Five Years of the Citizens Directive in the UK – Part 1

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At a glance
The purpose of this article is to review how the UK authorities have fared in the practical application of Directive 2004/38 in the five years since it entered into force based upon questions and complaints received by Your Europe Advice, an independent advisory service of the European Commission. It identifies and examines the most common problems referred to Your Europe Advice by EU citizens and their family members living in the UK and seeking to have their rights recognised by the UK authorities under the Immigration (European Economic Area) Regulations 2006 (SI 1003/2006). In reviewing the experiences of Your Europe Advice as they relate to UK law and practice, account is taken of a number of recent judgments of the Court of Justice of the European Union concerning EU citizenship, including *Metock*, *Lassal*, *Eman & Sevinger* and *Ruiz Zambrano*. Part 1 covers the scope and beneficiaries of the Directive, the conditions placed on the right of residence, the circumstances under which such a right may be retained and ends with a discussion of the right of permanent residence. Part 2, which will appear in a later issue of the Journal, will examine problems relating to residence formalities and obstacles encountered in exercising the right to equal treatment. It then looks at the circumstances where the right of residence may be lost, followed by a discussion of appeal rights. It concludes by providing recommendations for the amendment of both the Directive and the EEA Regulations.

'Citizens are not "resources" employed to produce goods and services,
but individuals bound to a political community and protected by fundamental rights.
... [W]hen citizens move, they do so as human beings, not as robots.
They fall in love, marry and have families.
The family unit, depending on circumstances, may be composed solely of EU citizens,
or of EU citizens and third country nationals, closely linked to one another.
If family members are not treated in the same way as the EU citizen exercising rights of free movement, the concept of freedom of movement becomes devoid of any real meaning.'

Advocate General Eleanor Sharpston
Opinion in Ruiz Zambrano Case C-34/09

Directive 2004/38/EC ([2004] OJ L 229/35) on the rights of residence of EU citizens and their family members, also known as the Citizens Directive, celebrated its fifth year of entry into force on 30 April 2011. Although the Directive was designed to simplify and strengthen the residence rights of EU citizens and their family members, this is not necessarily the reality in practice. Based on the enquiries received by Your Europe Advice[1] – the European Commission's independent service that provides information to individuals on their rights

[1] Your Europe Advice's website is available at: http://ec.europa.eu/citizensrights/front_end/index_en.htm

under EU law – there is strong anecdotal evidence that suggests many citizens continue to face significant difficulties in exercising their rights under the Directive.

It is clear from previous reports on implementation of the Directive on the rights of residence of citizens and their family members undertaken for the European Commission[2] and the European Parliament[3] that the Directive's implementation has been far from perfect, both in terms of its legal transposition and in the administrative practice of the Member States' authorities. The problem of the Directive's incorrect or incomplete implementation affects all Member States of the European Union and regrettably the UK is no exception. The Commission disclosed in 2010 that 63 infringement proceedings had been initiated against Member States in relation to free movement and residence rights[4]. This situation has contributed to an increase in the public perception, as articulated by the comments made by individuals in contact with Your Europe Advice, that citizens do not truly enjoy the same rights of free movement throughout the European Union.

In the UK, the Directive is implemented by way of the Immigration (European Economic Area) Regulations 2006 (SI 1003/2006) (EEA Regulations) that entered into force on 30 April 2006 and which on the whole appear to comply with the majority of the Directive's provisions. However, the EEA Regulations have been roundly criticised for failing to comply with the Directive in a number of respects, most notably in connection with the rights of residence of family members who are not EU citizens themselves[5] and appeal rights[6]. The EEA Regulations are also silent on the issue of equal treatment of EU citizens and their family members, which, in this age of austerity, is leading to a growing number of problems in practice.

A comparative analysis of the Directive and the EEA Regulations does not by itself provide a sufficiently clear picture of the state of implementation in the UK. Indeed, a fuller perspective requires an examination of the administrative practice of the Home Office's UK Border Agency. The Home Office's European casework instructions, which supplement the EEA Regulations and aim to provide guidance to UKBA staff in the processing of applications, provide further insight into how rules are administered in practice. These are not without contention as will be seen below. However, it is the complaints received by Your Europe Advice that provide the clearest picture still of the UK's administrative practices and discloses the emergence of recurrent and worrying trends in connection with the treatment of EU citizens and their family members, especially in connection with residence formalities, equal access to social advantages, retaining the right of residence and obtaining recognition of the right of permanent residence.

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[2] See Milieu Ltd. & Europa Institute (Edinburgh University) for the European Commission 'Conformity Study for the United Kingdom' (December 2008) (Commission Study).
[3] See European Citizen Action Service for the European Parliament 'Comparative study on the application of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States', PE 410.650 (March 2009) (EP Study).
[4] Commission report on progress towards effective EU Citizenship 2007-2010, COM (2010) 602 (27 October 2010) at part 2.3.2.
[5] See for instance 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 (10 December 2008), at part 3.1; see further this journal, A. Hunter 'Family members: an analysis of the implementation of the Citizens Directive in UK law' (2007), Vol 21, No 3 *IANL* 191Richard McKee, 'Regulating the Directive? The AIT's Interpretation of the Family Members Provisions in the EEA Regulations' in (2007) Vol 21 No 3 *IANL* 186
[6] COM (2008) 840, supra at part 3.8.2; EP Study, supra at p 156.

These worries are shared by other organisations such as the AIRE Centre, which has 'noticed that significant numbers of people in this group suffered discrimination. Often, the [UK] authorities would fail to recognise that they held EU citizenship or fail to recognise the legal significance of their EU citizenship, in ways that were directly or indirectly discriminatory.' Similar concerns have also been echoed by the membership of the Immigration Law Practitioners' Association and charities such as the Child Poverty Action Group. The situation is further exacerbated by the restrictive interpretation of the Directive that has sometimes been followed by the UK courts.

This article seeks to examine Your Europe Advice's experiences in assisting EU citizens and their family members in their interactions with the UK authorities. Part 1 of this article will review its experiences in advising citizens on the scope of the Directive, particularly in connection with its territorial scope and its various categories of beneficiaries. A review of practical issues concerning the rights of entry and residence will then follow, including the specific problems faced by workers, students and self-sufficient persons. The article will then reflect upon the difficulties experienced by workers and family members seeking to retain their right of residence. Part 1 will end by examining the challenges arising out of the right of permanent residence.

Part 2 will examine the onerous formalities and practical obstacles imposed by the UK authorities on EU citizens and their family members when applying for residence documents. This will be followed by an analysis of the right of equal treatment and the difficulties faced by EU citizens and their family members in accessing social advantages such as social welfare benefits, healthcare and study aids, as illustrated by the complaints received by Your Europe Advice. The discussion will then turn to the circumstances where the right of residence may be lost or restricted, as well as the procedural safeguards contained in the Directive. Part 2 will conclude by providing recommendations for the amendment of both the Directive and the EEA Regulations.

Scope of the Directive

The Directive applies to EU citizens and their family members who travel to or reside in an EU country other than their country of nationality. It does not apply to British citizens living in the UK, except to the extent that they return to the UK after having exercised their right to free movement in another EU country as explained later. Enquiries received by Your Europe Advice have concerned practical issues concerning the scope of the Directive, both in terms of its territorial scope and the persons whom it is intended to benefit.

A number of questions have arisen regarding the geographical reach of the Directive. Does the Directive apply solely to the EU, or does it extend to the EEA as well? Can it apply to British territories that do not form part of the UK? These questions certainly merit further consideration.

Territorial Scope of the Directive

The Directive applies to entry and residence within the entire territory of the Member States in furtherance of the Court of Justice of the European Union's ruling in *Rutili* Case 36/75 [1975] ECR 1219. In addition, by virtue of Decision 158/2007 of the EEA Joint Committee ([2008] OJ L 124/10), the Directive is incorporated into the EEA Agreement and therefore applies to the European Economic Area comprising all 27 Member States as well as the three European Free Trade Association states that are parties to the EEA Agreement, namely Norway, Iceland and Liechtenstein. In consequence, the EEA Regulations apply to nationals from all EEA States and governs their right to reside with their family members in England, Wales, Scotland

and Northern Ireland. Whilst citizens from the EFTA states enjoy the same rights of residence under the Directive as EU citizens do, it should be emphasised that they do not benefit from EU citizenship and therefore would not necessarily benefit from the CJEU's case law on EU citizenship. As a result, this article will focus solely on the rights of EU citizens.

The Directive does not apply to Switzerland since free movement between the EU and Switzerland is instead regulated by the Agreement on the free movement of persons ([2002] OJ L 114/6). However, the EEA Regulations also apply to Swiss citizens and their family members residing in the UK. This article will not dwell further on their specific rights.

The EEA Regulations do not apply to Gibraltar or the Channel Islands, but the specific situation of these territories calls for further comments.

Gibraltar
Separate legislation has been enacted for Gibraltar to take account of this territory's special constitutional status in the form of the Immigration Control (Amendment) Act 2008 (No 2008-12, First Supplement to Gibraltar Gazette, No 3663), which came into force on 26 June 2008 and which amends the Immigration, Asylum & Refugee Act (No 1962-12). Although it is not within the scope of this article to review the practice of Gibraltar's authorities in respect of the Directive, a few comments should be made as regards the interaction between the UK's and Gibraltar's respective rules given that the EU Treaties apply to Gibraltar by virtue of art 355(3) TFEU as confirmed in a joint declaration annexed to the Lisbon Treaty[7].

