

Five Years of the Citizens Directive in the UK – Part 2

Anthony Valcke

Journal of Immigration, Asylum & Nationality Law, Vol 25, No 4, 331-357

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 covered the scope and beneficiaries of the Directive, the right of residence and the right of permanent residence. Part 2 examines the 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.

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. Despite the Directive's stated aim to simplify and strengthen the rights of residence of EU citizens and their family members, the enquiries received by Your Europe Advice¹ – the European Commission's independent service that provides information to individuals on their rights under EU law – show that they continue to face difficulties when exercising their right to reside in the UK.

Part 1 examined the extent of the difficulties faced by EU citizens and their family members in demonstrating that they fall within the scope of the Directive or that they meet the conditions that apply to their right of residence whether as workers, students or self-sufficient persons. It also looked at the challenges faced by EU citizens and their family members in obtaining recognition by the UK authorities of their right of permanent residence.

Part 2 now examines 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 in practice. The absence in the Immigration (European Economic Area) Regulations 2006 (SI 1003/2006) of a provision corresponding to art 24 of the Directive, which gives a right of equal treatment to EU citizens and their family members, is also the source of problems, particularly in this age of austerity. Complaints received by Your Europe Advice illustrate that EU citizens and their family members often face considerable difficulties in exercising their right to equal treatment in accessing social advantages such as social welfare benefits, healthcare and study aids. The discussion will then turn to the circumstances where the right of

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

residence may be lost or restricted. Although EU citizens and their family members benefit from certain procedural safeguards, the EEA Regulations are not fully compatible with the Directive as will be seen in more detail below. The article concludes by providing recommendations for the amendment of both the Directive and the EEA Regulations.

Problems Relating to Residence Formalities

In all the cases which have come before it concerning the interpretation of the Directive, the Court of Justice of the European Union (CJEU) has observed that the aim of the Directive is *inter alia* to simplify the formalities involved in the exercise of the right of free movement.

To achieve this objective, the Directive attempts to lay down the formalities governing the issue of registration certificates, residence cards and documents attesting to permanent residence (arts 8, 10, 19 and 20). As recital 14 makes clear the Member States are precluded from requiring documents which are not specified in the relevant provisions of the Directive (as confirmed by the CJEU in *Metock*² = at para 53):

‘The supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.’

It should be noted that the EEA Regulations do not require EU citizens and their family members to obtain residence documentation. However, they may choose to do so if they wish since this may help them to demonstrate that they have a right of residence in the UK in their dealings with local authorities and service providers which require proof of residence (such as banking institutions when opening a bank account). For family members who are not EU citizens, it also gives them the added advantage of being able to demonstrate that they have a right to live and work in the UK.

Regrettably the complaints handled by Your Europe Advice suggest that the processing of applications under the EEA Regulations by the UK authorities is fraught with delays and suspicion – if not outright hostility – particularly in connection with the processing of applications submitted by family members who are not EU citizens.

Excessive requests for information and documents

In connection with the processing of applications by the UK authorities, complaints received by Your Europe Advice demonstrate that the UK authorities are often requesting information and documents which are not listed in the Directive, contrary to recital 14. It should be noted that the EEA Regulations merely require applicants to provide ‘proof’ that applicants have a right to reside or a derived right as a family member without further specifying the means of establishing such proof.

For example, the various application forms which citizens and their family members are required to complete ask for irrelevant information not provided for under the Directive such as:

- questions relating to their travel history, including whether they have ever been issued or refused a visa;
- questions relating to their previous employment history;
- questions as to whether they have ever engaged in criminal conduct; and

² Case C-127/08 [2008] ECR I-6241.

- questions concerning their accommodation, including the nature of the property.

Other examples relate to students being asked to demonstrate that the course they have enrolled on comprises a minimum number of hours of tuition, even though there is no such requirement under the Directive.

It is clear that the imposition of additional requirements on applicants which go beyond those specifically laid down in the Directive represents reprehensible ‘divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence’ within the meaning of recital 14 of the Directive.

Problems regarding the recognition of civil status documents

In some cases the documents provided by family members have not been considered adequate. Your Europe Advice has received complaints that the UK immigration officials sometimes do not consider a marriage certificate as satisfactory or sufficient proof of a family relationship. One citizen was requested to obtain an attestation of his marriage certificate from the British Embassy in the country where he was married even though he had already left that country a number of years before. Such requests go beyond the margin of discretion permitted to national authorities by the Directive.

The CJEU has previously ruled in *Commission v Italy*³ that the national authorities could not require citizens and their family members to have documents certified by the consular authorities of their Member State of origin and held that ‘by limiting the means of proof which may be relied upon, and in particular by providing that certain documents must be issued or certified by the authority of a Member State, the Italian Republic has exceeded the limits imposed upon it by Community law.’ (at para 37).

In *Dafeki*⁴, the Court ruled that ‘the administrative and judicial authorities of a Member State must accept certificates and analogous documents relative to personal status issued by the competent authorities of the other Member States, unless their accuracy is seriously undermined by concrete evidence relating to the individual case in question.’

In addition, the Commission’s guidance on implementation of the Directive (COM (2009) 313) states that ‘Member States may require that documents be translated, notarised or legalized where the national authority concerned cannot understand the language in which the particular document is written, or have a suspicion about the authenticity of the issuing authority.’

