration of EU/EEA citizens and their family members (Article 8 in the directive) at the Swedish Migration Agency. However, EU/EEA citizens who intend to stay in Sweden for more than one year need to apply to be registered in Swedish Population Register at the Swedish Tax Agency.

Country Study United Kingdom^{*}

1 Introduction

1.1 General public attitude towards immigration and free movement

As noted by Prof. Jo Shaw a.o., in a study published in 2014, the UK's powerful 'border identity' as an island state which has negotiated itself an opt-out from membership of the Schengen zone and the development of certain policies which flow from the creation of a borderless Europe, including most aspects of external immigration policy, clearly has an impact on the British attitude towards EU citizenship and the related rights of free movement. According to this study,

This identity, combined with the hostility shown in sections of the press both to some aspects of EU free movement and also to European integration more generally, has led to a broad public opinion consensus at the present time which is wary of free movement, so far as it concerns flows into the UK.¹⁴⁵⁴

The UK public has consistently been opposed to the high level of immigration and placed immigration as a highly salient issue. The September Economist/Ipsos Mori issues index shows that over half (56%) of the public mentions immigration as among the most important issues facing Britain. For two fifths (40%) it is the single most important issue facing the country.¹⁴⁵⁵ Moreover, according to another opinion poll by Ipsos Mori published in October 2015, UK citizens are increasingly critical towards EU rules on free movement of persons. The poll found that 58% of respondents believe there should be greater restrictions on free movement of EU citizens, and 14% believe there should be no right to free movement between EU countries at all. Of those who want more restriction on free movement of EU citizens, 72% mention pressure on public services and 59% cite people coming to claim benefits as their reason.¹⁴⁵⁶

Following the steady rise of the United Kingdom Independence Party (UKIP) and this year's Conservatives' general election victory, efforts to renegotiate the terms of the UK's EU membership ahead of a referendum by the end of 2017 will certainly include the UK's wish for more leeway to adopt stricter policies on free movement. Indeed, according to the abovementioned poll published in October 2015:

(w)hen asked how the public would vote in the referendum if it was not possible to change the laws of the EU to impose greater controls on the free movement of people, the public become

^{*} The author would like to thank Thomas Horsley and Stephanie Reynolds, University of Liverpool, Jo Shaw, University of Edinburgh and Alison Hunter, partner with Wesley Gryk Solicitors LLP for the information and advice they provided in the early stage of the research, and the representatives of the Home Office (Free Movement Team), for the details provided on the UK's official position on certain issues, as indicated in the present study. However, the sole responsibility for the content of this study remains with the author.

¹⁴⁵⁴ Jo Shaw, Nina Miller and Maria Fletcher, (2014), *Getting to Grips with EU Citizenship: Understanding the Friction between UK Immigration Law and EU Free Movement Law*, Edinburgh Law School Citizenship Studies, p. vii

¹⁴⁵⁵ <https://www.ipsos-mori.com/researchpublications/researcharchive/3628/EconomistIpsos-MORI-September-2015-Issues-Index.aspx>, published on 30 September 2015

¹⁴⁵⁶ <https://www.ipsos-mori.com/researchpublications/researcharchive/3631/EU-Referendum-Controls-on-movement-of-EU-citizens-key-issue-for-majority-of-Britons.aspx>

significantly more likely to say they'll vote to leave. The number of those who would vote to stay in the EU decreases by 16 points from 52% to 36%. Those wishing to leave the EU increases by 12 points from 31% to 43%, with the number of undecided increasing from 17% to 21%.¹⁴⁵⁷

These numbers clearly indicate the British attitude about the perceived need to further restrict immigration by EU/EEA citizens into the UK.

1.2 Summary of main conclusions

The United Kingdom has incorporated all the main provisions of Directive 2004/38 (hereafter 'the directive') into its national law. The British interpretation of these provisions is, on some points, broader than the directive itself, such as the definition of family members. Although the UK has adjusted its legislation on several occasions to take account of the Judgments of the Court of Justice of the European Union (CJEU), there is evidence of a critical attitude in this regard.

The report also shows that the UK has adopted a decisively restrictive approach towards granting residence rights based on primary EU law on the free movement of persons. Moreover, the grounds for expulsion, in particular the public order and security criteria, have been broadly interpreted, and the differentiated levels of protection required by the principle of proportionality have not always been sufficiently taken into account, which has given rise to a substantial body of national case law. As noted by British academic experts and practitioners, the UK still follows a predominantly permission-based approach when implementing EU law on free movement instead of a rights-based approach, and therefore the concept of EU citizenship has not yet been fully integrated into UK law and practice.

However, the position of the Home Office with regard to using the 'room for maneuver' provided by the directive is that

The UK Government applies the Directive in a way that protects the free movement rights of EU nationals and their family members whilst ensuring the UK is able to tackle fraud and abuse of free movement. We will continue to apply all measures available to us under the terms of the Directive, and have sought the Commission's support for Member States to use the full extent of their powers to address abuse, as set out in Article 35.¹⁴⁵⁸

2 Implementation of Directive 2004/38: General Assessment

2.1 National implementing legislation

In the UK, the directive's provisions have, for the most part, been transposed into the Immigration (European Economic Area) Regulations 2006 (hereafter: EEA Regulations), which have lastly been amended in April 2015.¹⁴⁵⁹

¹⁴⁵⁷ BBC News, *Q&A: What Britain wants from Europe*, 13 May 2015, <http://www.bbc.com/news/uk-politics-32695399>

¹⁴⁵⁸ Information received from representatives of the UK Home Office (Free Movement Team), November 2015

¹⁴⁵⁹ Immigration (European Economic Area) Regulations 2006 (hereafter: 'EEA Regulations'), Statutory Instruments (hereafter 'SI') 2006/13, lastly amended by The Immigration (European Economic Area) (Amendment) Regulations 2015 (2015, No. 694), entered into force on 6 April 2015

2.2 Institutional context and complaint procedures

The government agency UK Visas and Immigration (hereafter: UKVI), which falls under the responsibility of the Home Office, is responsible for handling all visa and immigration applications, including those falling within the scope of the directive and primary EU law. Applicants may ask the Home Office either for an administrative review of its decisions, or introduce a reconsideration request, if he/she applied in the UK and believes that immigration rules or policies weren't followed correctly when the decision was made. After following the procedure for administrative review, the applicant (or a person acting as his/her referent) can also ask a UK Member of Parliament to bring the concerns to the attention of the Parliamentary and Health Service Ombudsman.¹⁴⁶⁰

Applicants may also appeal to the First-tier Tribunal (Immigration and Asylum Chamber) about a Home Office decision on an asylum application (also known as 'protection'), permission to stay in the UK (also known as 'leave to remain'), deportation from the UK as a national from the European Economic Area, or entry clearance to the UK.

The next step in the appeals system is the Upper Tribunal (Immigration and Asylum Chamber), a superior court dealing with appeals against decisions (i) made by the First-tier Tribunal in matters of immigration, asylum and nationality, and (ii) certain judicial reviews, mainly in the immigration context. If the Upper Tribunal considers an error of law has been made in the decision of the First-tier Tribunal, it can, either (i) substitute its own decision in place of it, or (ii) order the First-tier Tribunal to re-decide the appeal.

Further appeals can be made to the Court of Appeal. Finally, the Supreme Court may be asked to consider cases that raise points of law of general public importance.¹⁴⁶¹

2.3 Administrative policies and guidelines

Detailed policy guidelines are issued on the implementation of the applicable laws. The 'EEA, Swiss nationals and EC association agreements (modernised guidance)' issued by the UKVI provide UK immigration officials with guidance on the rights based on the directive and on the administrative procedures to follow.¹⁴⁶²

Nevertheless, a recent study by Jo Shaw a.o., examining the frictions between UK immigration law and EU free movement law showed that:

(i)nternal system-level frictions represent a very significant challenge to the effective implementation of EU free movement law within the UK. These relate to the character of the two systems, and the way in which rules are applied by decision-makers. For example, it was widely felt that some of the cultures of immigration law, which see the credibility of the claimant being placed at the heart of the enquiry, had 'seeped' or 'leaked' into EU free movement law, where a factual enquiry alone based on the principles of EU law is normally the central task of the decision-maker.¹⁴⁶³

¹⁴⁶⁰ <https://www.gov.uk/government/organisations/uk-visas-and-immigration/about/complaints-procedure>

¹⁴⁶¹ *Idem*, p. 36-37

¹⁴⁶² <https://www.gov.uk/government/collections/eea-swiss-nationals-and-ec-association-agreements-modernised-guidance> (hereafter: 'Modernised Guidance')

¹⁴⁶³ Shaw, Miller and Fletcher (2014) see above, note 1454, at p.vi

A positive step in this regard was taken in February 2015, when the Home Office published an overview of the case law of the CJEU and of selected national case law concerning the implementation of the directive and the TFEU provisions on the free movement of persons, also indicating when and in which provisions this case law has been incorporated in the applicable national law and Regulations. As stated at the outset of this document, "(t)his guidance applies and interprets the Immigration (European Economic Area) Regulations 2006 (as amended)," and provides information which can be of use both for the case-handlers at UKVI, but also for practitioners, NGOs and other interested persons, including prospective migrants themselves.¹⁴⁶⁴ This information tool clearly serves to enhance understanding of the UK rules and practice in relation to the directive's implementation. However, to date it includes relatively few references to national court cases, and especially the most recent judicial decisions are not always mentioned.

3 Specific Assessment: Interpretation of the Individual Provisions of the Directive

3.1 Personal Scope - To whom does it apply?

3.1.1 EU/EEA citizens

The British implementing legislation uses some definitions that need to be carefully taken into account in the further analysis of this study, since they are not entirely conform definitions used in other countries. For example: "EEA national" means a national of an EEA State who is not also a British citizen; and "EEA State" means—(a) a member State, other than the United Kingdom; (b) Norway, Iceland or Liechtenstein; or (c) Switzerland.¹⁴⁶⁵ The rights included in the UK's Immigration (EEA) Regulations 2006 may apply, in accordance with the other provisions of this law, to nationals of the above mentioned states, and their family members (see further below, 3.1.2).

3.1.2 Definition of family members

The UK has incorporated all the persons mentioned in the directive as family members in its national implementing laws. A distinction is made between 'family members' covering those categories mentioned in Article 2 of the directive, and 'extended family members', mentioned in Article 3. The 'family members' are considered to automatically enjoy a right of entry into and residence within the UK as host State, whereas "UK courts understand that, by contrast, extended family members benefit only from a more limited procedural right; specifically: a right to have UK authorities consider fully their personal circumstances with a view to 'facilitating' their entry and residence."¹⁴⁶⁶ In practice, this distinction does not lead to any notable differences between these two groups,¹⁴⁶⁷ although some implications have been highlighted.¹⁴⁶⁸

¹⁴⁶⁴ Home Office, *European Economic Area (EEA) case law and appeals*, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf;

¹⁴⁶⁵ Immigration (EEA) Regulations 2006, Section 2. Another example is: "EEA decision" means a decision under these Regulations that concerns—(a) a person's entitlement to be admitted to the United Kingdom; (b) a person's entitlement to be issued with or have renewed, or not to have revoked, a registration certificate, residence card, derivative residence card, document certifying permanent residence or permanent residence card; (c) a person's removal from the United Kingdom; or (d) the cancellation, pursuant to regulation 20A, of a person's right to reside in the United Kingdom (...)