The EU Court of Justice has had the opportunity of examining the special status of Gibraltar in a case brought by Spain against the UK concerning the voting franchise of the Gibraltar electorate in elections to the European Parliament in *Kingdom of Spain v. United Kingdom* Case C-145/04 [2006] ECR Page I-7917, where the Court upheld the legitimacy of the UK's decision to combine Gibraltar and South West England as one and the same electoral constituency for the purposes of holding elections to the European Parliament. Although the UK is responsible for Gibraltar's external relations and the EU Treaties apply to Gibraltar, neither the EEA Regulations nor Gibraltar's implementing rules contain any provision that regulates their interaction. The problem is not merely academic, since Your Europe Advice has received a number of enquiries from the divorced spouses of EU citizens who had retained rights of residence in Gibraltar under the Directive and wanted to move to the UK. It could be argued that such family members should be able to move to the UK on the basis of retained rights as divorced spouses, since this would be in keeping with the spirit of the Directive which provides for the right to reside throughout the entire territory of a Member State (art 22) taking into account the nature of Gibraltar's relationship with the UK. However, it remains to be seen whether the UK authorities would exercise any flexibility in this matter.

The Channel Islands
Given that the Isle of Man and Channel Islands do not form part of the EU as has previously been confirmed by the CJEU in *Barr & Montrose Holdings Ltd.* Case C-355/89 [1991] ECR I-3479 and *Pereira Roque* Case C-171/96 [1998] I-4607, the Directive is not the subject of implementing measures in those territories.

Beneficiaries of the Directive

[7] The UK and Spain have made a joint declaration annexed to the final Act of the Lisbon Treaty which specifies that '[t]he Treaties apply to Gibraltar as a European territory for whose external relations a Member State is responsible. This shall not imply changes in the respective positions of the Member States concerned.'

The Directive is intended to benefit both EU citizens and their family members whatever their nationality. But how is EU citizenship determined? Can EU citizens benefit from the Directive when they move to a Member State having previously lived outside the EU? What about dual nationals?

EU citizens

In order to avail themselves of the Directive's provisions, individuals must first demonstrate that they are EU citizens or the family member of such a citizen. At first glance it might appear a relative simple exercise to determine whether someone is an EU citizen, however the enquiries sent to Your Europe Advice reveal that this is not necessarily the case. Art 2(1) defines an EU citizen as 'any person having the nationality of a Member State'. This provision is based upon art 20 of the Treaty on the Functioning of the EU (TFEU), which specifies that '[e]very national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it.'

This begs the question who is to be considered a 'national' of a Member State? The answer is to be found in Declaration No 2 on nationality of a Member State annexed to the Final Act of the Maastricht Treaty ([1992] OJ C 191/98) which explains that 'the question whether an individual possesses the nationality of a Member State shall be settled solely by reference to the national law of the Member State concerned.' Some Member States have issued declarations on their nationality laws[8], including the UK[9]. As a practical matter, therefore, proof of nationality can be established by presenting a valid passport or identity card issued by one of the Member States.

Although the Member States remain competent to determine who is a national, the creation of Citizenship of the EU by the Maastricht Treaty has had implications for EU citizens living in European territories not forming part of the EU. In *Eman & Sevinger* (case C-300/04 [2006] ECR I-8055), the European Court of Justice was provided the opportunity to examine the situation of Dutch citizens living in Aruba, an overseas territory of the Netherlands. Messrs. Eman and Sevinger were Dutch nationals residing in Aruba and were seeking to register on the Dutch register of electors concerning the European Parliament elections in 2004. The Dutch authorities sought to argue that Dutch citizens inhabiting Aruba could not rely on the Treaty while they remained in Aruba because it was a territory subject only to the special arrangements for the association of overseas countries and territories (OCTs). The CJEU unequivocally rejected this argument and held at paras 27 & 29 that for the purposes of art 20 TFEU (formerly art 17 EC):

> 'It is irrelevant, in that regard, that the national of a Member State resides or lives in a territory which is one of the OCTs ….
>
> [P]ersons who possess the nationality of a Member State and who reside or live in a territory which is one of the OCTs referred to in Article [355(2)] may rely on the

[8] For example, Denmark's position is set out in a unilateral declaration annexed to the so-called 'Edinburgh Decision' concerning certain problems raised by Denmark on the Treaty of European Union [1992] OJ C 348/1.

[9] Declaration as to the meaning of the term 'national' under the British Nationality Act 1948 annexed to the UK's Accession Treaty ([1973] OJ L 73/196), as amended by the Declaration on the definition of "nationals" following the entry into force of the British Nationality Act 1981 ([1983] OJ C 23/1). The latter remains a valid statement of the UK's position following entry into force of the Lisbon Treaty by virtue of Declaration 63 annexed to the Final Act of the Lisbon Treaty ([2007] OJ C 306/2)

> rights conferred on citizens of the Union in Part Two of the Treaty [which concerns non-discrimination and citizenship of the EU].'

As a result, the fact that an EU citizen and their family members may be residing in a European overseas country or territory immediately prior to exercising their rights to reside within the EU under art 20 TFEU should not in any way affect their right to reside in the UK under the Directive.

In practice, the UK authorities do not appear to place restrictions on the ability of EU citizens who have lived outside the EU before moving to the UK to benefit from their rights of entry and residence, although as will be seen below such a distinction is made for family members who are not themselves EU citizens. Nonetheless, with the advent of Citizenship of the Union, questions remain as to the legality of restricting free movement for British nationals who have a connection with overseas territories such as the Channel Islands, even though they hold full British citizenship.

Dual nationals have enquired with Your Europe Advice about the possibility of relying on their second Member State nationality to claim a right of residence under the Directive thereby enabling their family members to derive a right to reside in the UK. The recent ruling in *McCarthy* Case C-439/09 (judgment of 5 May 2011), makes it clear that a dual national will only be able to rely on his second nationality in either country of nationality if he has previously exercised his right to free movement.

Although the Directive clearly grants an automatic right to EU citizens and their immediate family members, the UK authorities enjoy a wider discretion when dealing with extended family members. As will be seen, the situation of family members calls into question the compatibility of UK law and practice with the Directive.

Family members

The Directive potentially applies to all family members whatever their nationality and whatever the nature of their personal ties to the EU citizen. It is apparent from the enquiries sent to Your Europe Advice that a sizeable majority of complaints relate to the UK's implementation of the Directive in relation to the recognition of the rights of family members of EU citizens in the UK. The Directive operates a distinction between 'family members' and 'other family members' and each category presents its own set of problems.

Immediate family members

Immediate family members enjoy an automatic right to reside with the EU citizen in the host Member State. Under the Directive, 'family members' are limited to the citizen's spouse or registered partner, the citizen's or spouse/partner's children who are under the age of 21 or who are dependent on the citizen, as well as the dependent parents of the citizen or his spouse/partner, although the dependent parents do not enjoy such an automatic right in the case of students (art 7(4) corresponding to reg 7(2)).

Children over the age of 21 who are dependents are also considered as 'family members' if they are dependent upon the EU citizen or his spouse/partner[10]. According to the

[10] The Commission's original and revised proposals, COM (2001) 157 and COM (2003) 199, included a right of residence for all parents of the citizen or his spouse or registered partner, not just those who are dependent. However, the final text of the Directive as agreed by the Council restricted the scope of art 2(2) to dependent parent, (Council Common Position (EC) No 6/2004 [2004] OJ C 54E/12 adopted by the Council, acting in accordance with the procedure referred to in Article 251 of the Treaty establishing

Commission's guidance[11], the definition of 'family member' extends to adopted children, 'minors who are in custody of a permanent legal guardian' and foster children 'depending upon the strength of the ties in the particular case'. In the case of students, it is only their dependent children (or those of their spouse or registered partner) who enjoy such an automatic right of residence. According to the CJEU in *Lebon* Case 316/85 [1987] 2811 at para 17, 'the status of dependent member of a worker's family is the result of a factual situation, to be assessed in each specific case'. As explained by the Court in *Jia* Case C-1/05 [2007] ECR I-1 at para 43, albeit in the context of Directive 68/360/EEC ([1968] OJ L 257/13) on residence of workers and their family members (which was drafted in more restrictive terms than the Directive) [12], dependence constitutes a situation where family members 'need the material support of that Community national or his or her spouse in order to meet their essential needs'.

As to the means of proving such dependence, the Directive, art 8(5)(d) merely states it requires furnishing 'documentary evidence that the conditions laid down [in art 2(2)(d)] are met'. Nonetheless further guidance can be found in *Lebon* at paras 21-22, where the Court explained that: 'the status of dependent member of a worker's family does not presuppose the existence of a right to maintenance …. The person having that status is a member of the family who is supported by the worker and there is no need to determine the reasons for recourse to the worker's support or to raise the question whether the person concerned is able to support himself by taking up paid employment.' In *Jia* at paras 41-42, the CJEU indicated further that 'proof of the need for material support may be adduced by any appropriate means, … while a mere undertaking from the Community national or his or her spouse to support the family members concerned need not be regarded as establishing the existence of the family members' situation of real dependence.'

The Court of Appeal has confirmed that the Directive, art 2(2)(d) does not require a dependent parent to have been dependent in the country where they previously resided. In *Pedro* [2009] EWCA Civ 1358 at para 67, Goldring LJ held that 'Article 2(2) does not specify when the dependency has to have arisen. Neither does it require that the relative must be dependent in the country of origin. … It is sufficient if, as is alleged here, the dependency arises in the host state.' Such an interpretation of art 2(2) cannot be faulted.

It should also be noted that the Directive does not require a family member to have already been in a relationship with the EU citizen at the time the latter moves to the host Member State. In *Metock* Case C-127/08 [2008] ECR I-6241, the CJEU held at para 87 that 'none of those provisions [of the Directive] requires that the Union citizen must already have founded a family at the time when he moves to the host Member State in order for his family members who are nationals of non-member countries to be able to enjoy the rights established by that directive.' The immigration status of a family member seeking to exercise the right of

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the European Community, with a view to adopting a directive of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, at p 30).

[11] Commission Communication 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 (2 July 2009), at part 2.1.2.