The absence of EU rules on the mutual recognition of documents relating to personal status (such as birth certificates and marriage certificates) is exacerbating these problems and is leading to divergent administrative practices in residence formalities. At present the formalities for recognising official documents are partly governed by the Convention Abolishing the Requirement of Legalisation of Foreign Public Documents (The Hague, 5 October 1961), which institutes the ‘apostille’ certificate. In other cases a bilateral agreement may exist that provides for the automatic recognition of official documents, such as the bilateral agreement signed between the UK and Belgium relating to birth, marriage, death and divorce certificates (Brussels, 21 December 1928).

In view of the kaleidoscope of rules regulating official documents, it would be ideal – and beneficial for citizens – if the EU was able to move to a situation where there is mutual recognition of official

³ Case C-424/98 [2000] ECR I-4001.

⁴ Case C-336/94 [1997] ECR I-6761 at para 19.

documents issued by the national authorities in Member States without the need to translate or “legalise” documents. One option would therefore be for the EU to adopt a Regulation incorporating certain aspects of the Hague Convention into EU law, following the approach taken by the EU in adopting the so-called Family Maintenance Regulation 4/2009 [2009] OJ L 7/1 as regards the enforcement and mutual recognition of judgments relating to maintenance obligations which refers back to the Convention on the International Recovery of Child Support and other Forms of Family Maintenance (The Hague, 23 November 2007). Better still, this could also be complemented by establishing a standardised European format for documents relating to personal status, as is presently the case for documentation relating to social security within the EU under Regulations 883/2004 [2004] OJ L 200/1 and 987/2009 [2009] OJ L 284/1.

In this context, the Commission has announced that it ‘will facilitate the free circulation of civil status documents (e.g. birth certificates) by proposing legislative instruments in 2013’ (EU Citizenship Report 2010 ‘Dismantling the obstacles to EU citizens’ rights’, COM (2010) 603 (27 October 2010)). This has been followed by a public consultation exercise based upon a Green Paper entitled ‘Less bureaucracy for citizens: promoting free movement of public documents and recognition of the effects of civil status records’ in which it sought views on a variety of proposed actions to enhance the cross-border recognition of public documents (COM (2010) 747 (14 December 2010)).

Considerable delays in the processing of applications

The Directive obliges the national authorities to issue a registration certificate immediately upon application by an EU citizen (art 8(2)) and within six months of an application being submitted by a family member for a residence card or permanent residence card (arts 10(1) and 20(1) respectively). Despite the existence of these deadlines, the issue of residence documents by the UK authorities is subject to considerable delays. In late 2009, the Government reported that 27,120 (38%) out of 71,428 pending applications for residence cards had been outstanding for more than six months⁵.

As has been noted elsewhere⁶, the problem is of the UK’s own making. In 2008, as part of the reorganisation within the Home Office that led to the creation of the UK Border Agency, approximately 140 case workers were taken off European casework leaving only around 25 caseworkers to handle all applications under the EEA Regulations. This effectively meant each caseworker would have been required to deal with over 2,500 applications on average per year in order to ensure compliance with the timelines contained in the Directive. This is no small feat to achieve, however efficient the UKBA caseworkers and their procedures may be. In addition, although the Public Enquiry Offices (PEO) can deal with applications on the same day, this facility is not made available to family members who are not EU citizens, even though the PEOs are available to those non-EU citizens making applications under the UK immigration rules. Nor can PEOs be used by applicants who avail themselves of the services of a legal representative, contrary to the situation of non-EU applicants under the immigration rules who are allowed to use a legal representative to submit an application on their behalf at PEOs. It would therefore appear that the delays are being caused by a failure of the UK authorities to provide adequate resources to the processing of applications under the EEA Regulations.

In its latest report on EU citizenship ‘On progress towards effective EU Citizenship’ covering the period 2007-2010 (COM (2010) 602), the Commission singled out the UK for its delays in processing applications for residence documents. The Home Office has since ceased publishing details of

⁵ Hansard, HC Vol 496, col 1912w (9 September 2009)

⁶ Presentation by E. Guild at the UK national seminar, TRESS (Training and Reporting on European Social Security) network, London (27 June 2008).

processing times on its website, which had shown that delays of around a year were not uncommon⁷. In its report, at part 2.3.3, the Commission explains further the extent of the UK's failure to comply with the time limits prescribed by the Directive:

‘One of the main cases dealt with during the reporting period concerned the delays in processing residence applications of EU citizens and their families by the United Kingdom authorities. Since October 2008, the Commission has registered more than 250 individual complaints by EU citizens and their families alleging that the UK authorities failed to meet the deadlines imposed by national and EU law for handling their residence applications. Following contacts with the UK, the UK authorities put in place a comprehensive plan including the significant expansion (by 400%) of the number of caseworkers making decisions on European applications and the time for handling new applications has returned to the appropriate service standards, as required by Directive 2004/38/EC.’

Despite these assurances, Your Europe Advice continues to receive complaints relating to delays in the processing of applications for residence documents. It is to be hoped that the announced cuts in public services contemplated by the coalition government do not have an adverse effect on the UK's ability to comply with the Directive. Should the delays continue or even worsen, it would not be surprising if the Commission were to consider initiating formal proceedings against the UK as it has done in the past against other recalcitrant Member States. For example, in 2003, the Commission initiated infringement proceedings against Spain. In the resulting case, *Commission v Spain*⁸, the CJEU ruled that Spain had failed to comply with its obligations under EU law by not processing applications for residence cards within the six months stipulated under Directive 64/221/EEC (OJ 1964 56/850), which the Directive has since replaced.