¹⁴⁶⁶ Thomas Horsley and Stephanie Reynolds, 'The United Kingdom', in Ulla Neergaard, Catherine Jacqueson and Nina Holst-Christensen (eds.) (2014) *Union Citizenship: Development, Impact and Challenges, The XXVI FIDE Congress in Copenhagen*, Congress Publications Vol. 2, pp. 453-479 (hereafter: 'FIDE Report on the UK'), at p. 840

¹⁴⁶⁷ Interview with Alison Hunter, Partner with Wesley Gryk Solicitors LLP, specialized in EU migration and free movement rights, held in London on 4 March 2015

¹⁴⁶⁸ FIDE Report on the UK, see above, note 1466, at p. 841, referring to the national case *B v Home Office*, [2012] EWHC 226 (QB), in which the High Court concluded that the EU law doctrine of Member State liability for breaches of Union law (*Francovich*) only protected

'Family member' is defined in Regulation 7 as meaning:

- (1) Spouse/civil partner - excluding a person who is party to a marriage or civil partnership of convenience, and excluding a person where they, or the person with whom they are in a relationship, already has a spouse, civil partner or durable partner in the UK); It should be noted that same-sex marriages are recognized in the UK, and that 'registered partners' as mentioned in the directive, are referred to as 'civil partners'.¹⁴⁶⁹
- (2) Children of the EEA national or of his/her spouse/civil partner who are under 21 years of age or are dependent. This includes stepchildren or adopted children provided that the UK has recognized the adoption;
- (3) Dependents in the ascending line (i.e. parents, grandparents) of the EEA national or of his/her spouse / civil partner.

Slightly different rules apply where the EEA national is a *student*. In that case, after the initial three month period of residence, (i) the children of the EEA national student (or of his/her spouse or civil partner) must be dependent on the EEA national in order to be treated as family members, and (ii) his/her dependents in the ascending line (or those of his/her spouse or civil partner) are not to be treated as family members.¹⁴⁷⁰

'Extended family members' is defined in Regulation 8 as meaning:

- (1) More distant family members of the EEA national or of his spouse / civil partner who can demonstrate that they are dependent; and
- (2) Partners where there is no marriage or civil partnership but they can show that they are in a „durable relationship“ with the EEA national. A durable relationship is an unmarried partnership that has normally subsisted (continued in existence) for two years or more.¹⁴⁷¹

Textbox 1 - Evidence to prove a durable relationship

According to the Home Office's Guidance and Instructions,¹⁴⁷² the evidence the applicant can provide may include (but is not limited to):

- Proof that any previous relationship has permanently broken down:
 - Degree absolute for marriages
 - Dissolution order for civil partnerships.

the substantive rights of entry and residence afforded to family members under art 2 of the directive and not the procedural rights conferred on extended family members by art 3 of the directive (paragraphs 105-119 of this judgment)

¹⁴⁶⁹ EEA Regulations 2006, Reg. 7(1)a

¹⁴⁷⁰ EEA Regulations 2006, Reg. 7

¹⁴⁷¹ EEA Regulations 2006, Reg. 8, and UKVI's *Modernised Guidance*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/421238/Qualified_Persons_v3_0.pdf (emphasis added)

, *Extended Family Members of EEA Nationals*, at p. 6

¹⁴⁷² *Modernised Guidance, Extended family members of EEA nationals*, V2.0, updated on 15 April 2015, see above, note 1462

- Evidence of cohabitation for at least two years:
 - Bank statements or utility bills in joint names at the same address
 - Rent agreements
 - Mortgage payments
 - Official correspondence which links them at the same address.
- Evidence of joint finances, joint business ventures and joint commitments:
 - Tax returns;
 - Business contracts
 - Investments.
- Evidence of joint responsibility for children (birth certificate/custody agreement) demonstrating that the two parties are cohabiting and sharing responsibility for children.
- Photographs, or other evidence demonstrating their relationship.

3.1.3 *Definition of economically active persons*

Economically active persons are defined as workers, self-employed persons and students. Reg 4 EEA Regulations (2006), provides the following definitions:

- (a) “worker” means a worker within the meaning of Article 39 of the Treaty establishing the European Community;
- (b) “self-employed person” means a person who establishes himself in order to pursue activity as a self-employed person in accordance with Article 43 of the Treaty establishing the European Community.

Moreover, a *student* is defined as a person who: (i) is enrolled, for the principal purpose of following a course of study (including vocational training), at a public or private establishment which is (a) financed from public funds; or (b) otherwise recognised by the Secretary of State as an establishment which has been accredited for the purpose of providing such courses or training within the law or administrative practice of the part of the United Kingdom in which the establishment is located; (ii) has comprehensive sickness insurance cover in the United Kingdom; and (iii) assures the Secretary of State, by means of a declaration, or by such equivalent means as the person may choose, that he has sufficient resources not to become a burden on the social assistance system of the United Kingdom during his period of residence.¹⁴⁷³

3.1.4 *Definition of 'self-sufficiency'*

The term 'sufficient resources' in the sense of Article 7 of the directive is defined in Reg 4(4) EEA Regulations (2006):

For the purposes of paragraphs (1)(c) and (d) and paragraphs (2) and (3), the resources of the person concerned and, where applicable, any family members, are to be regarded as sufficient if they exceed the maximum level of resources which a United Kingdom national and his family members may possess if he is to become eligible for social assistance under the United Kingdom benefit system.

¹⁴⁷³ Idem, Reg. 4(d) EEA Regulations, as amended in 2012

The Modernised Guidance specifies this as follows: "When deciding if an EEA national and their family members have sufficient resources you must first check if they exceed the maximum level of resources which a British citizen and their family members can have *before they no longer qualify for social assistance* under the UK benefit system."¹⁴⁷⁴ Therefore, any social benefits that the person may receive will not be taken into account in the assessment of the resources that he/she has at his/her disposal.

With regard to *social benefits*, it should be noted that in the UK, Article 24 of the directive is *not* transposed into the EEA Regulations: neither Article 24(1) of the directive containing a positive statement on equal treatment, nor Article 24(2), allowing EU member states to make exceptions with regard to social benefits to economically non-active persons and maintenance aid to students.

However, the content of Article 24(2) is incorporated in UK in several amendments to existing UK legislation on social security and student maintenance. A controversial point in this respect is the introduction of the 'right to reside' for EEA citizens, as a prior requirement for entitlement to any social benefits. TEEA nationals need to prove that they have acquired a right of residence under Article 6 (temporary residence), or Article 16 (permanent residence) of the directive. There is no statutory definition of the term "right to reside". Whether EEA nationals arriving in the UK and claiming free movement rights have a right to reside in the UK, is determined by EU law and domestic immigration law.¹⁴⁷⁵ For a summary of the conditions to acquire a right to reside, see below (Section 3.2.).

– *National case law on the 'right to reside'*

The requirement for EEA citizens to prove their right to reside has been the subject of a several national judicial decisions. These concern, in the first place, administrative decisions finding that they do not qualify as 'EU workers' in the sense of to Art 7(3) of the directive and are, therefore, not entitled to social assistance.¹⁴⁷⁶ Other cases focus on the question whether EU citizens failing the 'right to reside' test enjoy a right of residence in the UK under primary EU law (Art 21 TFEU), and on the right to equal treatment with respect to social assistance benefits on the basis of Art 18 TFEU.¹⁴⁷⁷ Finally, in several recent cases, EU claimants have argued unsuccessfully that the right to reside test is discriminatory, contrary to both EU and UK law.¹⁴⁷⁸

– *Infringement proceedings on the right to reside*

In 2013 the European Commission initiated infringement proceedings against the UK with regard to the right to reside test to govern entitlement to social benefits, stating that this test is indirectly discriminatory and cannot be justified under EU law.¹⁴⁷⁹ When the case was eventually issued in

¹⁴⁷⁴ UKVI's *Modernised Guidance*, see above, note 1462, *EEA nationals qualified persons*, p.35,

¹⁴⁷⁵ Kennedy, Steven, *Commons Briefing Papers SN00416, Part 3 - Habitual residence & right to reside - IS/JSA/SPC/ESA*, at paragraph 73230, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446055/dmgch0703.pdf

¹⁴⁷⁶ *Secretary of State for Work and Pensions v Elmi* [2008] EWCA Civ 1403; *R. (on the application of Tilianu) v Secretary of State for Work and Pensions* [2010] EWCA Civ 1397; and *Jessy ST Prix v Secretary of State for Work and Pensions* [2011] EWCA Civ 806, cited in FIDE Report on the UK, see above, note 1466, at p. 855

¹⁴⁷⁷ *Abdirahman v Secretary of State* [2007] EWCA Civ 657

¹⁴⁷⁸ *Kaczmarek v Secretary of State for Work and Pensions* [2008] EWCA Civ 1310, *Patmalniece (FC) v Secretary of State for Work and Pensions* [2011] UKSC 11, cited in FIDE Report on the UK, see above, note 1466, at p. 856

¹⁴⁷⁹ http://europa.eu/rapid/press-release_IP-13-475_en.htm

June 2014, the proceedings have been confined to Child Benefit and Tax Credits.¹⁴⁸⁰ In his recently published Conclusion in this case, Advocate General Cruz Villalón concludes that:

(It) does not constitute discrimination prohibited by Article 4 of Regulation No 883/2004 if national legislation provides that, when examining claims for social benefits such as child benefit or child tax credit, the Member State's authorities may carry out the checks necessary to ensure that nationals of other Member States claiming those benefits are lawfully resident in its territory.¹⁴⁸¹

The Advocate General considers that for that purpose, the authorities responsible for carrying out these checks will have to observe a number of principles as outlined in his Conclusions, "in particular the principle of proportionality, as well as the provisions of the second paragraph of Article 14(2), Article 15(1) and Articles 30 and 31 of directive 2004/38."¹⁴⁸² In his opinion, the Commission has not demonstrated that the United Kingdom is failing to comply with the conditions as to substance and form as he has described in his Conclusion, and concludes that this action for failure to fulfil obligations should be dismissed.¹⁴⁸³