[12] See Goldring LJ in *Pedro* [2009] EWCA Civ 1358, who observed at para 63 that: '[w]hen in *Jia* [at para 37] the court referred … to the need for material support having to exist in the state of origin, it did so on the basis of what was said in article 4(3)(e) of Directive 68/360. It said as much in paragraph 38. … What was said in that Article may be contrasted with what is said in Article 8(5)(d) of the Citizens' Directive. That says nothing to suggest that documentary evidence of an Article 2(2)(d) dependency need emanate from the state of origin. That is in specific contrast to "other family member cases," where under Article 8(5)(e) the relevant authority of the country of origin is referred to.'

residence under the Directive is of no concern. Thus, in *Sahin* Case C-551/07 [2008] ECR I-453 at para 33, the Court has confirmed that it is irrelevant 'at the time the family member acquires that status [under the Directive] or starts to lead a family life, he resides temporarily in the host Member State pursuant to that State's asylum laws.'

Registered partners

The definition of 'family members' in the Directive includes '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' (art 2(2)(b)). In the EEA Regulations, the provisions on civil partnerships are intended to implement the rights of a registered partner of an EU citizen to reside in the UK and reg 2, fn 6 specifies that the term 'civil partner' has the meaning given by the Civil Partnership Act 2004 (CPA 2004).

Under the CPA 2004, ss 212-218 and Schedule 20, same-sex overseas partnerships contracted in Member States are recognised to the extent that they are specified in Schedule 20[13]. Schedule 20 does not provide an exhaustive list of all Member States that authorise same-sex unions or registered partnerships. As a result certain unions contracted in certain Member States would not currently be recognised as overseas partnerships under the CPA 2004, for example a same-sex union contracted under Portuguese law[14], and the partner of an EU citizen to such a union may not therefore be able to invoke an automatic right to reside in the UK.

A further problem concerns the recognition of heterosexual partnerships by the UK authorities. Various complaints have been received by Your Europe Advice concerning the non-recognition of registered partnerships contracted by heterosexual couples, for example by partners registered in France under a *pacte civil de solidarité*[15] or in Belgium under a *cohabitation légale*[16].

When contacted on the subject, the Home Office stated that '[t]here is no provision for heterosexual unmarried partners to register their relationship under the 2004 Act as a civil partnership and the UK consequently does not recognise registered partnerships of heterosexual partners'[17]. The effect is that the heterosexual partners who have contracted a registered partnership in another Member State are not considered as 'family members' under art 2(2) of the Directive, although they may be considered as partners in 'a durable relationship, duly attested' under art 3(2) corresponding to the category of 'extended family members' under the EEA Regulations. Consequently the registered homosexual partner of an EU citizen enjoys an automatic right to reside in the UK as a family member, whilst the registered heterosexual partner of an EU citizen merely enjoys a right to have his residence 'facilitated' by the UK authorities. The result is to operate a distinction between registered partners according to their sexual orientation contrary to recital 31 of the Directive which requires 'Member States [to] implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as … sexual orientation'.

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[13] These include Belgium, Denmark, Finland, France, Germany, Iceland, Netherlands, Norway and Sweden. Spain and Luxembourg were later added to this list by the Civil Partnership Act 2004 (Overseas Relationships) Order 2005 (SI 2005/3135).

[14] *Lei n.º 9/2010 de 31 de Maio permite o casamento civil entre pessoas do mesmo sexo, Diário da República, 1.ª série,* No 105 (31 May 2010).

[15] *Loi n°99-944 du 15 novembre 1999 relative au pacte civil de solidarité*, *Journal Officiel* 265, 16959 (15 November 1999).

[16] *Loi instaurant la cohabitation légale du 12 novembre 1998, Moniteur Belge* (12 January 1999).

[17] Correspondence between the Home Office and the European Citizen Action Service quoted in EP Study, supra at p 150.

In practical terms this means that, in the event of termination of a registered partnership, the registered partner in a heterosexual relationship who does not possess the nationality of a Member State would be unable to claim a right to retain residence in the UK under art 13(2) of the Directive, whereas the same-sex registered partner who does not hold EU citizenship would be able to claim such a right (provided the civil partnership lasted for three years and the partners lived in the UK for at least one year). It is arguable that, in not recognising registered partnerships contracted by partners to a heterosexual partnership contracted in a Member State, the UK is engaging in discrimination on the grounds of sexual orientation contrary to the stated aims of the Directive.

Unmarried partners

Under art 3(2) (corresponding to reg 8), in order to have a right to reside with the EU citizen to whom they are related, unmarried partners need to demonstrate that they are in 'a durable relationship, duly attested'. The UK authorities require unmarried partners to be able to demonstrate that they have been in a relationship for at least two years[18]. The same requirement would apply in connection to a heterosexual partner who has contracted a registered partnership with an EU citizen in another Member State.

The UK's the two-year requirement has been previously criticised as being too restrictive and inflexible[19]. The European Commission has since issued guidance[20] in this connection:

> 'National rules on durability of partnership can refer to a minimum amount of time as a criterion for whether a partnership can be considered as durable. However, in this case national rules would need to foresee that other relevant aspects (such as for example a joint mortgage to buy a home) are also taken into account.'

As a result, the two-year requirement should not be the sole criteria by which to judge the durability of a relationship and, in the event this requirement is not met, the Directive still requires the UK authorities to undertake 'an extensive examination of the personal circumstances' of unmarried partners. In this connection, Your Europe Advice has advised that, in the absence of any contradictory evidence, the Home Office should be satisfied that the requirement as to durability of the relationship has been met in circumstances where, for example, an unmarried couple have given birth to a child and the couple are listed as the parents on the child's birth certificate.

Extended family members

Under the Directive, art 3(2) other relatives may be allowed to reside with the EU citizen. This category of 'other family member' (which corresponds to 'extended family members' under the EEA Regulations) applies to all relatives whatever their degree of kinship and therefore extends to parents (when they do not qualify under art 2(2)), siblings, grandparents, uncles and aunts, nephews and nieces, cousins, etc. What matters is that they must fall within the scope of the distinct situations enumerated in art 3(2), namely that they are other family members who, in the country they have come from, are either dependent on the EU citizen concerned, or members of the citizen's household, or reliant on the EU citizen for their personal care due to serious health grounds.

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[18] See European casework instructions, Chapter 2, section 2.4; and Immigration Rules, Part 8, para's 295A and 295D, HC 395.

[19] A. Hunter 'Family members: an analysis of the implementation of the Citizens Directive in UK law', supra.

[20] COM (2009) 313, supra at part 2.1.1.

However, the EEA Regulations limit the right of all family members – whether direct or extended – to have their entry and residence facilitated by requiring them to have been lawfully present in the EEA prior to coming to the UK.

Condition of prior lawful residence of all family members
In the event that family members are not lawfully present in the EEA prior to coming to the UK, under the EEA Regulations, they will only be granted entry and residence to the UK if they also qualify under the Immigration Rules[21]. This has the effect of automatically excluding certain family members such as nephews or cousins[22] from joining their relations in the UK. The right to enter has also been denied to direct family members, on the basis that the requirements for entry under the Immigration Rules had not been met, in the case of the spouse of a Swedish self-employed person working in the UK (*KA (Sudan)* [2008] UKAIT 52) and the child of a Polish national working in the UK (*CO (Nigeria)* [2007] UKAIT 70) in clear breach of art 5(2).

The condition of prior lawful residence contained in the EEA Regulations has been a source of complaints from a significant number of family members who have had recourse to Your Europe Advice. It should be noted however that the UK is not the sole Member State to have adopted implementing rules containing such a condition. According to the Commission[23], Denmark, Finland and Ireland also imposed a similar condition of prior lawful residence in their legislation to implement the Directive.

The EEA Regulations place a requirement of prior lawful residence on other family members which is not found in art 3(2) of the Directive. Reg 8(2) has the effect of requiring extended family members to be lawfully resident in an EEA State in order to be able to invoke a right to reside in the UK. Reg 12(1) contains a similar restriction on the ability of all family members to apply for an EEA family permit in order to join or accompany an EU citizen to whom they are related. Such a condition was inserted by the drafters of the EEA Regulations in consideration of the CJEU's ruling in *Akrich* Case C-109/01 [2003] ECR I-9607[24], according to which the Court held that a non-EU spouse of an EU citizen could only rely on rights of residence of family members under Regulation 1612/68/EC to the extent that he was 'lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated'.

In *Jia* Case C-1/05 [2007] ECR I-1, the Court of Justice sought to distance itself from the *Akrich* ruling by confining it to the particular facts of the case. A few months later, in *Metock* Case C-127/08 [2008] ECR I-6241, the CJEU considered the legality of a condition of prior lawful residence contained in the regulations that implement the Directive in the Republic of Ireland, the European Communities (Free Movement of Persons) (No 2) Regulations 2006. After calling at para 58 for a reconsideration of the ruling in *Akrich*, the Court held that:

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[21] See further European casework instructions, Chapter 3.
[22] See R. McKee 'Regulating the Directive? The AIT's Interpretation of the Family Members Provisions in the EEA Regulations', supra,
[23] COM (2008) 840, supra at part 3.1.
[24] Such an amendment was made to the Immigration (European Economic Area) Regulations 2000 (SI 2000/2326), reg 13 concerning the issue of an EEA family permit by the Immigration (European Economic Area) (Amendment) Regulations 2005 (SI 2005/47), reg 2(4), as made clear in the Explanatory Note. The 2000 Regulations were replaced by the EEA Regulations in 2006.