As if these delays were not bad enough, applicants are placed under the further inconvenience of having to provide their original passports and other documents to the UKBA, which are retained by the authorities until completion of the application process. As a result applicants are finding themselves unable to travel, open bank accounts, apply for a national insurance number, accept job offers or undertake other formalities that require them to provide evidence of their identity by producing their passport. In some cases this has led to citizens and their families having to cancel holiday plans which resulted in them incurring considerable financial loss following the forced cancellation of travel and hotel bookings. This practice could be considered an unjustified restriction on the rights of free movement and residence under art 21 TFEU. Although it would be open to those affected to lodge a claim for damages on the basis of *Brasserie du Pêcheur & Factortame*⁹, the costs of doing so are prohibitive and would likely exceed the amount of damages they could obtain. This situation could be addressed by allowing all applications under the EEA Regulations to have recourse to PEOs whether or not applicants choose to have recourse to the services of a legal representative.

⁷ The EP Study at p 152 also identified the problem of delays in the processing of residence documents:

‘Based on information published on the Home Office's website, we understand that there are considerable delays in processing applications for residence cards of family members who are third-country nationals. According to the Home Office, it currently takes approximately 11 months to process an application for a residence card. This clearly does not comply with Article 10(1) of the Directive and Regulation 17(3) which both provide that the residence card must be issued ‘no later than six months’ from the date on which they submit the application.’

⁸ Case C-157/03 [2005] ECR I-2911.

⁹ Joined Cases 46 & 48/93 [1996] ECR I-1029.

Questionable use of protections against marriages of convenience

The Directive, art 35 allows Member States to ‘adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience.’

The Commission has provided extensive guidance on the issue of marriages of convenience (COM (2009) 313 at part 4.2) which it is worth quoting here:

‘A marriage cannot be considered as a marriage of convenience simply because it brings an immigration advantage, or indeed any other advantage. The quality of the relationship is immaterial to the application of Article 35. ...

Measures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights. They must not undermine the effectiveness of Community law or discriminate on grounds of nationality.

Member States may define a set of indicative criteria suggesting the possible intention to abuse the rights conferred by the Directive for the sole purpose of contravening national immigration laws. National authorities may in particular take into account the following factors:

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

The above criteria should be considered possible triggers for investigation, without any automatic inferences from results or subsequent investigations. Member States may not rely on one sole attribute; due attention has to be given to all the circumstances of the individual case. The investigation may involve a separate interview with each of the two spouses. ...

The burden of proof lies on the authorities of the Member States seeking to restrict rights under the Directive. The authorities must be able to build a convincing case while respecting all the material safeguards described in the previous section. ...

Investigations must be carried out in accordance with fundamental rights, in particular with Articles 8 (right to respect for private and family life) and 12 (right to marry) of the ECHR (Articles 7 and 9 of the EU Charter).

Ongoing investigation of suspected cases of marriages of convenience cannot justify derogation from the rights of third country family members under the Directive, such as the

prohibition of the right to work, seizure of passport or delay of the issue of a residence card within six months from the date of application. These rights can be withdrawn at any time as a result of subsequent investigations.’

Despite this extensive guidance, the complaints received by Your Europe Advice demonstrate that UK authorities have used spurious arguments to reject applications for residence documents on the basis that a relationship is not genuine. The reasons which have been cited by UKBA officials to reject applications include the following:

- a spouse had applied for an EEA family permit the day after getting married, even though the caseworker was provided evidence that the couple was expecting a child and therefore the spouse’s prompt return to the UK was justified on medical grounds;
- a person’s spouse was reportedly not present at the airport to meet them when joining them in the UK;
- a spouse failed to provide the Home Office with a copy of his divorce decree showing a previous marriage had been dissolved;
- only one of the spouse’s name appears on the couple’s tenancy agreement; or
- the applicant’s spouse is not registered on the electoral register at the couple’s home address.

None of these reasons could by themselves or in combination constitute conclusive evidence of a marriage of convenience. Although these cases were ultimately resolved with a favourable outcome for the citizens and their family members concerned, they demonstrate that the UK authorities are making questionable use of the Directive’s provision to combat marriages of convenience.

Increasing incidence of refusals

It should be noted with some concern that the Home Office has been refusing applications for residence documents with increasing regularity since the Directive came into force. According to the Home Office’s control of immigration statistics¹⁰, in 2009 it issued residence documents to a total of 71,795 EEA citizens and their family members, compared to totals of 40,700 documents issued in 2008, 75,210 documents in 2007 and 75,830 documents in 2006 (excluding worker registrations and worker authorisations). By comparison, a total of 10,850 applications for residence were rejected in 2009, representing a rate of refusal of 13% for 2009. This is up from a corresponding rate of refusal of 12.5% in 2008, 9.3% in 2007 and 6.1% in 2006. It is regrettable that the statistics collated by the Home Office on the number of appeal cases are not disaggregated to distinguish EEA appeals from other immigration appeals so that further analysis could be carried out to determine the final outcome of such cases.

The Right to Equal treatment

EU citizens and their family members who reside in a host Member State must enjoy equal treatment with nationals of that Member State under the Directive, art 24(1). This right is derived from art 18 TFEU that prohibits ‘any discrimination on grounds of nationality’. In addition, the Directive, art 23 grants a right to work (in an employed or self-employed capacity) to family members who have a right of residence irrespective of their nationality, which would likely extend to ‘other family members’ who are granted the right to reside with the EU citizen under art 3(2).

¹⁰ Control of Immigration Statistics United Kingdom 2009 (Home Office Statistical Bulletin 15/10) (August 2010) and Control of Immigration Statistics United Kingdom 2006 (Cm 7197) (August 2007).

For example, these rights would allow family members who are not EU citizens to rely on the Professional Qualifications Directive 2005/36 [2006] OJ L255/22 in order to gain entry to a regulated profession in the host Member State (see Order of the Court in *Mayeur*¹¹ and Commission's FAQs on Directive 2005/36, D/3418/5/2006 (24 July 2008), part 8).