In this context, it should also be mentioned that the CJEU's Judgment in the *Dano* case was well received in the UK, both by the Government and in the media, with headlines like: 'The end for benefit tourism: European court rules unemployed EU migrants can be denied welfare benefits' (The Mirror), and 'Landmark ECJ ruling boosts David Cameron's bid to clamp down on EU benefit migrants' (The Independent).¹⁴⁸⁴ The CJEU concludes in this case that economically inactive EU citizens have a general entitlement to non-contributory social benefits (either in the form of social assistance or a non-contributory cash benefit) under EU law and that member states can circumscribe the conditions under which such benefits are granted to economically inactive migrants to prevent them from becoming an unreasonable burden on their social assistance system. As argued by Rutledge, "(t)he judgment in *Dano* does not, however, address the position of EU citizens who are not in the same position as Ms Dano but who nevertheless are excluded from access to social benefits due to a right to reside condition contained in national legislation."¹⁴⁸⁵

Finally, with regard to the amount of 'sufficient resources' in the sense of Article 7 of the directive, the Court of Appeal held in a decision of July 2014 concerning a complaint against the level of the fixed minimum income requirement for an EEA citizen applying for family reunification with TCN family members:

Given the work that was done on behalf of the Secretary of State to analyse the effect of the immigration of non-EEA partners and dependent children on the benefits system, the level of income needed to minimise dependence on the state for families where non-EEA partners enter the UK and the rational conclusion on the link between better income and greater chances of

¹⁴⁸⁰ Action brought on 27 June 2014, *European Commission v United Kingdom of Great Britain and Northern Ireland*, Case C-308/14, OJ. 2014/C 329/03)

¹⁴⁸¹ Opinion of Advocate General Cruz Villalón, delivered on 6 October 2015, Case C-308/14, paragraph 99, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=169143&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=85658>

¹⁴⁸² *Idem*

¹⁴⁸³ *Idem*, at paragraph 98

¹⁴⁸⁴ Cited by Desmond Rutledge, *Dano and the exclusion of inactive EU citizens from certain non-contributory social benefits*, Free Movement, Updates and commentary on immigration and asylum law, 19 November 2014, at p. 2

¹⁴⁸⁵ *Idem*, at p. 9

integration, the Secretary of State's judgment could not be impugned and the judge had erred in holding otherwise.¹⁴⁸⁶

3.1.5 *Establishing 'dependency'*

In the UK, the criteria for dependency are outlined quite specifically in the Modernised Guidance issued by UKVI. In determining if a family member or extended family member is dependent (i.e. financially dependent) on the relevant EEA national, financial dependency should be interpreted as meaning that the person needs financial support from the EEA national or his/ her spouse/civil partner in order to meet his/her essential needs – not in order to have a certain level of income.¹⁴⁸⁷ Provided a person would not be able to meet his/her essential living needs without the financial support of the EEA national, s/he should be considered dependent on that national. In those circumstances, it does not matter that the applicant may in addition receive financial support / income from other sources. There is no need to determine the reasons for recourse to the financial support provided by the EEA national or to consider whether the applicant is able to support him/herself by taking up paid employment. The person does not need to be living or have lived in an EEA state in which the EEA national sponsor also lives or has lived.

However, for *extended family members* the following conditions in relation to dependency must also be satisfied:

- The extended family member must have established his/her dependency or household relationship on the relevant EEA national in the country from which the EEA national moved to the UK; and
- The dependency/household relationship must have existed immediately before or very recently before the EEA national came to the UK.

3.1.5.1 Relevant national case law

(i) The case of '*Bigia and Others v Entry Clearance Officer (2009) EWCA Civ 79*' relates to *extended family members* being dependent on an EEA national. It concerns applications for a right of residence by several persons, each of whom claimed to be dependent on a reference person who already had acquired a right of residence in the UK. In the particular case of *Bigia* the applicant, U.B., was an Indian national who had a daughter, who was born in 1997. Their entitlements, if any, derive from their relationship with Lala Bigia, U.B.'s father, who was originally resident in India but he also has Portuguese nationality and he relied on that when he entered the United Kingdom in 1995. On 16 May 2005, U.B. and her daughter applied for an EEA family permit in order to join Mr Bigia.¹⁴⁸⁸

In this judgment the Court of Appeal confirmed:

- Where an extended family member is dependent on an EEA national, or is a member of the EEA national's household then consideration must be given to whether the EEA national would be discouraged from exercising their treaty rights if the extended family member did not have the right to join or accompany them in the UK.

¹⁴⁸⁶ *R (on the application of MM (Lebanon)) v Secretary of State for the Home Department*, Court of Appeal [2015] I.N.L.R. 22, paragraph 3

¹⁴⁸⁷ *Modernised Guidance*, see above, note 1462, *Direct Family Members of European Economic Area (EEA) Nationals*, p.17

¹⁴⁸⁸ For the full text of the Judgment, see <http://court-appeal.vlex.co.uk/vid/-52560145>

- In situations where an extended family is financially dependent on an EEA national there is no reason why the EEA national's movement to the host member state would be discouraged.
- The EEA national would only be deterred in certain circumstances.
- The EEA national and the extended family member must have been present in the same country and that country must be the one the EEA national has most recently moved to the UK from.
- The applicant must show very recent evidence of the dependency or membership of the EEA national's household.

The Court of Appeal held that it is *unlikely* that EEA nationals would be deterred from exercising treaty rights in the UK if:

- The extended family member lived in a different country to the one from which the EEA national moved to the UK, or
- Dependency or membership of the EEA national's household was historic or has lapsed, or
- The extended family member was only financially dependent on the EEA national, for example the EEA national paid for their accommodation and living expenses.

In these circumstances the EEA national is able to continue to provide accommodation and financial support from the UK to the country in which the extended family member lives.¹⁴⁸⁹

(ii) However, for *family members*, their dependency on the EEA national sponsor does not need to have existed before they came to the UK. This follows from the Court of Appeal judgment in the case of *Pedro*.¹⁴⁹⁰ The case concerned a Macedonian citizen who applied for a derived right of residence based on his dependency as an extended family member of his brother-in-law, an Italian citizen, who had acquired a residence right in the UK.

In this judgment the Court of Appeal stated:

- Article 2(2) of the Free Movement of Persons directive 2004/38/EC does not specify when the dependency has to have taken place, but it does require that the relative must be dependent in the country of origin.
- Article 3(2)(a), however, requires actual dependency at a particular time and place.
- The court concluded that those direct family members who must show dependency on the EEA national (that is, direct descendants over 21, or dependent relatives in the ascending line) do not have to show they were dependent upon them before they came to the UK.

¹⁴⁸⁹ EEA Case law and Appeals, at p. 46-47, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf

¹⁴⁹⁰ *Pedro v Secretary of State for Work and Pensions* (2009) EWCA Civ 1358 (14 December 2009), at p.48

- So unlike extended family members, these direct family members only need to show they are dependent on the EEA national in the UK in order to be considered to be a dependent direct relative of an EEA national.
- On the other hand, extended family members, such as the appellant in this case, must also show that they were already dependent on the EEA national in the UK before they came to the UK.¹⁴⁹¹

(iii) Moreover, the case of *RS (Brazil)*, concerned a Brazilian appellant who had been dependent on his aunt and a member of her household in Brazil before she came to live in the UK with her Italian husband. He joined them as a visitor and overstayed. The SSHD refused to issue him with a residence card. The Court of Appeal considered that:¹⁴⁹²

- The Citizens Directive had deliberately not included in ‘other family members’ that dependency could relate to the spouse or partner of an EEA national.
- Dependency or household membership can only be on or of the EU citizen.
- There is no obligation on the UK to extend the qualifying criteria wider than required by the Citizens Directive.

The court concluded that extended family members must be dependent upon the EU citizen and dependency on the non-EEA spouse or other family members is not sufficient.¹⁴⁹³

(iv) The case of ‘*Oboh and Others*’¹⁴⁹⁴ involved Alexander Oboh, a Nigerian citizen, his wife and their four children, who resided in Italy and applied for a derived right of residence in the UK based on their alleged dependency on Alexander Oboh's elder brother, Marcus Oboh, a German citizen, who had acquired a right of residence in the UK by exercising his Treaty rights. In 2011, on appeal against the negative decision of the Immigration authorities, the Upper Tribunal Judge concluded that he was not satisfied that Alexander Oboh and his family had demonstrated that they were dependent on Marcus while they lived in Italy, and that it was not enough to show that they were now financially dependent on him and living in his household in the United Kingdom. Further appeal to this decision was not granted. The sole question in these appeals from the Upper Tribunal (Immigration and Asylum Chamber) is whether the appellants can bring themselves within Article 3(2)(a) of the 2004 directive where the dependency on the EU citizen or membership of his or her household arose only after their arrival in the United Kingdom.

The Court of Appeal considered that:

- Whether applicants are ‘members of a household’ is a matter of fact alone and that following *KG (Sri Lanka)* and *Bigia*, there is a requirement that the members of a claimed household have lived together at least recently in order to be part of a household.

¹⁴⁹¹ *Idem*. Full text available at <https://tribunalsdecisions.service.gov.uk/utiac/2010-ukut-380>

¹⁴⁹² *RS (Brazil) v Secretary of State for the Home Department* [2013] EWCA Civ 575, available through https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf

¹⁴⁹³ *Idem*

¹⁴⁹⁴ *Oboh & Ors v Secretary of State for the Home Department* [2013] EWCA Civ 1525 (25 November 2013), summary available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf

- Whether or not an applicant is ‘dependent’ on their EEA sponsor depends on whether they rely on that person for their ‘essential needs’, and that there is no minimum standard of living set out by the directive.

Therefore, it may be concluded that British courts have clearly established that the requirements for *extended family members* to be granted a derived right of residence based on the dependency on an EEA national who resides in the UK, are stricter than those for *family members*. This is also reflected in the Modernised Guidance, as mentioned above (Section 3.1.5.). For an overview of the criteria for establishing dependency included in this Guidance compared to other countries, see the Comparative Analysis, Section 4.1.5.

3.2 Material scope - Which rights are covered, to whom do they apply and what do they entail?

3.2.1 Rights against the host state

3.2.1.1 Right of entry, right of residence for up to 3 month: Arts 5 and 6, directive¹⁴⁹⁵

The right of entry (Article 5 of the directive) is incorporated in Reg 11 of the EEA Regulations. The safeguards of the directive's Article 5(4), which obliges member states to afford Union citizens and their family members ‘every reasonable opportunity’ to obtain – or have brought to them within a reasonable period – the necessary documentation required to support their right of entry into the host State, or alternatively, to permit persons to corroborate or prove by other means that they are covered by the right of free movement and residence under Union law, are transposed in Reg 11(4). Nevertheless, the EEA Regulations require from non-EEA national family members that upon entry in the UK, they present, besides a valid passport, also a so-called ‘EEA family permit’ to be obtained prior to their entry. The UK goes so far as to impose financial fines on air carriers who bring non-EEA nationals not having such a permit to UK territory. The requirement of this EEA family permit is arguably in conflict with Article 5(2) of the directive, which requires member states to exempt non-EEA family members from visa requirements otherwise applicable under national law where such persons hold a valid EU residence card issued by the authorities of another Member State in accordance with Art 10 of the directive.