> 'Directive 2004/38 precludes legislation of a Member State which requires a national of a non-member country who is the spouse of a Union citizen residing in that Member State but not possessing its nationality to have previously been lawfully resident in another Member State before arriving in the host Member State, in order to benefit from the provisions of that directive'. (*Metock* at para 80)

The *Metock* ruling has since been followed by the Court of Appeal handed down in *Bigia and Others v Entry Clearance Officer* [2009] EWCA Civ 79. In his judgment, Justice Kay LJ held at para 41 '[i]t follows that the provisions in Regulations 8 and 12 of the 2006 Regulations, to the extent that they require an OFM [other family member] to establish prior lawful residence in another Member State, do not accord with the Directive'. However, the Home Office has indicated that it considers that the ruling in *Metock* is limited to immediate family members but does not apply to 'extended family members' and therefore does not consider reg 8(2) requires amendment.[25]

In spite of these rulings, the UK has still not amended its legislation to comply with the CJEU ruling in *Metock*, nor have the European casework instructions been fully amended in this respect[26]. In a worrying development, the UK was reported to have circulated proposals to restrict the scope of the Directive[27] in preparation for the EU Council meeting held in Brussels on 27-28 November 2008 that 'constituted a clear will to restrict the scope of the rights and freedoms envisaged by the EU legal system to the very institution of European citizenship'[28], although these were ultimately unsuccessful.

In any event, as a matter of EU law[29], the UK is under an obligation to bring its legislation into compliance with the CJEU's ruling in *Metock*. The continuing failure by the UK authorities to comply with the judgment and bring the EEA Regulations into line with the Directive is likely to render the UK liable for damages towards individuals who suffer loss under the principles of Member State liability enunciated by the Court in *Brasserie du Pêcheur & Factortame* Joined Cases C-46/93 & C-48/93 [1996] ECR I-1029. It could be further argued that, by knowingly maintaining legislative provisions in the EEA Regulations which contravene the CJEU's ruling in *Metock*, the UK is manifestly and gravely disregarding the limits on the exercise of its legislative powers and therefore it would not be able to claim an error of law to mitigate its liability under EU law, as has been successfully argued by the UK in *British Telecoms* Case C-

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[25] Correspondence between the Home Office and the European Citizen Action Service quoted in EP Study, supra at 150.

[26] The European casework instructions were amended in 2008 to reflect the situation of direct family members as reported in House of Commons Standard Note SN/HA/4900 (9 February 2009). However Chapters 2 and 3 have retained the requirement of prior lawful residence in the EEA as regards 'extended family members'.

[27] Draft Council conclusions 'Free movement of persons: abuses and substantive problems', 15903/08 of
18 November 2008 and 16151/1/08 of 26 November 2008.

[28] S. Carrera and A. Faure Atger 'Implementation of Directive 2004/38 in the context of EU Enlargement - A proliferation of different forms of citizenship?', Special Report, Centre for European Studies (April 2009); see further S. Peers, 'The UK proposals on EU free movement law: an attack on the rule of law and EU fundamental freedoms', Statewatch Analysis No 72 (27 November 2008).

[29] The ECJ has consistently held that 'the maintenance of national legislation which is in itself incompatible with Community law, even if the Member State concerned acts in accordance with Community law, gives rise to an ambiguous state of affairs by maintaining, as regards those subject to the law who are concerned, a state of uncertainty as to the possibilities for them of relying on Community law' (see *Commission v. France* Case C-307/89 [1991] ECR I-2903 at para 13; see further *Commission v Greece* Case C-185/96 [1998] ECR I-6601 at para 30).

392/93 [1996] ECR I-1631 in respect of the implementation of the EU rules on public procurement in utilities.

Rights of entry and residence

The Directive regulates both the entry and residence of EU citizens and their family members in a host Member State, which will now be discussed in further detail.

The right of entry to the UK

In order to be able to enter the UK, EU citizens are required to present a valid identity card or passport. Family members who do not possess the nationality of a Member State are required to have an entry visa, which must be issued 'as soon as possible and on the basis of an accelerated procedure' (art 5(2)). In the UK the entry visa takes the form of an EEA family permit.

In practice, family members continue to face difficulties in obtaining EEA family permits and when making use of contracted-out visa processing services. These problems are exacerbated by the fact that the UK does not recognise residence cards issued to family members by other Member States. Even if they are in possession of the required travel documentation, EU citizens and their family members continue to face difficulties when proceeding through border controls.

Problems concerning EEA family permits

Aside from the condition of prior lawful residence within the EEA, enquiries received by Your Europe Advice seem to suggest that applications for EEA family permits by extended family members are more often than not being refused immediately. Those who nonetheless persevere with the process often have to engage in protracted negotiations with the UK consular authorities before the permit is finally issued. This has resulted in extensive delays in obtaining an EEA family permit, which is contrary to the requirement under the Regulations that they be issued 'as soon as possible'. In some cases, plans to visit the UK by EU citizens and their family members have had to be postponed or even abandoned, resulting in financial loss as a result of penalties imposed for the cancellation or postponement of hotel and flight bookings. Moreover, applications for EEA family permits involve the completion of lengthy paperwork requiring applicants to provide answers to a veritable mountain of questions[30].

It is regrettable to note that the EEA Regulations, reg 12 do not contain a specific time limit within which an EEA family permit should be issued. This is in stark contrast to the Schengen Visa Code[31] which specifies a deadline of 15 days for the processing of visas for entry into the Schengen area (art 23). As a result, given the lengthy delays that family members regularly face when applying for EEA family permits, it does not appear that the UK can be said to comply with the Directive's requirements for entry visas to be issued to family members 'as soon as possible and on the basis of an accelerated procedure' under art 5(2).

Issues relating to contracted-out visa processing

The predominance of contracted-out services for the handling of visa applications by the UK authorities raises its own set of problems. In particular, those wishing to obtain information over the telephone, require the applicants to call a 'premium service' number sometimes costing as much as £10.00 per call. In some countries, the telephone is the only method to start the process because individual appointments can only be arranged over the telephone.

[30] See Commission Study and EP Study, supra.

[31] Regulation 810/2009/EC establishing a Community Code on Visas [2009] OJ L243/1.

This arguably constitutes a failure by the UK to comply with the Directive's requirement that entry visas should be issued to family members 'free of charge' under art 5(2). Such problems perhaps also indicative of the poor quality of the training provided to the staff of firms providing these contracted-out services, which fail to ensure that they attain the required degree of awareness of the intricacies of residence rights that family members of EU citizens enjoy under EU law. Indeed, complaints made to Your Europe Advice indicate that the information provided to visa applicants by such providers can be misleading. For example, some non-visa nationals (Australians, Canadians, etc.) who are family members of EU citizens have been advised that they still require an EEA family permit to enter the UK even though they are exempt from the need for an entry visa for short stays.

Non-recognition of residence cards issued by other Member States

Despite the clear wording of the Directive, art 5(2), the UK authorities do not recognise residence cards issued by other Member States as entitling family members of EU citizens to enter without the need for an EEA family permit. Therefore even if the family members of an EU citizen are in possession of a residence card issued by the Member State of residence, they will be required to obtain an EEA family permit in order to enter the UK. This constitutes a breach of the Directive, art 5(2)[32].

This has had a further knock-on effect on the ability of family members to travel to the UK with EU citizens because airline staff have sometimes denied boarding to family members even though they were in possession of a residence card issued under the Directive, due to a misinformed desire by airlines to comply with their obligations under Directive 2001/51/EC [2001] OJ L 187/45 on air carrier's liability[33].

Moreover, Your Europe Advice is aware that, when pressed on the issue, UK consular officials will admit that the family members of EU citizens cannot be required to have an EEA family permit in order to enter the UK. In this respect it should be noted that art 5(4) requires the UK authorities to provide family members who do not have an EEA family permit 'every reasonable opportunity to obtain the necessary documents or have them brought within a reasonable period of time or to corroborate or prove by other means that they are covered by the right of free movement and residence'. This would include an opportunity to apply for a visa upon arrival in accordance with the CJEU's ruling in *MRAX* Case C-459/99 [2002] ECR I-6591 at para 60.

Border controls

Your Europe Advice continues to receive complaints from EU citizens (particularly from the new Member States) and their family members (particularly non-EU nationals) who protest at having been questioned at length by UKBA officials in relation to the purpose of their entry into the UK.

Whilst it does not appear EU citizens and their family members are being routinely subjected to systematic questioning, it should be observed that the CJEU has held that 'the only precondition which Member States may impose on the right of entry into their territory of the persons covered by [the Directive] is the production of a valid identity document or passport.'

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[32] This point of view is shared by the Commission: see for example its reply in Petition 1307/2007. submitted to the European Parliament, PE 414.051 (26 September 2008).

[33] Nevertheless, it should be noted that family members who are denied boarding by airline staff based on an incorrect determination by the latter that they do not have adequate travel documentation may have a claim under Regulation 261/2004 [2004] OJ L 46/1 on the compensation of air passengers denied boarding.

(*Commission v Belgium* Case 321/87 [1989] ECR 997, at para 11). The Court went on to specify that 'the carrying out of such [border] controls upon entry into the territory of a Member State may, depending on the circumstances, constitute a barrier to the free movement of persons within the Community, a fundamental principle of the [TFEU] to which the [Directive is] intended to give full effect. That would be the case in particular if it were found that the controls in question were carried out in a systematic, arbitrary or unnecessarily restrictive manner.' (at para 15).

Furthermore, in *Commission v Netherlands* Case C-68/89 [1991] ECR I-2637 at para 13, the Court held that 'the obligation to answer questions put by frontier officials cannot be a precondition for the entry of a national of one Member State into the territory of another.' Moreover in that case, the Court was quick to dismiss the UK government's argument that 'it is necessary [for officials] to ask questions in order to verify the validity of the identity documents produced' by remarking that the 'lawfulness of controls as to the validity of the document produced derives from the requirement laid down in Article [4] of [the Directive] that the identity card or passport should be "valid" ' (at para 15) suggesting that questions as to the purpose of a person's entry to the UK are not in any way related to determining that a travel document is valid.