No corresponding provision to art 24(1) can be found in the EEA Regulations, which is leading to a wide variety of problems in practice, particularly as regards social assistance, healthcare and study aids.

Limited right to social assistance

The right to equal treatment under the Directive is not absolute. The Directive, art 24(2) explicitly limits the scope of the right of equal treatment in relation to 'social assistance' according to the nature of the citizen's activity and the length of residence and in the host Member State.

As a result, a distinction needs to be made according to the circumstances surrounding the nature and duration of residence:

- during the first three months of their residence, Member States are not obliged to grant social assistance to EU citizens and their family members except for workers and the self employed (art 24(2) read in conjunction with Regulation 1612/68, art 7);
- during the time they are looking for a job, Member States are not obliged to grant social assistance to job-seekers and their family members (art 24(2) read in conjunction with art 14(4)(b));
- workers, the self-employed and those having retained the status of worker, together with their family members, have a right to social assistance after three months of residence, including financial assistance for studies (art 24(2) read in conjunction with Regulation 1612/68, arts 7-12);
- however, until such time as they have acquired permanent residence, students and self-sufficient persons, together with their family members, can obtain social assistance depending on their degree of integration in the host Member State but only to the extent that they do not become an unreasonable burden on the social assistance system of the host Member State (*Grzelczyk*¹² and *Bidart*¹³); moreover, Member States are not obliged to grant 'maintenance aid for studies, including vocational training, consisting in student grants or student loans' to students or self-sufficient persons and their family members until they have acquired permanent residence (art 24(2) and *Förster*¹⁴); and
- once permanent residence is acquired, equal treatment is absolute and therefore permanent residents whatever the nature of their activity have an absolute right to social assistance under the same conditions as nationals of the host Member State (art 24(2) read in conjunction with art 16(1)).

¹¹ Case C-229/07 [2008] ECR I-0008.

¹² Case C-184/99 [2001] ECR I-6193.

¹³ Case C-209/03 [2005] ECR I-2119.

¹⁴ Case C-158/07 [2008] ECR I-8507.

Nonetheless, art 24(2) must be examined in the context of the long line of cases in which the CJEU has consistently upheld the rights of EU citizens to enjoy equal treatment when having recourse to social assistance in the host Member State.

Towards a restrictive concept of ‘social assistance’

Not all benefits and ‘social advantages’ will necessarily be considered as ‘social assistance’ within the meaning of the Directive, art 24(2). This was made clear in *Vatsouras & Koupatantze*¹⁵. In its judgment at paras 44-45, the CJEU ruled that ‘the derogation provided for in Article 24(2) of Directive 2004/38 must be interpreted in accordance with [art 45 TFEU]. Benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting “social assistance” within the meaning of Article 24(2) of Directive 2004/38’.

Such a ruling was primarily motivated by a desire to ensure that the Directive should not lead to an outcome that would constitute a move away from the CJEU’s earlier rulings in *Collins*¹⁶ and *Ioannidis*¹⁷. In those cases the Court had held that ‘in view of the establishment of citizenship of the Union and the interpretation of the right to equal treatment enjoyed by citizens of the Union, it is no longer possible to exclude from the scope of Article 39(2) EC a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State’ (*Collins* at para 63 and *Ioannidis* at para 22).

Furthermore, in *Chakroun*¹⁸ the CJEU ruled in the context of Directive 2003/86 [2003] OJ L 251/12 (the Family Reunification Directive), that ‘the concept of “social assistance system” is a concept which has its own independent meaning in European Union law and cannot be defined by reference to concepts of national law’ (at para 45). After drawing a specific analogy with the *Eind* judgment concerning the Citizens Directive at para 46, the Court then went on to hold that ‘the concept of “social assistance” ... must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed.’ (at para 49).

The *Vatsouras & Koupatantze* case should also be seen as part of the wider need to ensure that any derogation from the fundamental freedoms of EU law should be narrowly interpreted as the Court has consistently held in a long line of cases including *Van Duyn*¹⁹, *Kempf*²⁰, *Lawrie-Blum*²¹, *Yiadom*²² and *Sayn-Wittgenstein*²³.

In *Orfanopoulos and Others*²⁴, the CJEU emphasised the point concerning derogations that affect the freedoms which EU citizens are to enjoy under the Treaties:

‘It must be added that a particularly restrictive interpretation of the derogations from that freedom [of movement of workers] is required by virtue of a person’s status as a citizen of the Union. As the Court has held, that status is destined to be the fundamental status of

¹⁵ Joined Cases C-22/08 & C-23/08 [2009] ECR I-4585.

¹⁶ Case C-138/02 [2004] ECR I-2703.

¹⁷ Case C-258/04 [2005] ECR I-8275.

¹⁸ Case C-578/08 [2010] ECR I-1839.

¹⁹ Case 41/74 [1974] ECR 1337.

²⁰ Case 139/85 [1986] ECR 1741.

²¹ Case 66/85 [1986] ECR 2121.

²² Case C-357/98 [2000] ECR I-9265.

²³ Case C-208/09 [2010] ECR not yet reported, judgment of 22 December 2010.

²⁴ Joined Cases C-482/01 & C-493/01 [2004] ECR I-5257 at para 65.

nationals of the Member States (see, in particular, Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 31, and Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 61)

The point was also firmly made in *Chakroun* at paras 42-43 in reference to the requirement under the Family Reunification Directive:

‘Art 7(1)(c) of the Directive ... allows Member States to require evidence to have stable and sufficient resources which are sufficient to maintain himself and members of his family, without recourse to the social assistance system of the Member State concerned. ...