In 2011 the European Commission concluded that the UK had failed to transpose Art 5(2) of the directive correctly.¹⁴⁹⁶ In November 2012, the High Court ruled that the UK’s refusal to recognize non-UK issued residence cards in accordance with Art 5(2) of the directive was justified and proportionate,¹⁴⁹⁷ but the Court nevertheless referred the question to the Court of Justice on a preliminary reference.¹⁴⁹⁸ In its judgment of 6 February 2015, the CJEU ruled that

Both Article 35 of Directive 2004/38/EC (...) and Article 1 of the Protocol (No 20) on the application of certain aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland must be interpreted as *not permitting a Member State to require*, in pursuit of an objective of general prevention, family members of a citizen of the European Union who are not nationals of a Member State and who hold a valid residence

¹⁴⁹⁵ The implementation of the right of exit, laid down in Article 4 of the directive, is not considered here since the focus of this study is on the rights to entry and residence

¹⁴⁹⁶ http://europa.eu/rapid/press-release_IP-12-417_en.htm

¹⁴⁹⁷ *R (on the application of McCarthy) v SSHD [2012] EWHC 3368 (Admin)*, at paragraph 108, cited in FIDE Report on the UK, see above, note 1472, at p. 845

¹⁴⁹⁸ *Idem*, at paragraph 112

card, issued under Article 10 of Directive 2004/38 by the authorities of another Member State, to be in possession, pursuant to national law, of *an entry permit, such as the EEA (European Economic Area) family permit*, in order to be able to enter its territory.¹⁴⁹⁹

This ruling has subsequently been incorporated into UK practice:

Following the judgment, the UK exempts those family members in possession of a valid, genuine Article 10 residence card from the requirements to hold an EEA family permit for travel to the UK. However, such family members are still required to demonstrate that they meet the relevant conditions for a right of admission (that is, that they are accompanying or joining their EU national family member, and that EU national family member has a right of admission or residence under EU law) in order to be admitted to the UK. Possession of a residence card alone does not entitle the holder to admission where these conditions are not met. For third country family members who do not hold a valid, genuine Article 10 residence card, the EEA family permit requirement still applies. This requirement is in line with the entry visa requirement permitted by Article 5(2) of the Directive.¹⁵⁰⁰

The right to stay for a maximum period of 3 months (Article 6 of the directive) is transposed in Reg 13 EEA Regulations, which also state that 'an EEA national or his family member who becomes an unreasonable burden on the social assistance system of the United Kingdom shall cease to have the right to reside under this regulation.'¹⁵⁰¹

3.2.1.2 Right of residence between 3 months and 5 years: Art 7, directive

The right of extended residence, in accordance with Article 7 of the directive, is transposed in Reg 14 EEA Regulations. There is some national case-law regarding expulsion based on non-fulfillment of the criteria of Article 7, in particular the criterion on self-sufficiency.¹⁵⁰² However, that determination does not, of itself, lead to the expulsion of EEA nationals. EU citizens who do not enjoy a right of residence by virtue of e.g. Art 7 of the directive are regarded as 'present' in the UK; they are subject to UK immigration control and, therefore, liable to removal by the Secretary of State.¹⁵⁰³

On another aspect of fulfilling the conditions of Article 7, namely the *criterion of having comprehensive sickness insurance*, the case of '*W (China) and Anor v Secretary of State for the Home Department* (2006) EWCA Civ 1494' should be mentioned. In this judgment the Court of Appeal stated: (i) EEA nationals who need to have medical insurance cannot rely on the NHS as providing medical insurance; and (ii) EEA nationals and their family members must show they will not place an unreasonable burden on the public finances of the UK. This judgment in *W and X China* has been further supported by the recent Court of Appeal judgment in *Ahmad*,¹⁵⁰⁴ which confirmed that an EEA national who is exercising Treaty rights as a student or self-sufficient person in the UK can not rely on an entitlement to treatment on the NHS in order to meet the requirement to hold CSI.

¹⁴⁹⁹ Case C- 202/13, judgment of 6 February 2015, available at <http://curia.europa.eu/juris/documents.jsf?num=C-202/13>, restating the Operative Part of the judgment of 18 December 2014, Case C-202/13 *McCarthy* ECLI:EU:C:2014:2450

¹⁵⁰⁰ Information received from representatives of the UK Home Office (Free Movement Team), November 2015

¹⁵⁰¹ Reg 13(2)b, EEA Regulations (2006)

¹⁵⁰² E.g. *Lekpo-Bozua v Hackney LBC* [2010] EWCA Civ 909 and *Mirga v Secretary of State for Work and Pensions* [2012] EWCA Civ 1952, cited in FIDE Report on the UK, see above, note 1466, at p. 846

¹⁵⁰³ FIDE Report on the UK, see above note 1472, at p. 846

¹⁵⁰⁴ *Ahmad* [2014] EWCA Civ 988, cited in EEA Case law and Appeals, see above, note 1495

With regard to the retention of the rights of TCN spouses or registered partners who are still officially married or in a valid registered partnership, but who *de facto* do not live together any longer, the United Kingdom will apply the case law of the CJEU, in particular Case *C-Diatta*, and the rights of the spouse or partner will in principle not change as long as the marriage or registered partnership is legally valid. Only if the specific circumstances of a case indicate that the factual situation is such that this is an abuse of free movement rights the decision regarding the retention of residence rights might, exceptionally, have a different outcome.¹⁵⁰⁵

In recent years, there have been several actions by the UK authorities focusing on rough sleepers resulting in the deportation of 13 persons in 2010 (while around 100 persons received removal notices), and around 20 in 2013. The ground for their expulsion was that they did not fulfill the criteria for residence in the UK.¹⁵⁰⁶ It is not clear whether the procedural safeguards of Article 15 of the directive, including access to judicial and administrative redress, have been respected in these situations. In this respect, the recent cuts in the national budget for legal aid *de facto* contribute to reducing migrant's possibilities of seeking redress.¹⁵⁰⁷

3.2.1.3 Right of permanent residence: Art 16, directive

The right of permanent residence (Articles 16-18 of the directive) is incorporated in Reg 15 EEA Regulations. As noted by Horseley and Reynolds, with respect to the relevant national case-law:

UK courts consistently interpret the requirement for 'legal' residence in Art 16 CRD to mean residence in accordance with the CRD. Under the terms of the EEA Regulations, Union citizens must therefore be resident in the UK as 'qualified persons' i.e. as a worker, or self-employed/self-sufficient person in order for residence to be legal. TCN family members also have to reside in the UK with 'qualified persons'. Residence that does not accord with the terms of the CRD, but which is lawful by virtue of UK nationality,¹⁵⁰⁸ or because no steps have been taken by national authorities to remove an individual,¹⁵⁰⁹ will not constitute 'legal' residence for the purposes of Art 16 CRD. Moreover, residence that is lawful under other provisions of Union law, rather than the CRD, whether secondary or primary law, will not meet the requirements of Art 16.¹⁵¹⁰

In this regard, it should be noted that according to the EEA Regulations as amended in 2012 the rights of residence arising from the CJEU's decisions in *Chen*, *Teixeira and Ibrahim*, and *Zambrano* do not qualify as 'legal' for the purposes of acquiring a right to permanent residence under Art 16 CRD.¹⁵¹¹

National courts have also addressed the question whether periods of imprisonment should be counted as legal residence, thereby contributing to the fulfillment of the 5-year period required for obtaining

¹⁵⁰⁵ Information provided by representatives of the UK Home Office (Free Movement Team)

¹⁵⁰⁶ FIDE Report on the UK, see above note 1466, at p. 845

¹⁵⁰⁷ Interview with Alison Hunter, see above, note 1467

¹⁵⁰⁸ *McCarthy* [2008] EWCA Civ 641

¹⁵⁰⁹ *Lepko-Bozua v Hackney LBC* [2010] EWCA Civ 909, *Okafor v Secretary of State for the Home Department* [2011] EWCA Civ 499

¹⁵¹⁰ Regarding secondary law: *Dias v Secretary of State for the Home Department* [2009] EWCA Civ 807; and *MDB* [2010] UKUT 161 (IAC); regarding primary law (Arts 20/21 TFEU): *Lepko-Bozua*, cited above, note 1509 and *Abdirahman v Secretary of State* [2007] EWCA Civ 657

¹⁵¹¹ Reg 15A, The Immigration (European Economic Area) (Amendment) (No. 2) Regulations 2012

a right to permanent residence. Until recently, national courts had consistently held that time spent in prison does not constitute ‘legal’ residence for the purposes of attaining a right to permanent residence under Art 16 CRD.¹⁵¹² The Upper Tribunal recently referred this question to the Court of Justice for a preliminary ruling, in the case *Onuekwere*. In March 2014, the CJEU has confirmed the above interpretation, as follows:

Article 16(2) of directive 2004/38/EC (...) must be interpreted as meaning that the periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods, cannot be taken into consideration in the context of the acquisition by that national of the right of permanent residence for the purposes of that provision.¹⁵¹³

Moreover, the Court also stated that based on Articles 16(2) and (3) of the directive, "the *continuity of residence is interrupted by periods of imprisonment in the host Member State* of a third-country national who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods."¹⁵¹⁴

Therefore, UK practice is in line with this judgment:

Time spent in prison is not considered ‘lawful residence’ for the purposes of acquiring a right of permanent residence under EU law in the UK. Time in prison breaks the continuity of residence for the purposes of acquiring a right of permanent residence under EU law, and time before and after a period of imprisonment cannot be ‘aggregated’ for the purpose of meeting the continuous residence requirement.

This position is supported by the judgments of the CJEU in *MG* (C-400/12) and *Onuekwere* (C-378/12). The UK courts have also reflected this position.¹⁵¹⁵

With regard to time spent in a psychiatric hospital, this will firstly depend on whether the individual was convicted and sentenced or not:

A person who is detained (‘sectioned’) under the Mental Health Act 1983, but who has not been convicted of a crime or sentenced, will not automatically be precluded from being considered ‘lawfully resident’ on the basis of that detention. For example, in the case of *JO Slovakia [2012] UKUT 00237(IAC)*, the UK Upper Tribunal found that an EEA national does not cease to be a qualified person as a result of being detained in a hospital pursuant to an order of the court under the Mental Health Act 1983, having not been convicted of any criminal offence. However, such a person would still need to demonstrate that they otherwise meet the conditions for a right of residence under the directive in order for their residence to be considered ‘lawful’.