It is therefore arguable that the questioning of EU citizens and their family members by UKBA as to the purpose of their trip, even though they are in possession of valid travel document and necessary visas, is likely to constitute an undue restriction on their rights of entry.

Having looked at the right of entry, we now turn our attention to the rights of residence under the Directive.

The right to reside in the UK

The Directive provides that EU citizens and their family members have a right to residence in any EU state for up to three months without the need to fulfil any conditions (art 6 corresponding to reg 13), aside from complying with the formalities relating to entry discussed above.

In order to benefit from a right to reside for over three months, the Directive requires EU citizens to meet different conditions according to the nature of their residence as workers (including the self-employed), job-seekers, students or those not engaging in an economic activity (art 7 corresponding to regs 6 and 14). The problems faced by each of these categories will be examined in turn.

Although the concept of workers includes apprentices, vocational trainees and researchers, as will be seen below, complaints to Your Europe Advice indicate that the UK authorities do not necessarily follow the CJEU's case law that provides guidance on what constitutes a 'worker' under EU law. In other instances, Your Europe Advice has been informed that the UK authorities have sometimes questioned whether students or interns could be considered workers under the Directive on the basis of the hours worked and the level of remuneration provided. The situation of job-seekers has also given rise to some practical problems. The problems faced by the self-employed have tended to concern proof of self-employment. The UK authorities have sometimes also placed requirements on students as regards the duration of their course of study, although no such conditions can be found in the Directive. In connection with self-sufficient persons, proof of adequate resources has often been an issue. The situation of other beneficiaries falling outside the scope of the Directive will also be briefly summarised.

Workers

Although it appears that it is not generally a problem for EU citizens to demonstrate that they are workers when they are engaged full-time, Your Europe Advice has received complaints from researchers and vocational trainees (such as trainee teachers) who have faced difficulties in demonstrating their right to reside as a 'worker'.

Apprentices and vocational trainees

The Court of Justice has consistently held that the status of 'worker' under EU must be given a wide meaning. The status of 'worker' applies to any person who for a certain period of time performs services for the benefit and under the direction of another person in return for remuneration, provided that these activities are genuine and effective, rather than being on such a small scale as to be considered merely marginal and ancillary (*Levin* case C-53/81 [1982] ECR 1035 at para 17 and *Meeusen* Case C-337/97 [1999] ECR I-3289 at para 13). As a result, the CJEU recognised in *Lawrie-Blum* Case C-66/85 [1986] ECR 2121 at para 18 that a trainee who engages in paid work in the context of a work placement scheme that forms a part of a vocational training course must be considered a worker for the purposes of EU law.

The Court also ruled that a trainee will still be considered a worker under EU law even if the trainee only works a small number of hours per week and receives limited remuneration (*Lawrie-Blum* at para 21). The origin of the worker's remuneration is of no consequence, so that remuneration which is funded by public subsidies cannot affect whether a trainee is considered a worker (*Bettray* Case C-344/87 [1989] ECR 1621 at para 15). The fact that the person performs work for a short duration of time cannot of itself exclude that person from being considered as a worker (*Vatsouras & Koupatantze* Joined Cases C-22 & 23/08 [2009] ECR I-4585 at paras 29-30). What matters, in order for a person undergoing vocational training to be considered as a worker, is that the trainee's work experience has enabled him to complete a sufficient number of hours in order to familiarise himself with the work (*Bernini* Case C-3/90 [1992] ECR 1071 at para 16). In addition, the fact that a person may be remunerated by way of a stipend or salary that may be below the equivalent of a living wage in the UK is immaterial for the purposes of considering that a person can claim the status of a worker (*Levin* at para 16).

Furthermore, under the Directive, vocational trainees who previously worked would be able to retain the status of worker for the duration of their vocational training course. Art 7(3)(d) gives vocational trainees a right to retain the status of worker if they ceased employment voluntarily and embarked on occupational training, provided that this training is related to their previous employment. Where a worker became 'involuntarily' unemployed (for example if he was made redundant but remained available to work), there is no such requirement for the vocational training to be related to the nature of his previous employment.

As the Court previously held in *Blaizot* Case 24/86 [1988] ECR 379 at paras 16-20, the concept of 'vocational training' includes university studies 'with the exception of certain special courses of study which, because of their particular nature, are intended for persons wishing to improve their general knowledge rather than prepare themselves for an occupation'.

Researchers

In *Racanelli* Case C 94/07 [2008] ECR I-2939 at para 37, the Court has recognised that university researchers may, under certain circumstances, be considered as workers: 'a researcher preparing a doctoral thesis on the basis of a grant contract concluded with [a higher education institution] must be regarded as a worker within the meaning of Article [45 TFEU] only if his activities are performed for a certain period of time under the direction of

an institute forming part of that association and if, in return for those activities, he receives remuneration.'

Duration of work
In some instances Your Europe Advice has been contacted by EU citizens whose right to reside was challenged on the basis that their working hours were deemed insufficient by the UK authorities.

The short duration or fixed-term nature of employment does not mean that the activity will necessarily be considered as marginal or ancillary. The CJEU's ruling in *Ninni-Orasche* Case C-413/01 [2003] ECR I-13187 at paras 42-44 demonstrates that employment of only two and a half months' duration is sufficient to be categorised as employment within the meaning of art 45 TFEU.

Students engaging in part-time work
A student who also engages in part-time paid work is not precluded from having the status of a worker. What matters is that the work constitutes a genuine and effective activity, rather than being on such a small scale as to be considered merely marginal and ancillary (*Levin* at para 17 and *Meeusen* at para 13). This was also confirmed by the CJEU in *Payir* Case C-294/06 [2008] ECR I-203, albeit in the context of the EEC-Turkey Association Agreement [1973] OJ C 113/1.

Volunteers and unpaid interns
Finally, it should be recalled that volunteers and unpaid interns who are remunerated with benefits in kind (such as board and lodging and a pocket money allowance) or counterpart services may still be considered 'workers' under EU law (*Trojani* Case C-456/02 [2004] ECR 7573 at para 22 and *Steymann* Case 196/87 [1988] ECR 6159 at para 14).

Job-seekers
Your Europe Advice has been contacted by EU citizens who have faced difficulties in having their right of residence recognised because they were not in receipt of Jobseekers Allowance.

The Court of Justice has consistently held that nationals of a Member State seeking employment in another Member State fall within the scope of art 45 TFEU and therefore enjoy the right to equal treatment by virtue of that provision (*Ioannidis* Case C-258/04 [2005] ECR I-8275 at para 21, and *Vatsouras & Koupatantze*, at para 36). A job-seeker is therefore to be considered as a 'worker' for the purposes of the Directive, art 7(1)(a).

In *Antonissen* Case C-292/89 [1991] ECR I-745 at para 21, the CJEU recognised that job-seekers have a right to reside for at least 6 months while they seek employment. To have a right to stay beyond 6 months, job-seekers would need to demonstrate that they are continuing to seek employment and that they have genuine chances of being engaged.

This case law has been codified by the Directive, art 14(4) and appears to be accurately reflected in the EEA Regulations, reg 6(1) and (4). It is also worth noting that, although the EEA Regulations use the term 'jobseeker', this does not have the same meaning of the expression 'jobseeker' under the Jobseekers Act 1995. In this connection, Justice Walker and Judge Ward have remarked in *Secretary of State for Work and Pensions v FE* [2009] UKUT 287 (AAC) at para 11 that:

> 'the expression "job-seeker" [under the Directive] is not intended to bear the specific meaning of the word "jobseeker" as used within the United Kingdom in (or as derived

> from) the legislation establishing jobseeker's allowance. … The Directive is concerned with people who have registered as looking for a job rather than "jobseekers" as a term of art in the UK sense.'.

Transitional measures for EU citizens from new Member States

Your Europe Advice has also had its fair number of enquiries from workers from the new Member States enquiring about the existence in the UK of derogations from the EU free movement rules.

The Accession Treaty ([2003] OJ L236/1) that regulates the accession of new Member States which joined the EU in 2004 allows the existing EU Member States to impose restrictions on workers from the so-called 'A8' countries[34] for a transitional period ending on 1st May 2011. The Annexes to the Accession Treaty make clear that the permitted derogations only extend to Articles 1 to 6 of Regulation 1612/68[35] and not to art 45 TFEU. The derogations do not apply to workers from Cyprus or Malta.

The UK availed itself of this possibility and adopted the Accession (Immigration and Worker Registration) Regulations 2004 (SI 2004/1219) which required workers and jobseekers from A8 countries to register with the Home Office in order to have a right to work in the UK. Such workers also had to re-register if they changed employers within the first twelve months of working in the UK. Failure to register (or re-register) meant such workers would have no right to work in the UK and consequently no right to reside. The UK's transitional arrangements have been roundly condemned for going beyond the derogations permitted in the Accession Treaty, in particular as regards its effect on the right of A8 workers to access social security benefits in the UK[36]. It should be noted that the transitional period for A8 countries ended on 1st May 2011. The UK's restrictions on A8 workers therefore ended by virtue of the Accession (Immigration and Worker Registration) (Revocation, Savings and Consequential Provisions) Regulations 2011 (SI 2011/544) and the right of A8 workers to reside in the UK is now governed by the EEA Regulations.

Likewise, the UK has imposed restrictions on Bulgarian and Romanian workers as permitted during the transitional period ending 31 December 2013 by the Accession Treaty relating to the accession of those two countries to the EU ([2005] OJ L 157/1). The UK currently requires workers from the 'A2 countries' to apply for a work permit (in the form of a 'worker authorisation card') in order to have a right to work in the UK. The Accession (Immigration and Worker Authorisation) Regulations 2006 (SI 2006/) have not escaped criticism either[37].

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[34] The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia.