Since authorisation of family reunification is the general rule, the faculty provided for in Article 7(1)(c) of the Directive must be interpreted strictly.’

Since the Directive, art 24(2) essentially consists in a derogation from the fundamental principle of non-discrimination and the fundamental freedoms, it is arguable that a narrow meaning should be attributed to the concept of ‘social assistance’ for the purposes of determining whether certain benefits are subject to that derogation.

This is of particular importance regarding healthcare and other social security benefits falling within the scope of Regulations 883/2004 [2004] OJ L 166/1 and 987/2009 [2009] OJ L 289/1²⁵ which aim to coordinate the social security rules within the EU. In this connection it must be emphasised that Regulation 883/2004, art 3(5) already operates a distinction between ‘social security benefits’ (ie contribution-based benefits and some income-based benefits which fall within its scope) and ‘social assistance’, the latter being excluded from its scope.

As has been noted elsewhere, Regulation 1408/71 on the coordination of social security was not ‘subject to the fulfilment of the criteria for obtaining a residence right under Directive 2004/38 or its predecessors. Yet, the legislature was perfectly able to do so. ... The same is true for the corresponding provisions in Regulation 883/2004 which was adopted on the same day as Directive 2004/38 (on 29 April 2004)...’²⁶

Adopting a restrictive approach to the meaning of ‘social assistance’ under art 24(2) as suggested by the Court in *Vatsouras & Koupatantze* and *Chakroun* would also have the added advantage of ensuring a more structured co-existence between the Directive and Regulation 883/2004 and eliminate potential conflicts between the two instruments.

Such an approach would guarantee that Regulation 883/2004 operates as intended and is not deprived of its ‘useful effect’. Accordingly, during the first three months of residence, workers and their family members would be able to claim social security benefits governed by Regulation 883/2004, since no condition is included in that instrument to the effect that claimants must have completed a minimum period of residence, which would essentially cover contribution-based benefits and so-called ‘special non-contributory benefits’. Such an approach would also ensure that the conditions of eligibility for social security benefits for citizens and their family members would solely be determined by reference to national law to the same extent as they apply to a Member State’s nationals, subject to compliance with Regulation 883/2004.

²⁵ Previously Regulation 1408/71 [1971] OJ L 149/2 and Regulation 574/72 [1972] L 74/1.

²⁶ H. Verschuere ‘European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems’ (2007) Vol 9 Eur J Migration L 307, at 325.

Limiting the concept of ‘social assistance’ to ‘assistance which compensates for a lack of stable, regular and sufficient resources’ as indicated in *Chakroun* would mean that obtaining benefits covered by Regulation 883/2004, such as having recourse to NHS treatment, could not be considered to constitute ‘social assistance’ and would therefore not be deemed as placing a burden on the UK’s social assistance system.

The problems in taking a different approach that considers social assistance as including benefits that fall within the scope of Regulation 883/2004 and therefore subject to art 24(2) of the Directive are evident. Such an approach would legitimise the refusal of the UK authorities to recognise the rights of EU citizens and their family members to reside as students or self-sufficient persons if they rely on the NHS for their healthcare needs while in the UK, because that could be considered as placing a burden on the UK’s social assistance system.

Equal treatment and healthcare

The Directive makes the right of residence of students and self-sufficient persons conditional upon their having comprehensive sickness insurance cover in place in the host Member State.

The obligation to have healthcare cover under the Directive is not new: it was also contained in Directive 93/96 on the right of residence of students, Directive 90/364 on residence in general and Directive 90/365 on the rights of workers and self-employed persons who have ceased their occupational activity, which have all since been replaced by the Directive. Given that the CJEU ruled in *Metock* at para 59 that ‘Union citizens cannot derive less rights from that directive [2004/38] than from the instruments of secondary legislation which it amends or repeals’, this requirement must be seen as corresponding for all intents and purposes to the previous requirement for ‘sickness insurance in respect of all risks in the host Member State’ found in Directives 90/364, 90/365 and 93/96.

However, it appears that the requirement in the Directive that students and inactive persons obtain ‘comprehensive sickness insurance cover’ has been used as a pretext by several Member States to make changes to their national rules on healthcare coverage. The effect of these changes is to require students and inactive persons to obtain private healthcare insurance, and deprive citizens from universal health coverage that EU citizens previously enjoyed in several Member States. Your Europe Advice has received numerous complaints from citizens and their family members concerning such changes when seeking to have their residence rights recognised by authorities in the UK, France and Spain amongst others.

Since June 2011, the Home Office now accepts that the European Health Insurance Card issued by other Member States constitutes evidence of comprehensive sickness insurance cover for EU citizens and family members who are temporarily staying in the UK and have, within the meaning of Regulation 883/2004, retained their residence in another Member State. This followed extensive correspondence lasting several months between the Home Office and a number of EU citizens being advised by Your Europe Advice in connection with the effects of the CJEU’s ruling in *Baumbast*²⁷.