¹⁵¹² For more details, see FIDE Report on the UK, see above, note 1472, at p. 852-853. For example, in *Carvalho v SSHD [2010]EWCA Civ*, the Court of Appeal decided that the appellant’s appeal against the decision that the time he spent in prison was not counted as legal residence, should be dismissed. Reference was made to Article 28 of the Citizen’s Directive (which deals with the calculation of the duration of residence) and the European Commission’s opinion communicated to the Parliament and Council on 2nd July 2009 stating that; time spent behind bars does not necessarily count towards the qualifying period. In this case, the appellant had not been exercising his treaty rights in the host member state and could not therefore, benefit from the enhanced protection.

¹⁵¹³ CJEU, Judgment of 7 March 2014 in Case 378/12, *Onuekwere*, Operative part, first paragraph

¹⁵¹⁴ *Idem*, second paragraph

¹⁵¹⁵ Information provided by representatives of the UK Home Office (Free Movement Team), November 2015

Where a person is convicted of a crime and receives a custodial sentence, and is subsequently transferred to a secure unit for either part or all of their remaining sentence, the principle set out above regarding time spent in prison would continue to apply, and that person would not be considered to be lawfully resident in the UK while they are detained.¹⁵¹⁶

Text box 2 - Time spent in prison or a psychiatric hospital: legal residence?

Practice in the United Kingdom:	<ul style="list-style-type: none"> – Time spent in prison is <i>not</i> considered as lawful residence (following <i>Onuekwere</i>) – Time spent in a psychiatric hospital as an alternative to a prison sentence is <i>not</i> considered as lawful residence either – However, time spent in a psychiatric hospital without being convicted of a crime or sentenced, <i>can be</i> considered as lawful residence, if the other requirements for such residence are fulfilled.
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3.2.2 *Rights against the home state*

3.2.2.1 Rights of persons returning to the home State after a stay in another EU/EEA Member State and their family members - family reunification

The CJEU's case of *Surinder Singh* (C-370/90) relates to the rights of direct family members of EEA nationals who return to their home state after working or being self-employed in another member state. As noted by the Home Office, the judgment does not apply to extended family members.¹⁵¹⁷ The UK has implemented this judgment into regulation 9 of the Immigration (European Economic Area) Regulations 2006, which sets out the requirements to be met for British citizens returning to the UK with their family members. This was amended on 1 January 2014 to include a 'centre of life' test.

3.2.2.1.a. *Centre of life test*

Since January 2014, the Regulation 9 (EEA Regulations) requires that the British citizen demonstrates that he/she has moved his/her "centre of life" to another EU member state before qualifying to rely on EU rules in order to bring his or her family members to the UK.

As set out in the Home Office's guidance for the implementation of this test, Regulation 9(3) specifies the factors to be considered when deciding whether a British citizen has transferred the centre of their life to another member state. These include, but are not limited to:

- a. The period of residence in another EEA member state as a worker or self-employed person;
- b. The location of the British citizen's principal residence; and
- c. The degree of integration of the British citizen in the host member state.

¹⁵¹⁶ Information provided by representatives of the UK Home Office (Free Movement Team), November 2015

¹⁵¹⁷ EEA Case law and Appeals, see above, note 1495, at p.12. On the British definitions of 'direct' and 'extended' family members, see above, Section 3.1.2

The Guidance mentions that "these criteria are indicative and it is not necessary to meet all three."¹⁵¹⁸

Regarding the *period of residence* in another EEA member state, the guidance states that, in general, the longer the British citizen has resided in another EEA member state as a worker or self-employed person, the more likely it is that they have transferred the centre of their life to that member state. For example, a British citizen who has lived and worked in another member state for a period of two years is more likely to meet the requirement of regulation 9(2)(c) than a British citizen who was employed in another Member state for a period of four months.¹⁵¹⁹

The *principal residence* is the place and country where the British citizen's life is primarily based. For example, a British citizen worked in France for three months, staying in a hotel during the week and returning to their main home in the UK at the weekends. In this case they are unlikely to meet the requirements of regulation 9(2)(c) as their principal residence would be considered to be the UK.¹⁵²⁰

When considering the *degree of integration* in another EEA member state, relevant factors may include:

- a. Does the British citizen have any children born in the host member state? If so, are the children attending schools in the host member state?
- b. Does the British citizen have any other family members resident in the host member state?
- c. Has the British citizen immersed themselves into the life and culture of the host member state? For example, have they bought property there? Do they speak the language? Are they involved with the local community?¹⁵²¹

The Guidance provides the following example: "a British citizen is working in France, is fluent in French and has bought a house there. Their children were born in France and are educated in a French school where the British citizen sits on the school council. In this example it is likely that the British citizen has moved the centre of their life to France. Contrast with the example of a British citizen who will be working in France for three months, who resides in a hotel and returns to the UK every weekend. They don't speak the language and educate their children in a school in the UK. In this second example they are less likely to have moved the centre of their life to the UK. However, it should be noted that the factors set out in regulation 9(3) are not determinative. The question as to whether the British citizen would be deterred from exercising their free movement rights were their spouse/civil partner refused, must be determined having regard to all relevant factors."¹⁵²²

If the family member meets the conditions in regulation 9, the British citizen must be treated as if they were an EEA national, and their family members may be granted with an EEA family permit, a residence card, or a permanent residence card.

¹⁵¹⁸ Notice of the Home Office, European Operational Team, on Regulation 9 (*Surinder Singh* cases), issue number 02/2014, made available in response to a request under the Freedom of Information Act, - See more at: <http://www.kadmosimmigration.com/news/home-office-guidance-centre-life-test-surinder-singh-cases#sthash.2drbaTm7.dpuf>, at paragraph 7

¹⁵¹⁹ *Idem*, at paragraphs 8-9

¹⁵²⁰ *Idem*, at paragraphs 10-11

¹⁵²¹ *Idem*, at paragraphs 12

¹⁵²² *Idem*, at paragraphs 13-14

The European Commission has expressed some criticism regarding the introduction of the 'centre of life' test, and it has reportedly launched an investigation on this point.¹⁵²³ In a letter dated 7 August 2014 the EU Commission writes to the family member of a British citizen. After moving to Ireland for several months and working there, they moved back to the UK. An EU right of residence was denied to the family member on the grounds that the couple had not transferred their "centre of life" to Ireland, a test that was amended by the UK Government into the Immigration (European Economic Area) Regulations 2006 on 1 January 2014. The Commission clearly indicates that the 'centre of life test' appears to be incompatible with EU law:

The UK criterion of having transferred one's centre of life to the host Member State is not contemplated in the Directive and would not appear to be equivalent to the conditions spelt out in *O and B*, in particular where examining the location of the principal residence and the degree of integration in the host Member State. The location of EU citizens' principal residence or their degree of integration do not play any role in examining whether the residence is in line with Article 7 of the Directive.¹⁵²⁴

The Commission also writes that it "envisages contacting the UK authorities shortly in relation to the January amendment of Regulation 9 of the 2006 Regulations and asking for their observations on the compliance with EU law on free movement of EU citizens, as interpreted by the Court of Justice."¹⁵²⁵ It is currently investigating this issue.¹⁵²⁶

3.2.2.1.b. Practice regarding 'centre of life' test

To date, no cases have been reported on the application of the 'centre of life test' that have reached the courts or the Upper Tribunal.¹⁵²⁷ However, some examples of administrative practice have been made public. In one case of July 2014 an Australian citizen was refused on entry despite the fact that she stayed together with her British husband in Cyprus for four months, where her husband worked, and who previously looked for work in France and Ireland. The authorities seem to have suspected abuse, considering that four months was not long enough to fulfill the condition of having their 'principal residence' in Cyprus. As noted by Colin Yeo, "(t)here have been other similar cases, although not many as far as it is possible to ascertain."¹⁵²⁸

3.2.2.1.b. Recent national case law - *Surinder Singh* cases

Two recent judgments that are relevant for family unification upon return to the UK after a stay in another EEA State (often referred to as '*Surinder Singh* cases') should be mentioned here.

First, in a judgment of October 2014, in the case *SSHD v Kamila Santos Campelo Cain*,¹⁵²⁹ the Upper Tribunal ruled that Regulation 9, as the provision that implements the CJEU's judgment in

¹⁵²³ See <https://www.freemovement.org.uk/eu-to-investigate-uk-interpretation-of-surinder-singh/>

¹⁵²⁴ *Idem*, an anonymized copy of the letter is available at <http://www.freemovement.org.uk/wp-content/uploads/2014/08/EU-Commission-letter-anon.pdf>

¹⁵²⁵ *Idem*

¹⁵²⁶ Colin Yeo, *Surinder Singh: EU Free Movement for British Citizens*, 2014, ebook, version 3, updated (2015), available through <https://www.freemovement.org.uk/about/>, a blog launched and edited by Colin Yeo, barrister at Garden Court Chambers, London

¹⁵²⁷ *Idem*, at p. 74

¹⁵²⁸ *Idem*

¹⁵²⁹ *SSHD v Kamila Santos Campelo Cain* (IA/40868/2014) promulgated 17 October 2014

Surinder Singh, also applies to unmarried partners. The case concerned a Brazilian citizen who applied for a residence card as an extended family member of a British citizen (durable partner), with whom she had lived together in Spain and Portugal for two years, and with whom she has two children who also lived with them abroad during that same period, before they all returned to the UK (*i.e.* the British partner returned to the UK after having made use of his treaty rights of free movement, accompanied by his TCN partner and their children). The application was denied, based on the reasoning that Regulation 9 did not apply to unmarried partners. On appeal, the First-tier Judge concluded that Regulation 9, in limiting its application to married persons or civil partners, was contrary to Directive 2004/38/EC. The Secretary of State appealed this judgment before the Upper Tribunal, which considered that:

Notwithstanding that *Surinder Singh* and the other cases we have referred to¹⁵³⁰ which concern family members as defined in the Directive, we cannot see that there is any distinction *in principle* between those cases and the case of the appellant before us. In our judgment, the exercise of the right of free movement by an EEA national is as likely to be adversely affected by the inability of a durable partner to reside with the EEA national in the host State, as it would be were his or her spouse to be denied residence status.¹⁵³¹

This conclusion is based on primary EU law, and not on Directive 2004/38/EC. The Upper Tribunal confirmed on this point, that "(t)here is no provision in the Directive which is equivalent to the *Surinder Singh* principle, that principle being founded upon Community law in general."¹⁵³² The Upper Tribunal left it to the discretion of the Secretary of State to reconsider her decision on granting a derived right of residence to the appellant, taking account of this judgment on the questions of law addressed in the appeal.