[35] See Annex V in respect of the Czech Republic [2003] OJ L236/803; Annex VI in respect of Estonia [2003] OJ L236/812; Annex X in respect of Hungary [2003] OJ L236/846; Annex VIII in respect of Latvia [2003] OJ L236/824; Annex IX in respect of Lithuania [2003] OJ L236/836; Annex XII in respect of Poland [2003] OJ L236/875; Annex XIV in respect of Slovakia [2003] OJ L236/915 and Annex XIII in respect of Slovenia [2003] OJ L236/906.

[36] See S. Currie '"Free" Movers? The Post-Accession Experience of Accession-8 Migrant Workers in the UK' (2006) Vol 31, No 2, *ELRev* 207; V. Mitsilgas, 'Free Movement of Workers, EU Citizenship and Enlargement: the Situation in the UK' (2007) Vol 21, No 3, *IANL* 223; K. Puttick, 'Welcoming the New Arrivals? Reception, Integration and Employment of A8, Bulgarian and Romanian Migrants' (2006) Vol 20, No 4, *IANL* 238; and ILPA Response to the Consultation on Draft Regulations Relating to Accession of 8 New Member States to the European Union (19 April 2004)

[37] See ILPA Response to Consultation on Controlled Access to UK Labour Market for Romanians and Bulgarians (10 September 2007); V. Mitsilgas, 'Free Movement of Workers, EU Citizenship and Enlargement: the Situation in the UK', supra; and K. Puttick, 'Welcoming the New Arrivals? Reception, Integration and Employment of A8, Bulgarian and Romanian Migrants', supra.

As regards the situation of the self-employed, students and self-sufficient persons from A8 and A2 countries, their right to reside in the UK is governed by the Directive and the EEA Regulations.

The self-employed

The Directive also governs the residence rights of self-employed workers in the UK (art 7(1)(a) corresponding to regs 4 and 14). The questions received by Your Europe Advice have tended to originate from family members facing difficulties in proving the self-employed status of the EU citizen to whom they are related. The Directive, art 8(3) provides scant guidance in this connection and merely states that citizens are required to provide 'proof that they are self-employed persons'. However, the Court of Justice held in *Roux* Case C-363/89 [1991] ECR I-273 at 16 that '[s]ince the means of proof admissible in that respect are not specified [in the Directive], it must be concluded that evidence [of self-employment] may be adduced by any appropriate means.'

In the UK, Your Europe Advice has accordingly advised that a self-employed worker should be able to demonstrate his self-employed status by any means. This may include providing evidence of registration for self-assessment with Revenue & Customs. However, this process requires a National Insurance (NI) number, which some citizens have faced difficulties in obtaining from their local Job Centre (the UK's employment office). This appears to be the particular experience of citizens from Bulgaria and Romania, who have been asked to provide proof of their right to reside before they can obtain their NI number. This practice does not appear in keeping with the CJEU's ruling that 'prior registration of a national of a Member State of the Community with a social security scheme established by the legislation of the host State cannot be imposed as a condition either for obtaining the right of residence or the issue of the corresponding permit, and that registration in one social security scheme rather than another may justify neither a refusal to issue a residence permit nor a deportation order.' (*Roux* at para 16).

These problems have usually been resolved following the intervention of SOLVIT, the European Commission's on-line problem solving network made up of civil servants from all Member States, which have liaised with the relevant UK authorities to facilitate a compromise that complies with EU law.

Students

The Directive, art 7(1)(c) also gives a right of residence to students who are 'enrolled at a private or public establishment, accredited or financed by the host Member State on the basis of its legislation or administrative practice, for the principal purpose of following a course of study, including vocational training'. This has been transposed by the EEA Regulations, reg 4(1)(d) which requires a student to be enrolled on an establishment included on the Register of Education and Training Providers[38] maintained by the Department of Innovation, Universities and Skills (formerly the Department for Education and Skills).

Students have previously complained to Your Europe Advice that they face difficulties in obtaining recognition of their right of residence in the event they wish to undertake studies of

[38] The register was last published on 30 March 2009 and is available online: http://www.ukba.homeoffice.gov.uk/sitecontent/documents/employersandsponsors/pointsbasedsystem/diusregister.pdf

a part-time nature. It should be noted that neither the Directive nor the EEA Regulations prescribe that a course of study should be full-time or consist in a minimum number of hours.

In order to have a right of residence under the Directive, students are required to possess sufficient resources so as not to become an unreasonable burden on the social assistance system of the host country.

As regards proof of sufficient resources, art 7(1)(c) (corresponding to reg 4(1)(d)) specifies that students must satisfy the national authorities, by means of a declaration or 'such equivalent means as they may choose', that they have sufficient resources so as not to become an unreasonable burden on the social assistance system of the host country. The CJEU has ruled that a student will fulfil the requirements of the Directive where resources are provided by members of his family without the need to establish that there is a formal legal obligation on the family member to provide for the student (*Commission v Belgium* Case C-408/03 [2006] ECR I-2647 at paras 42-46). The Directive, art 8(4) prohibits the national authorities from requiring students to provide evidence that they possess resources of a specific amount and must instead take into account the personal situation of the student concerned (see also *Commission v Italy* Case C-424/98 [2000] ECR I-4001 at para 46).

The Directive also requires students to have comprehensive sickness insurance cover. Your Europe Advice has received numerous complaints concerning the requirement for comprehensive sickness insurance cover, which will be examined in Part 2 of this article in connection with the right to equal treatment.

Inactive (self-sufficient) persons

So-called 'economically inactive' citizens who do not engage in an economic activity or pursue studies also have a right to reside under the Directive, art 7(1)(b) provided that they have sufficient resources to prevent them from becoming an unreasonable burden on the host country's social assistance system and have comprehensive sickness insurance cover. This category of beneficiaries are defined as 'self-sufficient' persons under the EEA Regulations, reg 4(1)(c).

Contrary to the situation of students, the Directive does not specify the acceptable methods of proof which Member States may require from self-sufficient persons as to the sufficiency of their resources. However the Directive, art 8(4) does prohibit Member States from requiring that self-sufficient persons possess a fixed amount of resources and further provides that '[i]n 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.' In *Commission v Netherlands* C-398-06 [2008] ECR I-56 at para 29, the CJEU held that Member States cannot require economically inactive persons to have to prove they have resources that are sufficient to sustain them for at least a year.

In the UK, art 8(4) is transposed by the EEA Regulations, reg 4(4) which states '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'. The Home Office considers that social assistance includes benefits such as Income Support, Housing Benefit and Council Tax Benefit and other income-related benefits payable to persons on low incomes.[39] As a result, the eligibility conditions for

[39] European casework instructions, Chapter 12.

such benefits could therefore be used as a reference point to determine whether someone is self-sufficient.

For instance, a single person above the age of 25 on a low-income will only be eligible for Income Support if his weekly income is below the applicable personal allowance (currently £65.45 per week) or has savings below the upper savings limit (currently £16,000). As a result, a person claiming a right of residence in the UK should necessarily be considered as a self-sufficient person within the meaning of the Directive and the EEA Regulations if his weekly income (whatever its source) is above the applicable personal income or his savings are in excess of the upper savings limit.

The requirement for comprehensive sickness insurance cover will be examined in Part 2 of this article in connection with the right to equal treatment.

Other situations not expressly covered by the Directive
The extensive case law of the Court of Justice shows that EU citizens and their family members may also enjoy rights to reside in the EU in circumstances that are not specifically addressed by the Directive.

Firstly, there is the situation of nationals who return home after having exercised their right to free movement in another EU country. As a result, the family members of EU citizens who return home after exercising their free movement rights in another EU country also have a right to reside in the home country, as recognised by the CJEU in *Knoors* Case 115/78 [1979] ECR 399 and *Singh* C-370/90 [1992] ECR I-4265. A further judgment in *Eind* Case C-291/05 [2007] ECR I-719 has since confirmed that the right to return laid down in *Singh* also applies to a situation where an EU citizen and family members returns home after working in another EU country even if the citizen does not have sufficient resources to support himself and his family upon their return to his home country. This case law is reflected in EEA Regulations, reg 9, which provides that the family members of British citizens who return home after working in another EU country benefit from a right to reside with their sponsor in the UK. Reg 9 is therefore limited in its present form to family members of workers or the self-employed. However, it is arguable that the right to return home extends beyond workers and would also extend to all British citizens who return home with their family members after having exercised their right to reside in another Member State.

The second situation concerns the primary carers of EU minors, regardless of their nationality. The Directive explicitly governs the situation of non-EU nationals who are the primary carers of EU minors, but only to the extent that they retain a right of residence under art 12(3) following the departure of the EU citizen to whom they are related. A similar right benefits the primary carer following divorce from the EU citizen under art 13(2). The recent rulings in *Ibrahim* Case C-310/08 and *Teixeira* Case C-480/08 (judgments of 23 February 2010), give further rights to primary carers of EU minors under Regulation 1612, art 12, where they can demonstrate that they are caring for the children of a former migrant worker who are in education in the UK.

In addition, the ruling in *Chen* Case C-200/02 [2004] ECR I-9925 still remains a source of rights for those primary carers who do not fulfil the conditions of the Directive, art's 12(3) and 13(2) or Regulation 1612/68, art 12. In this connection, it should be observed that the method used by the UK to comply with the *Chen* ruling is highly questionable. Instead of considering that the primary carer of an EU minor falls within the scope of the Directive (which replaced Directive 90/364 used as the basis for the ruling in *Chen*), the UK authorities require such a person to apply for leave to enter or remain on the basis of para 257C of the Immigration

Rules instead of the EEA Regulations. Furthermore, it is arguable that para 257C does not comply with the *Chen* ruling insofar as it precludes the primary carer from benefiting from a right to work in the UK.