However, the Home Office still does not accept as sufficient proof of ‘comprehensive sickness insurance cover’ evidence that citizens and their family members are registered with the National Health Service (European casework instructions, Chapter 4, Annex A). It should also be noted that

²⁷ Case C-413/99 [2002] ECR I-7091.

the Home Office’s view conflicts with those expressed by the Department of Health and HM Revenue and Customs on their websites.^{28 29}

The Home Office’s casework instructions appear to be based in part upon the Court of Appeal’s ruling in *W (China) and X (China)*³⁰, in which Buxton LJ considered that only private healthcare insurance would fulfil the requirement for ‘sickness insurance’ under Directive 90/364, at paras 10-11:

‘[t]hat argument [ie NHS treatment constitutes comprehensive sickness insurance cover] overlooks the fundamental reason for the insurance requirement that was identified as the basis of the scheme of the Directive in *Chen*: to prevent the presence of the EU citizen placing a burden on the host state. Use of free state medical services exactly creates such a burden. ... The NHS scheme is not financed solely out of the social security scheme, but is largely tax-financed. Contribution to the social security fund cannot therefore serve as any sort of proxy for insurance designed to remove from the *taxpayer* the burden of providing health care.’

However, these are incorrect reflections on the state of the law. As Sedley LJ correctly remarked in his dissenting opinion in *W (China) and X (China)* at para 26:

‘I would enter a caveat as to whether the Directive, when it speaks of “sickness insurance in respect of all risks” is necessarily speaking of private health insurance. The National Health Service, although now heavily funded out of general taxation, is in origin and in law based on national insurance. Nothing would have been easier, in the Directive and in the [Immigration] Rules, than to include the word “private” if that alone was what was meant – especially since, so far as I know, private insurance rarely if ever covers all risks, such as the risk of requiring long-term medical care’

EU law does not dictate how the Member States finance their healthcare systems and this remains a policy decision for each Member State. As the CJEU has had cause to remark in *Piatomske*³¹:

‘Since Community law does not detract from the power of the Member States to organise their own social security systems ... , in the absence of harmonisation at Community level it is for the legislation of the Member State concerned to determine the conditions governing the right or duty to be insured with a social security scheme, the level of contributions payable by insured persons ... and the income to be taken into account when calculating social security contributions ...’

Hence, it remains a policy decision for the UK government to choose to maintain a healthcare system providing universal coverage to all residents and decide to fund it by means of both taxation revenue and national insurance contributions. It could instead choose a system like that in operation in some EU countries which is funded solely through social security contributions and requiring

²⁸ The Department of Health’s website states ‘[a]nyone who is deemed ordinarily resident in the UK is entitled to free NHS hospital treatment in England Anyone who is not ordinarily resident is subject to the National Health Service (Charges to Overseas Visitors) Regulations 2011.’:

http://www.dh.gov.uk/en/Healthcare/Entitlementsandcharges/OverseasVisitors/Browsable/DH_074374

²⁹ The website of Revenue & Customs states: ‘[c]omprehensive sickness cover includes the National Health Service (NHS) cover’:

<http://www.hmrc.gov.uk/manuals/tcmanual/TCM0320400.htm>

³⁰ [2006] EWCA Civ 1494.

³¹ Case C-493/04 [2006] ECR I-2369 at para 32.

every domiciled person to affiliate to a social security scheme. Whatever the differences in funding of social security systems, these should not be used as a justification to deny EU citizens their right to reside when they have a right to healthcare under the same conditions as nationals.

The issue of sickness insurance in the UK has previously been examined by the CJEU in *Baumbast*³². In that case, the UK authorities had refused to recognise the right of residence as a self-sufficient person to the family members of a German national on the grounds, *inter alia*, that they did not have sickness cover in the UK even though they had sickness cover in Germany as evidenced by Form E-111 which has since been replaced by the EHIC.

Although the CJEU has yet to rule on the requirement for ‘comprehensive sickness insurance cover’ specifically under the Directive, the Commission has issued guidance on the Directive (COM (2009) 313 at part 2.3.2) which explains what is meant by the concept of ‘comprehensive healthcare insurance cover’:

‘Any insurance cover, private or public, contracted in the host Member State or elsewhere, is acceptable in principle, as long as it provides comprehensive coverage and does not create a burden on the public finances of the host Member State. In protecting their public finances while assessing the comprehensiveness of sickness insurance cover, Member States must act in compliance with the limits imposed by Community law and in accordance with the principle of proportionality.’

The requirement for EU citizens and their family member to have comprehensive sickness insurance cover must also be determined with due regard to the right to equal treatment under the Directive.

Under the National Health Service Act 2006 (NHS Act 2006) and associated regulations, an EU citizen and his family members are entitled to free healthcare under the same circumstances as British nationals living in the UK. Under UK law, persons who are ‘ordinarily resident’ have a right to treatment free of charge under the NHS Act 2006, s 1(3) (previously the NHS Act 1977, s 1(2)), as confirmed by the Court of Appeal in *YA v. Secretary of State for Health*³³.

‘Ordinary residence’ is not defined in UK legislation, but the leading case on the meaning of the term remains Lord Scarman’s ruling in *R v. Barnett ex parte Shab*:

“ordinarily resident” refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.

There is, of course, one important exception. If a man’s presence in a particular place or country is unlawful, eg in breach of the immigration laws, he cannot rely on his unlawful residence as constituting ordinary residence.³⁴

In addition, under s. 175 of the NHS Act 2006, s 175 (previously NHS Act 1977, s 171), the Secretary of State for Health may make and recover charges from persons who are not ordinarily

³² Case C-413/99 [2002] ECR I-7091.

³³ [2009] EWCA Civ 225.

³⁴ [1983] 2 AC 309 at 343.

resident in the United Kingdom. The UK authorities have accordingly adopted the NHS (Charging of Overseas Visitors) Regulations 2011 SI 2011/1556 (the NHS Charges Regulations)³⁵.