Secondly, in a judgment of 11 July 2014, the Court of Appeal allowed the Secretary of State's appeal against *MM, R (On the Application Of) v The Secretary of State for the Home Department [2013] EWHC 1900 (Admin)*. The appeal concerned the lawfulness of the UK immigration rules introduced in 2012 setting minimum income levels for the sponsorship of non-EEA family members. The Court of Appeal concluded that the Secretary of State's rules, though discriminatory in their effect, had a legitimate objective and were for this reason not unlawful. The immigration rule that was subject to the proceedings requires the British resident sponsor of a non-EEA spouse to demonstrate an income of at least £18,600 per annum in order that a visa be issued. In the event that a non-EEA national child is being sponsored a further £3,800 per annum income is required for the first child and £2,400 for each additional child. after that. Provisions also exist for the sponsor to demonstrate a means to support through the savings of amounts indicated by the rules being available. In the previous High Court judgment of 2013, Justice Blake had ruled that the rules were a disproportionate interference with the UK resident's right to family life under the terms of Article 8 of the European Convention of Human Rights.¹⁵³³ However, the Appeals Court held that, although the rule did discriminate against people with modest incomes they were not inherently irrational given the government's legitimate aim in limiting the impact of immigration on public funds. It should be noted that this judgment concerned situations that did *not* fall under the free movement provisions of the TFEU (all

¹⁵³⁰ These other cases are C-291/05 *Eind* ECLI:EU:C:2007:771; C-356/11 *O. and B.* ECLI:EU:C:2014:135, and C-357/11 *G. and S.* ECLI:EU:C:2014:136

¹⁵³¹ *Idem*, at paragraph 32

¹⁵³² *Idem*, at paragraph 47

¹⁵³³ *MM and others v Secretary of State* [2013] EWHC 1900 Admin

the partners in the cases on appeal, including MM,¹⁵³⁴ were non-EEA nationals, but the reference persons having a residence right in the UK were either TCNs or British citizens, and they had not resided in another EEA State from which they returned to the UK). Indeed, the minimum income requirement does not apply to persons who return to the UK after having resided in another EEA State. However, the judgment is of relevance in the context of this analysis precisely because it may lead to an increased use of the 'Surinder Singh route' in order to circumvent the minimum income requirement, now that its lawfulness has been confirmed.

3.2.2.1.c. Final considerations

To conclude this section on the rights of EEA nationals returning to their home State, it should be noted that in the case of *Eind* (C-291/05), the CJEU clarified that the British sponsor in a *Surinder Singh* case does not need to show they continue to be a worker or self-employed person upon their return to the UK. The British citizen is only required to show they were a worker or self-employed person before returning to the UK.¹⁵³⁵ Moreover, the CJEU judgments in *O. and B.* (C-456/12) and *S. and G.* (C-457/12), have not yet been incorporated into the EEA Regulations, nor in the criteria of the 'centre of life' test. Indeed, there seems to be some discrepancy between the Home Office's guidance on this test, as outlined above, and the criteria established by the CJEU in these later judgments. In particular, the criterion mentioned in the Home Office's guidance regarding the minimum period of the stay abroad (indicating that a stay of 2 years is more likely to qualify as such than a stay of only 4 months) does not take account of the consideration in *O. and B.* that a stay abroad must be at least three months. Also the Home Office's requirement concerning the degree of integration in the host State goes beyond the criteria mentioned by the CJEU.¹⁵³⁶

However, the main conclusions of these CJEU judgments are summarised in the EEA Case law and Appeals, and should therefore, in theory, be taken into account by the UK immigration authorities.¹⁵³⁷

3.2.2.2 Rights of caretakers of minor citizens (involving cross-border element) (*Alokpa, Zhu Chen*)

National courts in the UK are increasingly addressing EU citizenship rights beyond the scope of the directive. For instance, as noted by academic experts in the UK, 'with respect to the *Chen* ruling, UK courts and tribunals were quick to recognise that that decision establishes, in primary EU law, a derived right of residence for TCN family members in their capacity as primary carers of dependent minor EU citizens.'¹⁵³⁸

The Home Office initially gave effect to this judgment by including provision for parents of EEA national self-sufficient children to be issued leave to enter or remain under paragraph 257C of the Immigration Rules. On 16 July 2012, *Chen* was incorporated into the Immigration (EEA) Regulations 2006 and primary carers of EEA self-sufficient children can now be issued a derivative

¹⁵³⁴ The initial case leading to this appeal concerned a Lebanese citizen, MM, who legally resided in the UK as a refugee together with his sister, and who married a Lebanese woman. The couple wanted to live together in the UK, but MM's wife could not apply for a residence permit since MM's annual income did not meet the threshold of the minimum amount required to allow for family re-unification.

¹⁵³⁵ Case C- 291/05

¹⁵³⁶ See, for example, Immigration Law Practitioners' Association, *Information Sheet: EU Free Movement: 'Surinder Singh' cases*, 28 March 2014, at <http://www.ilpa.org.uk/resources.php/26070/information-sheet-eu-free-movement-surinder-singh-cases>

¹⁵³⁷ *Idem*, at p.13

¹⁵³⁸ FIDE Report on the UK, see above note 1466, at p. 868, citing the following cases: *M-T v T* [2005] EWHC 79 (Fam); *W (China) v Secretary of State for the Home Department* [2006] EWCA Civ 1494; and *Bassey v Secretary of State for the Home Department* [2011] NICA 67

residence card up until the child's 18th birthday. The provision for Chen carers was subsequently removed from the Immigration Rules.¹⁵³⁹

In the cases of *Ibrahim and Teixeira*, the CJEU looked at the relationship between the right of access to education of the children of EEA workers and the right of residence of the parents who are their primary carers. The court confirmed that the right of access to education, recognised by article 12 of Regulation (EEC) No 1612/68 ('the Regulation') also applies to the children of former EEA national workers even if the parents cease to be workers at the start of the education of the child. The court also confirmed that this right necessarily entails the right of residence within the territory of the host member state, not only for the children concerned, but also for the parents who have custody of them. In the UK, *Ibrahim and Teixeira* cases were given effect into the Immigration (EEA) (Amendment) Regulations 2012 at regulation 15A(3) for the child, and at regulation 14A(4) for the primary carer of that child.¹⁵⁴⁰

3.2.2.3 Cases with no cross-border element (*Zambrano* case)

The UK has adopted a relatively restrictive approach with regard to the granting of citizenship rights based on EU primary law. In particular, 'the UK has opted for a narrow transposition of the *Zambrano* decision, closely orientated around the particular facts at issue in that decision. Broadly, this is in line with the terms of the CJEU's subsequent clarifications in e.g. *McCarthy*, *Dereci* and *Iida*.¹⁵⁴¹ Following *Zambrano*, it should be noted that cases with similar facts were decided without making any explicit reference to the *Zambrano* judgment, but rather, for example, to the 'best interest of the child' included in the UN Convention on the rights of the Child and the UK's obligations following from that convention.¹⁵⁴² However, in other cases, UK courts have taken the *Zambrano* case into consideration, but they mostly adopted a restrictive approach to it, rather relying on the CJEU's later decision in *Dereci*.¹⁵⁴³

The case *Sanade*,¹⁵⁴⁴ concerned a decision to expel an Indian father, primary carer of a child having the British nationality, for sexual assault for which he had served a prison sentence of 12 months. The Upper Tribunal held that 'as British citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law, and that as a matter of relevant consideration they cannot reasonably be expected to relocate outside of the European Union.' The Upper Tribunal further considered that '(a)ny offence punished by a sentence of twelve months imprisonment must be considered serious, but (...), the statutory scheme does not mean such a sentence makes interference with family life proportionate save in exceptional circumstances.' In the present case, the Tribunal concluded that expulsion was not proportionate with the interference with the family life of his wife and child and their rights as EU citizens.

Later in *Izuazu*,¹⁵⁴⁵ it came to light that the government did not intend to acknowledge and does not acknowledge that there would never be situations where it would be proportionate to require the

¹⁵³⁹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf, p.33

¹⁵⁴⁰https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf, p.34

¹⁵⁴¹ FIDE Report on the UK, see above, note 1466, at p. 867

¹⁵⁴² *ZH, (Tanzania) v Secretary of State for the Home Department* [2011] UKSC4

¹⁵⁴³ Case C-256/11

¹⁵⁴⁴ *Sanade and others (British children - Zambrano – Dereci)* [2012] UKUT 00048 (IAC)

¹⁵⁴⁵ *Izuazu (Article 8 – new rules) Nigeria* [2013] UKUT 45 (IAC) (30 January 2013)

British child of a third-country national *Zambrano* carer to relocate with that carer to a country outside the EU (and thus be deprived of the enjoyment of his rights as a citizen of the EU). This point is being litigated in the CJEU in the pending duo of cases of C-304/14 *CS* and C-165/14 *Alfredo Rendón Marín*.¹⁵⁴⁶

In a judgment of 10 February 2015 (*Sanneh a.o.*), the Court of Appeal considered the claim that denial of social welfare to a TCN parent effectively compels Union citizen children to leave the Union territory. Confirming that the current legal regime in the UK is in line with EU law and with the European Convention on Human Rights, the Court stated, based on a detailed reasoning:

Zambrano carers who are in need and unable to work are *not entitled* to the same level of payments of social assistance as is required by EU law to be paid to EU citizens lawfully here. The UK must pay them such amount as will enable them to support themselves in order to be the carer for the EU citizen child within the EU, but, subject to that, may determine to pay social assistance to them on some different basis.¹⁵⁴⁷

Among the main reasons underlying this decision, is the Court's considerations that "only EU citizens can rely on the nationality non-discrimination principle," and that "EU law has no application when a member state treats some people within its jurisdiction less favourably than others (so-called "reverse discrimination")." Moreover, the Appeals Court held that the UK government has policy reasons for making distinctions between *Zambrano* carers and others, and that the Court cannot say that those reasons are clearly without foundation.¹⁵⁴⁸

Finally, the case *SSHD v AQ (Nigeria) & Ors (25 March 2015)* concerned a 15 year old British child, whose Nigerian mother was to be expelled after having served a prison sentence of more than 10 years years for a serious drug-related crime. The Appeals Court held that where a foreign criminal appealed against a deportation order being made on the basis that the public interest in his deportation was outweighed by his private or family life in the UK, the tribunal needed to examine the factors that would outweigh the public interest in deportation. The Appeals Court rejected the government's argument that the tribunal was only required to consider the *ability* of others to care for the child in the UK and was bound to ignore questions such as whether a family member would be *willing* to provide care or was under any familial or other responsibility to do so. The Appeals Court refused to make a reference to the CJEU for a preliminary ruling on this question, as suggested by the Home Office, and observed that in *Dereci* the CJEU Grand Chamber had found that the question regarding whether state action would deny the child enjoyment of the substance of his rights as an EU citizen is one for the domestic court to verify.¹⁵⁴⁹