Finally, because the Directive only applies to those moving to an EU country other than their country of nationality, it does not apply to the family members of British citizens living in the UK. However, the recent landmark judgment of the Court of Justice in *Ruiz Zambrano* Case C-34/09 (judgment of 8 March 2011), has considerably expanded the scope of art 20 TFEU on EU citizenship. As a result, citizens must be permitted to reside with their family members in their home country, in circumstances where a refusal of the national authorities to allow family members the right to remain would deprive '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' (at para 42). Indeed, it could be argued that, following *Ruiz Zambrano*, the application of the Immigration Rules by the Home Office in connection with the family members of British citizens living in the UK should now be subject to a requirement of proportionality to ensure that any decision taken under the Immigration Rules does not lead to an outcome which unjustifiably interferes with the exercise of those citizens' fundamental rights under the EU Treaties.

Retaining the right of residence in the UK

The Directive allows beneficiaries who cease to fulfil the conditions for residence to retain their right of reside in certain circumstances. First, it allows EU citizens who have ceased work to retain the status of a worker. It also gives family members the right to retain residence following the death or departure of the EU citizen or in the event of divorce or termination of a registered partnership (art's 12 and 13). In practice, these rights have been the source of a number of problems for EU citizens and their family members seeking to retain their right of residence in the UK.

Retaining the status of worker or self-employed person

The Directive, art 7(3) gives workers and the self-employed whose occupational activity has ended a right to retain their status in a number of different circumstances.

Your Europe Advice is aware that self-employed workers have faced difficulties in claiming a right to retain the status of worker after they become unemployed under the Directive, art 7(3). The view of the UK authorities is that this provision does not apply in its entirety to the self-employed. As a result, the EEA Regulations, reg 6(3), limit this right to former self-employed persons who have become unable to pursue their activity as the result of an accident or illness (corresponding to art 7(3)(a)).

This approach has been partly validated by the English courts in a judgment of the Court of Appeal *Tilianu* [2010] EWCA 1397, in which it held that the Directive, art 7(3)(b) and (c) does not give a right to former self-employed persons to retain that status in the event they become unemployed. In his judgment at para 12, Sedley LJ found favour with the deputy judge's decision that the Directive operates a 'distinction … between workers, and having the status of worker on the one hand, and self-employed persons on the other.' However, the argument could be made that such an interpretation is unnecessarily restrictive.

It should be recalled that the Directive is intended to strengthen the rights of EU citizens and their family members as confirmed by the CJEU in *Metock* at para 59. In this respect the *travaux préparatoires* make it clear that the art 7(3) is intended to build upon the previous directives that applied separately to workers and the self-employed and incorporate the Court's

case law 'regarding the retention of worker status where the worker is no longer engaged in *any employed or self-employed activity*' (emphasis added) (COM (2001) 257). This reflects the Commission's intention that art 7(3) should apply equally to workers and self-employed persons. Indeed the comparative table produced by the Commission clearly states that art 7(3) is a 'modified' provision that 'is based on and clarifies certain provisions of Directive 68/360 and incorporates Court of Justice case-law regarding the retention of worker status where the worker is no longer engaged in employed or self-employed activity'[40]. Moreover, the various linguistic versions of the Directive, including the original French text, do not appear to support the view that art 7(3), paras (b) and (c) can only apply to workers and not to the self-employed.

Following the Court of Appeal's approach in *Tilianu* to its logical conclusion would lead to a multitude of different outcomes depending not only on whether a person was employed or self-employed, but also on the kind of work the person was looking for after ceasing his former activity. It would mean that a former worker with at least a year's working experience could retain the status of worker under art 7(3) and claim jobseekers allowance whilst looking for work, whether that search related to employed or self-employed activities. On the other hand, it would mean that a self-employed person who is looking for new self-employed opportunities of a different kind after ceasing his self-employed activity would only have the right to continue residing in the UK as a self-sufficient person under art 7(1)(b), but after 6 months would be able to assume the status of worker by introducing a claim for jobseekers allowance[41]. Then again it would also mean that a formerly self-employed person who was looking for employed work immediately after ceasing his self-employed activity could assume the status of worker and have a right to remain there for at least 6 months in accordance with art 14(4) without needing to be self-sufficient. It would also lead to a diversity of outcomes across the EU according to whether a self-employed person who ceases his self-employed activity is entitled to claim unemployment benefit under each Member State's legislation. Surely such diverse outcomes on the retention of the status of worker or self-employed under the Directive cannot have been the intention of the EU legislature. In view of this ambiguity, is regrettable that the Court of Appeal did not refer the matter to the CJEU for a preliminary ruling on the scope of art 7(3).

The arguments in favour of such a reference are apparent. The Court of Justice has previously held that 'when the text of a Community provision contains, in its different language versions, considered in the light of the history of the provision and the preparatory documents, on which the parties have based their arguments in their observations submitted to the Court, too many contradictory and ambiguous elements to provide the answer, it is necessary, in order to interpret that provision, to consider its context and the objective of the rules in question.' (*Netherlands v Commission* Case 11/76 [1979] ECR 245 at 6, and *ARD* Case C-6/98 [1999] ECR I-7599 at 27).

It is clear from recitals 3 and 7 that the Directive aims to 'simplify and strengthen the right of free movement and residence of all Union citizens' and to 'remed[y] [a] sector-by-sector, piecemeal approach'. The CJEU has consistently held that the Directive's provisions 'cannot be interpreted restrictively, and must not in any case be deprived of their effectiveness' (*Eind* at 43, *Metock* at 84). In *Lassal* Case C-162/09 (judgment of 7 October 2010), at para 51, the Court

[40] Table of correspondence between Directive 2004/38 and current EC legislation on free movement and residence of Union citizens within the EU, Commission working document available on DG Justice's website:
http://ec.europa.eu/justice/doc_centre/citizenship/movement/doc/table_correspondence_en.pdf

[41] It would appear that the current rules on jobseekers allowance would allow a formerly self-employed person to claim the allowance once having been unemployed for 6 months.

held that 'where a provision of EU law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness'. Since the purpose of the Directive is to strengthen the right of free movement and remedy the previous 'piecemeal approach' to residence rights, it is arguable that the ambiguity found in the Directive, art 7(3) should be interpreted in favour of a former self-employed person (or family member) relying upon that provision, so that a person who ceases his self-employed activity can retain the status of self-employed when the conditions of art 7(3) are met.

Another issue that has led to problems for former workers claiming a right to retain their status is the question whether their unemployment is involuntary. In order to be considered 'involuntarily unemployed', a worker does not necessarily need to have been sacked or made redundant. In the context of fixed-term contracts, in *Ninni-Orasche* at para 42, the CJEU observed that "the mere fact that a contract of employment is from the outset concluded as a fixed-term contract cannot necessarily lead to the conclusion that, once that contract expires, the employee concerned is automatically to be regarded as voluntarily unemployed.' The worker's situation should be examined on a case-by-case basis.

What matters is not the manner in which the employment came to an end, but rather whether the person remains available for work after ending his prior period of employment. Such an approach is likely to be followed by the UK courts as would appear from Justice Walker and Judge Ward's *obiter* in *Secretary of State for Work and Pensions v FE* at para 33.

Finally, its should be noted that the English courts have ruled that registration as a job-seeker with 'the relevant employment office' under art 7(3) does not require a job-seeker to have made a claim for or be in receipt of jobseeker's allowance. In *Secretary of State for Work and Pensions v FE,* Justice Walker and Judge Ward held that '[t]here is no rule of law that such registration can be effected only by way of registering for jobseeker's allowance or national insurance credits, less still only by successfully claiming one or other of those benefits.' (at para 29)

Retaining the right of residence as a family member

The Directive, arts 12 -13 lays down the conditions under which the family members of an EU citizen retain the right to reside in the host Member States on a personal basis. These cover circumstances where the EU citizen leaves the Member State or dies while residing there (art 12), as well as divorce or termination of a registered partnership (art 13).

Right to retain residence following death or departure of the EU citizen

In the Directive, art 12 the family members will have a right to retain residence in the host Member State following the citizen's death or departure, provided they meet certain conditions.

One of the conditions under art 12(3) is that the family member has actual custody of the citizen's children, irrespective of their nationality, who reside in the Member State and are enrolled at an educational establishment. This provision is transposed by the EEA Regulations, reg 10(3)-(4). Reg 10(3) does not appear to be consistent with the Directive because it imposes a further condition that the child 'was attending an educational course in the United Kingdom immediately before the qualified person died' or left the UK.

It should be recalled that in its ruling in *Teixeira*, the CJEU confirmed (at para 74) that, for the purposes of Regulation 1612/68, art 12 it is not necessary for a child to have been in education at the time when one of his parents was working in the Member State concerned: 'the right of residence of the parent who is the child's primary carer, cannot therefore be subject to the

condition that one of the child's parents worked as a migrant worker in the host Member State on the date on which the child started in education.' Since the Court in that case drew a specific analogy between the Directive, art 12(3) and Regulation 1612/68, art 12 (at para 68), it is arguable that the *Teixeira* ruling should also apply in connection with the interpretation of art 12(3) and cannot be limited to circumstances where the child was in education immediately before the citizen leaves the host Member State. It is arguable that reg 10(3) therefore constitutes an incorrect transposition of art 12(3).

Right to retain residence following divorce
Under the Directive, art 13(2) (corresponding to reg 10(5)) the family members have a right to retain residence following divorce of the EU citizen from his spouse (or termination of the registered partnership) where the spouses have been married for at least three years and lived at least one year in the host Member State. The former spouse who has custody or a right of access to the children will also benefit from a right to retain residence. Victims of domestic violence also benefit from such a right.

Your Europe Advice regularly receives complaints concerning the UK authorities' refusal to recognise the right to remain of divorced family members who are not EU citizens. The refusal has often been made on the following grounds:

- failure to demonstrate that the family member's former spouse was an EU citizen, because the Home Office requires family members to produce their former spouse's original passport or identity card, which can be next to impossible following the breakdown in communication and trust which a divorce usually entails; or

- failure to demonstrate that the family member's former spouse had either worked, studied or been self-sufficient, because the Home Office requires family members to produce proof that their former spouse was working, studying or self-sufficient; again this may be excessively difficult for the family member to obtain from their former spouse after a divorce has been decreed.