Even if a person is not considered as ordinarily resident in the UK, under the NHS Charges Regulations, that person will still be exempt from paying charges for the NHS and therefore entitled to free NHS treatment. This is the case for workers and the self-employed (reg 8), students, (reg 8); permanent residents (reg 8), those having resided in the UK for at least a year (reg 7), those entitled to treatment under Regulation 883/2004 (previously Regulation 1408/17) (reg 9), and their spouse, registered partner or children who live with them in the UK (reg 24). Reg 23 also exempts EU citizens visiting the UK and their family members from incurring NHS charges ‘for the purpose of giving treatment the need for which arose during the visit’.

It is clear from the above that the NHS Charges Regulations provide that EU citizens and their family members have a right to NHS treatment free of charge, except arguably self-sufficient persons in their first year of residence in the UK, in the event they are not otherwise entitled to treatment by virtue of having retained their ‘residence’ in another Member State under Regulation 883/2004 and remain affiliated with social security in that country.

The right to equal treatment prescribed by the Directive, art 24 means that such citizens must be able to avail themselves of the provisions of the NHS Act 2006 and the NHS Charges Regulations under the same conditions as British nationals living in the UK. To consider otherwise, or to subject EU citizens and their family members to more onerous conditions than those that apply to British citizens who reside in the UK, would constitute a breach of the right to equal treatment under the Directive, art 24.

Indeed, although Member States remain competent to decide on the conditions governing the right or obligation to join a social security scheme and the conditions for entitlement to a social security benefit, the CJEU has consistently held that these are matters ‘to be determined by the legislation of each Member State, provided always that there is no discrimination in that connection between the nationals of the host State and those of other Member States’ (*Coonan*³⁶ at para 12, *Paraschi*³⁷ at para 15, and *Stüber & Pereira*³⁸ at para 38). Any measure that prevents EU citizens from benefiting from national rules on healthcare coverage under the same conditions as they apply to nationals of the Member State in question would therefore constitute prohibited discrimination on the grounds of nationality.

As a result, it is arguable that since, as a matter of UK legislation, an EU citizen and his family members are entitled to free NHS treatment – either because they are deemed ‘ordinarily resident’ or because they are exempt under the NHS Charges Regulations – they must therefore be considered as having comprehensive sickness insurance cover in the UK. The current practice of the Home Office that does not take into account entitlement to free NHS treatment as evidence of ‘comprehensive sickness insurance cover’ under the Directive is likely to constitute ‘a disproportionate interference with the exercise of that right [of residence]’ within the meaning of the CJEU’s ruling in *Baumbast* at para 93.

³⁵ Previously the NHS (Charging of Overseas Visitors) Regulations 1989 SI 1989/306 as amended by SI 1991/438, SI 1994/1535, SI 2000/602, SI 2000/909, SI 2004/614, SI 2006/3306, SI 2008/251 and SI 2009/1166

³⁶ Case C-110/79 [1980] ECR 1445.

³⁷ Case C-349-87 [1991] ECR I-4501.

³⁸ Joined Cases C-4/95 & C-5/95 [1997] ECR I-511.

Financial aid for studies

It is regrettable that the Directive does not contain a standstill provision that would have guaranteed the acquired rights of students following the CJEU's ruling in *Bidar*³⁹. In this case, the Court held that it was legitimate for a Member State to grant assistance in the form of maintenance grants only to students who had demonstrated a certain degree of integration into the society of that State and that this was regarded as established by a finding that the student in question had resided for three years in the host Member State. As a result of that ruling, students who were resident in a country for three years or more were entitled to educational assistance in the form of student loans and maintenance grants.

The effect of art 24(2) of the Directive is that, in order to be eligible for educational assistance such as student loans and maintenance grants, students must first acquire permanent residence by having lived at least for five years in the UK. The legitimacy of that provision has been upheld by the Court in *Förster*⁴⁰. Your Europe Advice has received complaints from students to the effect that Member States have now withheld educational assistance because, even though the students have resided in a host Member State for more than three years (and were entitled to educational assistance in accordance with the *Bidar* ruling), with the Directive coming into force they are no longer entitled to assistance because they had not yet obtained permanent residence as required under art 24(2). This has had an adverse effect on the ability of some students to be able to continue their studies.

The Directive, art 24(2) should have no impact on the ability of students to enjoy equal treatment as regards tuition fees. Nonetheless, the UK imposes a condition of prior residence in the EEA for a minimum of three years in order for students to be categorized as 'home students' for the purposes of university tuition fees under the Education (Fees and Awards) (Scotland) Regulations 2007 SI 2007/152, the Education (Fees and Awards) (England) Regulations 2007 SI 2007/779 and the Education (Fees and Awards) (Wales) Regulations 2007 SI 2007/2310.

Such a condition leads to some EU citizens being charged higher fees than home students, by sole virtue of the fact that they may have been studying or living outside the EU prior to starting their course of study in the UK. Such a practice does not appear to conform with the principle laid down by the CJEU's in its judgment in *Metock* according to which national law cannot impose a condition of prior residence in the EU on beneficiaries of Directive 2004/38 when seeking to avail themselves of the rights flowing from the Directive. It also goes against the CJEU's ruling in *Eman & Sevinger* Case C-300/04 [2006] ECR I-8055 in which it held that the rights flowing from the Treaty provisions on citizenship of the EU may be relied upon by all EU citizens regardless of their geographical location (paras 27-29). In addition, there is nothing in the text of the Treaty on the Functioning of the EU to suggest that EU citizens lose the rights which the Treaty confers on all citizens of the European Union when they temporarily move to a country outside the EU.