UK law has been amended to take account of the abovementioned case law of the CJEU through the Immigration (EEA) (Amendment) (No.2) Regulations 2012.¹⁵⁵⁰ This amendment confers rights of entry and residence on the 'primary carer of a British citizen who is residing in the United Kingdom and where the denial of such a right of residence would prevent the British citizen from being able to

¹⁵⁴⁶ United Kingdom Immigration Law blog, <https://asadakhan.wordpress.com/2015/04/09/court-of-appeal-avoids-referring-zambrano-question-to-cjeu/>

¹⁵⁴⁷ *Sanneh a.o. v. Secretary of State for Work and Pensions*, [2015] EWCA Civ 49, (emphasis added), available at <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/sanneh-others-v-secretary-of-state.pdf>

¹⁵⁴⁸ *Idem*, at paragraph 29

¹⁵⁴⁹ *SSHD v AQ (Nigeria) & Ors [2015] EWCA Civ 250 (25 March 2015)*, summary presented in United Kingdom Immigration Law Blog, <https://asadakhan.wordpress.com/2015/04/09/court-of-appeal-avoids-referring-zambrano-question-to-cjeu/>

¹⁵⁵⁰ SI 2012/2560 (incorporating the CJEU's judgments in *Zambrano*, *McCarthy*, *Dereci* and *Iida*).

reside in the United Kingdom or in an EEA State.¹⁵⁵¹ It should be noted that, where a Union citizen minor has two primary carers, the amended EEA Regulations provide that both primary carers must be required to leave the United Kingdom before a derivative right can be enjoyed.¹⁵⁵² The CJEU's case law on primary law citizenship rights has also had important consequences for social security benefits. In particular, 'the UK legal framework has been amended to exclude entitlement to a range of UK social assistance benefits for persons resident in the UK under the terms of the *Ruiz Zambrano* ruling.'¹⁵⁵³

3.2.2.4 Rights against home- and host state of commuters and their family members

The EEA Regulations do not include any specific rules with regard to the rights of family members of commuters, since commuting is a rather exceptional situation in the United Kingdom. The rights of commuters between Northern Ireland and the Republic of Ireland are set out in a separate legal agreement, which created a Common Travel Area between the United Kingdom and the Republic of Ireland, covering a broad range of issues.¹⁵⁵⁴

3.2.3 *Restrictions on the freedom of movement and residence: refusal of entry or residence; expulsion measures; re-entry bans*

According to Articles 27 and 28 of the directive, member states can restrict the freedom of movement and residence of Union citizens and their family members, regardless of their nationality, subject to certain conditions, on grounds of public policy, public security, or public health.

3.2.3.1 Refusal of entry or residence

In the UK, according to persons can be refused entry or residence when they do not comply with the relevant requirements (see above, Section 3.2.1.), or on grounds of public policy, public security or public health. To the latter grounds, the same limitations apply as those for expulsion (see below, Section 3.2.3.2).

3.2.3.2 Expulsion measures

For expulsion, a differentiation is made in accordance with Article 27 of the directive: the longer a person has resided in the Host State, the higher is the protection against expulsion. Therefore, persons enjoying a temporary right of residence can only be expelled if they pose a threat to public policy, public security or public health (so-called 'level 1 protection'), for those having acquired a permanent right of residence, 'serious grounds of public policy or public security' must be proven ('level 2 protection'), while those who have resided in the host State for ten years can only be expelled on 'imperative grounds of public security' ('level 3 protection'). These principles are incorporated into UK law by way of Regs 19, 20(6) 21(2)-21(6) of the EEA Regulations.

3.2.3.2.a. *Relevant national case law*

UK courts have recognised that, as derogations to the rights of free movement, grounds of public policy, public security, and public health must be interpreted strictly.¹⁵⁵⁵ They have questioned

¹⁵⁵¹ *Idem*

¹⁵⁵² *Idem*, see Reg 15A (7(A) EEA Regulations

¹⁵⁵³ *Idem*, at p. 867 and note 158, Social Security (Habitual Residence) (Amendment) Regulations, SI 2012/2587, amending, *inter alia*, Income Support (General) Regulations 1987; Jobseeker's Allowance Regulations 1996; State Pension Credit Regulations 2002, and the Employment Allowance Regulations 2008

¹⁵⁵⁴ Information provided by representatives of the UK Home Office (Free Movement Team), November 2015.

¹⁵⁵⁵ *Essa [2012] EWHC 1533 (Admin)*, cited in FIDE Report on the UK, see above, note 1466, at p. 863

whether administrative guidance adequately distinguishes between the different levels of protection as foreseen in Article 28 of the directive, as interpreted by the CJEU in its case law. As a result, differentiation based on ‘severity’ of the conduct or custodial sentence length alone has been rejected.¹⁵⁵⁶

In a judgment of 2014, *Vassallo (Qualifying residence; pre-UK accession)* [2014] UKUT 00313 (IAC), the Upper Tribunal re-affirmed the consideration in *Essa (EEA: rehabilitation/integration)* [2013] UKUT 316 (IAC), that:

(F)or any deportation of an EEA national or family member of such national to be justified on public good grounds (irrespective of whether permanent residence has been achieved) the claimant must represent a present threat to public policy. The fact of a criminal conviction is not enough. It is not permissible in an EEA case to deport a claimant on the basis of criminal offending simply to deter others. This tends to mean, in case of criminal conduct short of the most serious threats to the public safety of the state, that a candidate for EEA deportation must represent a present threat by reason of a propensity to re-offend or an unacceptably high risk of re-offending.¹⁵⁵⁷

In *Vassallo*, the appellant was an Italian national who had resided in the UK since he was two years old. He spoke no Italian and had no connections there. In the UK, though, he had committed as many as 68 criminal offences, most of which consisted in burglary (multiple minor offences). Although on the facts the appellant had not acquired permanent residence, he was nevertheless saved from deportation by the low risk of reoffending assessment. The Upper Tribunal confirmed that past convictions are not sufficient to justify deportation in European Union law.

There is also some national case law with regard to the principle of proportionality contained in Article 27(2) of the directive, incorporated in CRD/Reg 21(5)(a) of the EEA Regulations. The requirement to consider factors such as the individual’s age, family and economic situation, or links with his/her Member State of origin, include in Article 28(1) of the directive, is transposed in Reg 21(6) EEA Regulations. As noted by Horseley and Reynolds:¹⁵⁵⁸

In numerous cases, national courts have emphasised the need for a present threat to a fundamental interest of society and warned against using previous convictions or offender assessment reports made at the time of the offence to inform a deportation decision.¹⁵⁵⁹ However, in several cases, previous convictions have been combined with evidence of an individual’s continued unwillingness to reform or to abide by the criminal law; a willingness to mislead judges;¹⁵⁶⁰ escalating levels of violence;¹⁵⁶¹ and even financial circumstances, to determine a present threat on the facts.¹⁵⁶²

¹⁵⁵⁶ *Secretary of State for the Home Department v FV (Italy)* [2012] EWCA Civ 1199, and E.g. *LG and CC (Italy)* [2009] UKAIT 24, cited in FIDE Report on the UK, see above note 1472, at p. 864; also *R v Kluxen, R v Roastas* [2010] England and Wales Court Appeal, Civ 1081 (14 May 2010)

¹⁵⁵⁷ *Vassallo (Qualifying residence; pre-UK accession)* [2014] UKUT 00313 (IAC)

¹⁵⁵⁸ FIDE Report on the UK, see above, note 1466, at p. 862

¹⁵⁵⁹ For example, *A, B, C v Secretary of State for the Home Department* [2013] EWHC 1272 (Admin); *BF (Portugal) v Secretary of State for the Home Department* [2009] EWCA Civ 923

¹⁵⁶⁰ *Jarusevicius v Secretary of State for the Home Department* [2012] UKUT 120 (IAC).

¹⁵⁶¹ *Batista v Secretary of State for the Home Department* [2010] EWCA Civ 896

¹⁵⁶² *Flaneur’s Application for Judicial Review, Re* [2011] NICA 72

In some recent cases, the Court of Appeal held that in cases concerning EU citizens who have committed offences and are being considered for deportation, it is in the interests of the citizen, the host state and the Union itself that the offender should cease to offend.

In *SE (Zimbabwe) v Secretary of State for the Home Department* (2015), the Court of Appeal held that if the offender's rehabilitation is incomplete, it is relevant to consider the offender's prospects of future rehabilitation (a) if he is deported to his home state and (b) if he remains in the host state. The EU has a collective interest in promoting the rehabilitation of all EU citizens who have lapsed into crime.¹⁵⁶³ However, that analysis does not apply in a case where the appellant is not a European Economic Area (EEA) national.

3.2.3.3 Re-entry bans

Article 32 of the directive provides:

1. Persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order which had been validly adopted in accordance with Community law, by putting forward arguments to establish that there had been a material change in the circumstances which justified the decision ordering their exclusion. The Member State shall reach a decision on this application within six months of its submission.
2. The persons referred to in paragraph 1 shall have no right of entry to the territory of the Member State while the application is being considered.

As noted by Fripp a.o.:

Entry in breach of an exclusion order will not constitute the exercising of rights under the EU Treaties and thus, under Regulation 24, such a person may be removed as an illegal entrant (...). Exclusion orders and the decision not to revoke exclusion orders are EEA decisions for the purposes of the EEA Regulations and therefore, unlike non-EEA cases, attract a right of appeal.¹⁵⁶⁴

3.2.3.4 Abuse or fraud: Article 35 of the directive

3.2.3.4.a. Transposition of Article 35 in national law

Article 35 of the directive stipulates that the member state 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' subject to proportionality requirement and the procedural safeguards of Articles 30 and 31.

In the UK, this provision is incorporated in Regulation 19 (EEA Regulations). Regulation 19 now also requires the Secretary of State to consider the new regulation 21B (which came into force on 1 January 2014),¹⁵⁶⁵ which additionally permits the Secretary of State to exclude those who are

¹⁵⁶³ *SE (Zimbabwe) v Secretary of State for the Home Department*, Court of Appeal, [2015] I.N.L.R. 122

¹⁵⁶⁴ Eric Fripp (General editor), Rowena Moffitt and Ellis Wilfors (Deputy editors), *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship*, Hart Publishing, 2015

¹⁵⁶⁵ Introduced by the Immigration (European Economic Area) (Amendment) (No 2) Regulations 2013, SI 2013/3032

considered to have abused their EEA rights of residence, or if there are reasonable grounds to suspect that admission would lead to the abuse of those rights.

An abuse is considered to be:¹⁵⁶⁶

- (a) Conduct designed to circumvent the need to be a qualified person
- (b) Attempting to re-enter the UK within 12 months of being removed, where the person is unable to show that he or she would be a qualified person or a family member of a qualified person/person with residence
- (c) Entering or attempting to enter into a marriage of convenience
- (d) Using fraud to obtain or assist another to obtain the right to reside.