These problems are exacerbated by the Home Office's reported refusal to accept that a family member's residence card issued under the EEA Regulations should serve as proof that they were the family member of an EU citizen, or accept that the EU citizen's registration certificate issued under the EEA Regulations constitutes proof that the former spouse was an EU citizen or exercising a right of residence under the Directive. The Home Office has also refused to communicate with other government departments that could provide verification of certain facts, citing the Data Protection Act 1998 as the reason for not doing so (even though the Act permits the processing of personal data when it is necessary for the exercise of a government department's functions). For example, the Home Office has refused to contact Revenue & Customs to request confirmation that an EU citizen was paying national insurance contributions and/or income tax and therefore working.[42]

Such practices are likely to be considered as unjustified interferences with the right of residence contrary to the stated aims of the Directive to safeguard the rights of family members in the event of divorce (or termination of a registered partnership) (recital 15), based on the consideration that the rights to 'family life and human dignity …, [require] measures [to] 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.'

[42] Petition 0594/2009 submitted to the European Parliament, PE 431.122 (17 December 2009).

Finally it should be noted that the EEA Regulations, reg 26(3) do not give any rights of appeal where an application is turned down on the basis that the applicant failed to show that their former spouse was an EU citizen[43]. This is contrary to the general right of appeal contained in the Directive, art 15(1) read in conjunction with art 31(1) and the general principle of EU law on the right to judicial protection, as will be explained in the second part of this article.

The Right to Permanent Residence

One of the notable innovations of the Directive was that it created a right of permanent residence for all EU citizens, not just former workers or the self-employed. Recital 17 explains the basis for such a novelty:

> 'Enjoyment of permanent residence by Union citizens who have chosen to settle long term in the host Member State would strengthen the feeling of Union citizenship and is a key element in promoting social cohesion, which is one of the fundamental objectives of the Union. A right of permanent residence should therefore be laid down for all Union citizens and their family members who have resided in the host Member State in compliance with the conditions laid down in this Directive during a continuous period of five years without becoming subject to an expulsion measure.'

It should be noted that prior to the entry into force of the Directive, EU citizens and their family members who had resided in the UK for four years or more were entitled to apply for indefinite leave to remain. The relevant parts of the Immigration Rules were examined by the CJEU in *Kaba* Case C-356/98 [2000] ECR I-2623 and *Kaba II* Case C-466/00 [2003] ECR I-2219. The European casework instructions, Chapter 6 explain the rules prior to 30 April 2006:

> 'Under paragraph 255 of the Immigration Rules (HC 395 (as amended by Cm 4851)) an EEA national (other than a student) and non-EEA family members may have been eligible to apply for permanent residence. This was <u>not</u> provided for in EC law, only in the United Kingdom immigration rules. To qualify under paragraph 255 a person had to have been issued with a residence permit or a residence document valid for 5 years, to have remained in the UK in accordance with the 2000 EEA Regulations for 4 years and to continue to do so.'

Indeed, it appears that the UK's own rules influenced the Commission's original proposal for the Directive (COM (2001) 257 at pp 15-16) which foresaw the acquisition of permanent residence after four years of continuous residence.

Regrettably, although the Directive, art 37 does permit Member States to adopt rules which are more favourable than the Directive, it does not contain a 'standstill' provision that would have had the effect of obliging the UK to maintain the former rules in force.

Establishing the right of permanent residence

In order to claim permanent residence under the Directive, art 16, EU citizens and their family members must have been 'legally' residing in the host Member State for at least 5 years, provided they have not been absent from the UK for more than 6 months, or for a longer period in the event of compulsory military service. A permitted absence of a maximum of 12 consecutive months is also allowed for important reasons such as pregnancy and childbirth,

[43] See also European casework instructions, Chapter 5.

serious illness, study or vocational training, or a posting as a worker in another Member State or a third country.

It is clear from the *travaux préparatoires* that such temporary absences do not affect continuity of residence from the Commission's original proposal for Directive 2004/38 (COM (2001) 257 at p 17):

> 'The duration of permitted absences not affecting continuity of residence has been extended to six months or more than six months where there are special reasons, such as compulsory military service, pregnancy and childbirth, study or work away.'

In addition, the family members of an EU citizen who are not EU citizens must demonstrate that they have resided with the EU citizen in the host Member State. However, this does not necessarily mean that the family members must have resided under the same roof as the EU citizen. In this connection, it will be remembered that in *Diatta* Case 267/83 [1985] ECR 567 the Court held that '[a] requirement that the family must live under the same roof permanently cannot be implied' (at para18) and that family members 'are not necessarily required to live permanently with [the EU citizen] in order to qualify for a right of residence' (para 22). This is the approach followed by the UK Upper Tribunal in the context of permanent residence in *PM (Turkey)* [2011] UKUT 89 (IAC).

The Directive, art 17 also foresees circumstances where workers or the self-employed are able to acquire permanent residence before having resided in the host Member State for a continuous period of five years, for example upon reaching retirement age. These incorporate the former provisions of Regulation 1251/70 [1970] OJ L 142/24 and Directive 75/34/EEC [1975] OJ L 14/10.

Calculation of the five year period

The Court of Justice has had the occasion to provide guidance on calculation of the five year period in *Lassal* Case C-162/09 (judgment of 7 October 2010), on a ruling for a preliminary reference from the Court of Appeal.

Periods of residence completed prior to 30 April 2006

In *Lassal*, the CJEU held that periods of residence that were completed prior to the date entry into force of the Directive on 30 April 2006 must be taken into account in accordance with earlier EU law instruments (at paras 35, 37 and 40). In addition, the Court held that a period of absence of less than two years prior to 30 April 2006 that might have taken place following the completion of five years' legal residence will not affect the acquisition of the right to permanent residence (at para 57).

The right to permanent residence is transposed into UK law by the EEA Regulations, reg 15. In this connection it should be noted that reg 15 requires that the person must have been resident in the UK 'in accordance with the Regulations', but is silent on the issue of residence acquired under previous regulations. The *Lassal* ruling is authority for the proposition that periods of residence completed in accordance with earlier EU law instruments must be taken into account for the purposes of the Directive. It is arguable that reg 15(1) is incompatible with the Directive insofar as it excludes periods of residence completed under the Immigration (European Economic Area) Regulations 2000 which were intended to implement EU law instruments that preceded Directive 2004/38.

Periods of residence completed prior to accession

Your Europe Advice has received complaints from citizens that the UK does not take into account periods of continuous residence prior to 30 April 2006, or 1st May 2007 in the case of Bulgarian and Romanian nationals, for the purposes of calculating the five year period necessary to enjoy a right of permanent residence under the Directive.

It should be recalled that periods of residence completed prior to the date of accession may have had a basis in EU law. Prior to the accession of the new Member States in 2004 and 2007, a number of Europe Agreements were entered into. These provided for the right of self-employed persons to establish themselves in the EU. For example the Europe Agreement concluded with Romania [1994] OJ L 357/2 provided for 'the right [of Romania nationals] to take up and pursue economic activities as self-employed persons and to set up and manage undertakings' within the EU (art 45). As a result, nationals from the newer Member States who had been granted leave to remain in the UK under the Immigration Rules, paras 211-221 (now deleted) which were intended to implement the provisions of the Europe Agreements, should count towards permanent residence.

This raises the wider question whether periods of lawful residence acquired under national immigration law should count towards the five year period under Directive, art 16. The English courts have so far interpreted the words 'legal residence' in that provision as referring to periods of residence completed exclusively in accordance with EU law (*GN (Hungary)* [2007] UKAIT 73 (AIT) at para 10) and that it does not cover 'residence lawful under domestic law' (*McCarthy* [2008] EWCA Civ 841 at para 31, also followed in *Lekpo-Bozua* [2010] EWCA Civ 909 at para 18).

The problems with such an approach have been eloquently illustrated by Judge Rowland in RM [2010] UKUT 238 (AAC) at para 15:

> 'Domestic immigration legislation does not expressly recognise the concept of a right of residence except in the 2006 Regulations, which implement Directive 2004/38/EC. However, leave to enter or remain, granted under the Immigration Act 1971, amounts to recognition of a right of residence. Unfortunately, the immigration authorities regard decisions under the 1971 Act as being matters of immigration "control", not applicable to most European Union citizens who are free to enter the United Kingdom under regulation 11 of the 2006 Regulations. They do not seem to appreciate that, since 2004 [when eligibility for social security benefits in the UK became subject to claimants being able to demonstrate a right of residence], it has been important for European Union citizens to have decisions that establish not merely a right to be present in the United Kingdom but also a right of residence and that decisions under the 1971 Act are not concerned only with lawful presence but also with lawful residence.'

Although the CJEU cases in *Trojani* and *Martínez Sala* would tend to suggest that a right of residence acquired under national immigration law should be considered as lawful residence under the Directive, the position has not been the subject of a ruling that would provide unequivocal authority for such a proposition.

Fortunately, the issue has come again before the Court of Justice in a number of references for preliminary rulings from the German courts concerning periods of lawful residence completed by A8 nationals under national immigration law prior to the accession of the new Member States (*Ziolkowski* Case C-424/10 [2010] OJ C 301/13 and *Szeja* C-425/10 [2010] OJ C 301/13). Whatever the outcome of these references, they should provide an opportunity for

the CJEU to clarify the interaction between the Directive and national immigration rules, at least in connection with the right of permanent residence.

This article will conclude in the next issue of the journal which will examine residence formalities, the right to equal treatment, loss of residence, and appeal rights. Recommendations for the amendment of both the Directive and the EEA Regulations will also be made.

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