Regulation 21B permits the Secretary of State to exclude a person where there are reasonable grounds to suspect that the person has abused the rights of residence, for up to 12 months, unless that person can show that there has been a material change in his or her circumstances. Such a change in circumstances requires proof that the individual will be a qualified person on entry, or a family member thereof. The effect is to remove the initial right of residence, provided for under regulation 13 and Article 6 of the directive, from those whom the Secretary of State deems abusive. However, as clarified by a representative of the Home Office:

The provision for demonstrating a material change as set out here is only applicable where the person has been removed on the basis of (a) or (b) – for a person removed on the basis of (c) or (d), they are required to apply to the Secretary of State to set aside the effects of the decision to remove before being entitled to an extended right of residence under Reg 14 within 12 months of removal.¹⁵⁶⁷

These new provisions extend the exclusion provisions of Directive 2004/38/EC on grounds of abuse of rights and potentially exclude a person for 12 months on the grounds of ‘reasonable suspicion’ of abuse of rights. As convincingly argued by Fripp a.o.:

Whilst a member state is entitled to engage mechanisms for prevention of abuse of rights where there is well founded suspicion of the same, there is no authority that the state in fact is left power enabling it to take the actions proposed by current amendments.¹⁵⁶⁸

In their view, the wording of Article 35 "clearly does not envisage such actions on the basis merely of ‘reasonable suspicion’. EU law requires clear proof of both objective circumstances and intention for abuse of rights." Indeed, in Case C- 456/12 *O. and B.* the CJEU stated that

Proof of such an abuse [of rights] requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the European Union rules, the purpose of those rules has not been achieved, and, secondly, a subjective element consisting in the intention to obtain an advantage from the European Union rules by artificially creating the conditions laid down for obtaining it.¹⁵⁶⁹

¹⁵⁶⁶ Enforcement Instructions and Guidance, ch 50, cited by Eric Fripp (General editor), Rowena Moffitt and Ellis Wilfors (Deputy editors), *The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship*, Hart Publishing, 2015, at p 633. However, in the *Modernised Guidance, Removals and Revocations of European Economic Area (EEA) Nationals*, p.7, the link to the page on abuse and fraud is not accessible for the public (last accessed on 12 August 2015)

¹⁵⁶⁷ Information provided by a representative of the Home Office (Free Movement Team), December 2015.

¹⁵⁶⁸ Fripp a.o., see above, note 1564, at p. 633-634

¹⁵⁶⁹ Case C- 456/12 *O. and B.*, at paragraph 58, cited by Fripp a.o., see above note 1568, at p. 633-634

3.2.3.4.b. *Marriages of convenience*

In the UK, sham marriages, or marriages of convenience are considered as a particularly serious form of abuse. In January 2013, the Home Office launched 'Operation Mellor' to develop a cohesive coordinated and consistent approach to tackling sham marriages involving foreign nationals. This operation aimed to develop and increase understanding and inform improvements to current and future processes, and to inform work on legislation and policy with regard to sham marriages. A number of recommendations were made, which have, for the most part, been implemented by the Home Office in 2014.¹⁵⁷⁰ These recommendations concerned, (i) the need for the Home Office to work with the General Register Office to ensure that local register offices refer all cases of suspected sham marriages via so-called "section 24 reports", (ii) to ensure that local enforcement teams are adequately resourced to act on suspected sham marriage referrals; (iii) to provide clear and comprehensive guidance to enforcement staff on how to conduct sham marriage operations; and to establish a mechanism that ensures good practice is shared between enforcement teams, and (iv) to ensure that interviews of those suspected of entering into sham marriages are conducted in an effective and timely manner.¹⁵⁷¹

3.2.3.4.c. *Relevant national case law*

In the British national case law regarding marriages of convenience, the Upper Tribunal held in the case of *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038(IAC),¹⁵⁷² that:

(i) There is no burden on a claimant to demonstrate that a marriage to an EEA national is not one of convenience at the outset of an application;

(ii) The case of *IS (marriages of convenience) Serbia* [2008] UKAIT 31 only establishes that there is an evidential burden on the claimant to address evidence justifying reasonable suspicion that the marriage is entered into for the main purpose of securing residence rights, and

(iii) The standard of proof in such cases is to the civil standard (balance of probabilities). This means that the initial burden is on the Secretary of State to demonstrate that a marriage is one of convenience. However, where there is reasonable suspicion that the marriage is not genuine the evidential burden shifts onto the applicant.¹⁵⁷³

In a case concerning the procedural aspects of proving the existence of a sham marriage, *Miah (interviewer's comments: disclosure: fairness)* [2014] UKUT 00515 (IAC), the President of the Upper Tribunal, Mr McCloskey emphasised the importance of full disclosure by the Home Office. In marriage cases, the onus to prove that the marriage is a sham is on the Home Office.

¹⁵⁷⁰ The Home Office response to the Independent Chief Inspector's reports: A Short Notice Inspection of a Sham Marriage Enforcement operation 14th October – 24th October 2013, available at <https://www.gov.uk/government/publications/response-to-sham-marriage-enforcement-operation-report>

¹⁵⁷¹ *Idem*

¹⁵⁷² *Papajorgji (EEA spouse – marriage of convenience) Greece* [2012] UKUT 00038(IAC)

¹⁵⁷³ Home Office, *European Economic Area (EEA) Case Law and Appeals*, valid as of 6 February 2006, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/405640/EEA_Case_Law_v1_0_EXT.pdf

In a recent case, *R (Bilal Ahmed) v SSHD IJR* [2015] UKUT 00436 (IAC), a Pakistani national who resided in the UK on a student visa married a Romanian national. After interviews with both parties separately, the Secretary of State refused his application for a residence card on the basis that the marriage was one of convenience. His leave expired and he was detained and served with removal directions. His first appeal against the removal directions was declared inadmissible. On appeal, the Upper Tribunal concluded that where the Secretary of State claims a reasonable suspicion that the third country national spouse of an EEA national (exercising Treaty rights in the UK) has entered into a sham marriage, *he or she is no longer a spouse under the EEA regulations and thus gets no in country appeal right*. The exclusion is based on Reg 2 EEA Regulations, which states that a 'spouse' does not include a party to a marriage of convenience. E. Guilt has strongly criticised this decision, convincingly arguing that:

The key problem with the judgment is that it accepts as valid in EU law the position that the third country national spouse of an EEA national exercising treaty rights can fall completely outside the protection of the Citizen's Directive merely because the Secretary of State has decided that the marriage is one of convenience or a sham marriage. This is just plain wrong as it shifts the burden of proof to the applicant and withdraws EU procedural rights from the individual without any opportunity for a fair hearing of the issue of the sham marriage question before removal.

It may be expected that further case law will follow in the years to come, to clarify these questions.

3.2.4 Case study

a) Facts of the case: example from Norway

Rejected asylum seekers have the obligation to leave Norway. An asylum seeker stays illegally in Norway for 3 years, and then marries a Norwegian citizen. The rejected asylum seeker is then expelled and imposed a 5 years entry ban in conformity with Norwegian legislation (The Immigration act, provisions relevant for third country nationals). The new formed couple travels to Sweden, lives there for 7 months, and returns to Norway shortly after. The third country national/former asylum seeker, now a family member of a EEA citizen, requires to be registered in Norway as a family member of a EEA citizen. Norwegian authorities refuse to lift the re-entry ban due to his adverse immigration history. The administrative decision of refusal to lift the entry ban merely points to the fact that person committed a grave violation of the provisions in the Immigration Act.

b) United Kingdom¹⁵⁷⁴

In the following description on how such a situation would be handled in Belgium, all references to 'Norway' and 'Norwegian' nationality will be replaced by 'the United Kingdom' and 'British' nationality.

Where a third country national is the genuine family member of a British citizen, and they accompany that British citizen to another EU Member State where the British citizen exercises their Treaty rights as a worker or self-employed person, that person may seek to rely on a right under EU law to which they were not previously entitled, in line with the CJEU judgment in *Surinder Singh* (C-370/90)

¹⁵⁷⁴ Information received from representatives of the Home Office (Free Movement Team).

However, the UK Government requires evidence that the British citizen genuinely moved the centre of their life to the other EU Member State and that the claimed exercise of Treaty rights was effective and genuine (in line with the principles established in *DM Levin v Staatssecretaris van Justitie*).

Furthermore, where the applicant has previously attempted to enter or remain in the UK without having a legal right to do so, particularly where such a person has employed deception or fraud, the UK Government will submit the application to additional scrutiny, including conducting an assessment of whether the marriage is genuine or is one of convenience. Where either the relationship, or the claim to have genuinely exercised Treaty rights, is found not to be genuine, the UK Government will refuse a right of admission to the UK.

4 Conclusion

The United Kingdom has incorporated all the main provisions of Directive 2004/38/EC into its national law. The British interpretation of these provisions is, on some points, broader than the directive itself, such as the definition of family members. Although the UK has adjusted its legislation on several occasions to take account of the Judgments of the Court of Justice of the European Union (CJEU), there is clear evidence of a critical and sometimes reluctant attitude in this regard. Examples are the significant delay in incorporating the *Metock* judgment, and the restrictive interpretation of the CJEU case law on free movement rights based on primary EU law. On the other hand, the UK (in particular at the Executive level), seems to embrace more cautious or restrictive CJEU judgments, such as the *Dano* case (C-333/13), and -to a lesser extent- *O and S* (C-456/12 and C-457/12).

This has also led to the adoption of a decisively restrictive approach towards granting residence rights based on primary EU law on the free movement of persons at the administrative level. Moreover, the grounds for expulsion, in particular the public order and security criteria, have been broadly interpreted, which has given rise to a substantial body of national case law. In expulsion decisions, the differentiation between persons who have legally resided in the UK for longer periods of time, as foreseen in the directive (Art 28), and which intends to provide higher levels of protection against expulsion, is not sufficiently ensured. Furthermore, the European Commission has launched several infringements procedures against the UK for incomplete or incorrect implementation of certain provisions of the directive, including against the requirement for TCN family members to obtain an 'EEA family permit' prior to their entry in the UK, which the CJEU found to be in conflict with Article 5(2) of the directive. Another infringement procedure, which is still pending, concerns the UK's introduction of a 'right to reside' for EEA nationals before being entitled to social benefits, which constitutes a discrimination compared to UK (and Irish) nationals. However, in his recently published Conclusion in this case, Advocate General Cruz Villalón concludes that the right to reside as applied in the United Kingdom is not in conflict with the directive.

As noted by British academic experts and practitioners, the UK seems to adopt a pre-dominantly permission-based approach when implementing the Citizenship Directive and the EU law on free movement instead of a rights-based approach, and therefore the concept of EU citizenship has not - yet- been fully integrated into UK law and practice. In the current political context, it seems unlikely that this situation will change significantly in the near future.

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