It is arguable that, in laying down a requirement that EU students must have been resident in the EEA for at least three years prior to the start of the academic year, the UK is therefore preventing EU citizens from benefiting from their right to enjoy equal treatment with home students as regards tuition fees. Furthermore, these instruments only apply to some, but not, all family members who otherwise benefit from the right to equal treatment under the Directive (for example, unmarried partners in a durable relationship who cannot avail themselves of home student status).

³⁹ Case C-209/03 [2005] ECR I-2119.

⁴⁰ Case C-158/07 [2008] ECR I-8507.

Having looked at the numerous difficulties faced by EU citizens and their family members in obtaining residence formalities and exercising their right to equal treatment, we will now turn our attention to the circumstances under which the right of residence may be lost.

Losing the right to reside in the UK

The Directive, art 14(2) specifies that EU citizens and their family members have a right of residence as long as they fulfil the conditions found in art 7. This essentially means that, until they have acquired a right to permanent residence, the Directive requires EU citizens to be able to support themselves and their family members: they must either work, or, in the event they study or are self-sufficient, they must have sufficient resources so as not to become an unreasonable burden on the social assistance system in the host Member State. Alternatively, they may be able to retain a right of residence under arts 12 or 13.

In the event that EU citizens and their family members fail to fulfil the conditions for residence under art 7 or the right to retain residence under arts 12 or 13, they will lose their right of residence under the Directive. Nonetheless this will not necessarily mean that they can be expelled or asked to leave the host Member State as will first be discussed.

What is clear is that the Directive enables Member States to take steps to expel citizens who become an unreasonable burden on the state's social assistance system. Member states can also take measures to remove EU citizens from their territory where their presence constitutes a threat to the public interest. In both cases the EU citizens and their family members benefit from procedural rights under the Directive, including full rights of appeal. Each of these issues will now be examined in turn.

Citizens who lose the status of worker, student or self-sufficient person

In the event that EU citizens and their family members fail to fulfil the conditions for residence under art 7 or the right to retain residence under arts 12 or 13, they will lose their right of residence under the Directive. Nonetheless this will not necessarily mean that they can be expelled or asked to leave the host Member State and in this respect there appears to be a lacuna in the Directive.

Indeed, the Directive is silent on how to deal with the situation of an EU citizen who ceases to have a right to reside in the UK because he no longer fulfils the requirements of the Directive, art 7, but who cannot be expelled by the UK authorities unless and until he becomes an unreasonable burden on the social assistance system (art 14(3) and recital 14) or his personal conduct constitutes a 'genuine, present and sufficiently serious threat' to public order or public security (art 27(2)).

The question therefore arises whether art 21 TFEU, which guarantees the right of free movement within the EU, can be relied upon to bridge this legal gap in the Directive?

Although the Court of Justice has consistently held that the right to reside in another Member State is directly conferred by art 21 TFEU subject to the limitations and conditions laid down by the Treaty and the measures adopted to give it effect, its case law suggests that art 21 TFEU could be relied upon directly in circumstances where the conditions of the Directive are not met in order to be able to exercise other rights under the Treaty or secondary legislation.

In his Opinion in *Eind*, citing the Court's rulings in *Baumbast*, *Chen* and *Trojan*⁴¹, Advocate General Mengozzi has remarked at paras 122-125:

⁴¹ Case C-456/02 [2004] ECR I-7573.

‘[I]t emerges clearly from the case-law of the Court ... that the right of a citizen of the Union to move between and reside in the territory of the Member States, as provided for in [art 21 TFEU], is not unconditional but is granted only subject to the conditions laid down by the Treaty [on the Functioning of the EU] and by the relevant implementing provisions,

It would therefore be better, in my opinion, to speak of the direct effect not of [art 21 TFEU] as such, but rather of that provision combined with each of the other provisions of the Treaty [on the Functioning of the EU] or of secondary law that lay down the conditions for the existence of the right in question, which cannot therefore, as Community law stands at present, be regarded as conferred solely by virtue of European citizenship.’

As regards the position in the UK, the courts here have so far considered that mere presence must be distinguished from legal residence and that where EU citizens fail to fulfil the conditions of the Directive, they will have no right to reside in the UK, even though they are not in breach of the UK’s immigration laws. As a result, although their presence is tolerated and they cannot be removed, they do not have a right to reside in the UK which effectively precludes them from claiming welfare benefits (see for example *Secretary of State for Work and Pensions v AH*⁴² and *Lekpo-Bozua*⁴³). This situation obtains because the Directive does not permit the national authorities to expel EU citizens from the host Member State, unless they become an unreasonable burden on that state’s social assistance system or their presence constitutes a serious threat to public order or public security.

Could art 21 TFEU therefore provide a right of residence in circumstances where an EU citizen does not fulfil the requirements of the Directive? Or could some other provisions of the Directive be applied by analogy? Could residence under national immigration laws count towards ‘legal residence’ under the Directive?

To answer these question, a distinction should be drawn between, on the one hand, a situation where an EU citizen has never fulfilled the conditions of art 7, and, on the other, a situation where an EU citizen starts living in the UK by working, studying or being self-sufficient but then, at some point in his stay, he becomes unable to comply with the conditions of art 7. The latter situation is of practical importance as regards the acquisition of permanent residence, which requires a continuous period of ‘legal’ residence of five years under art 16. Once permanent residence is acquired the right to reside is no longer subject to the conditions of Directive, art 7, including the requirements as to adequate resources and sickness insurance in the case of inactive citizens.

The CJEU’s ruling *Trojani* will be of particular interest to EU citizens who have never fulfilled the conditions of the Directive. In such circumstances an EU citizen may rely on art 21 TFEU directly to enable him to take advantage of the protection provided by art 18 TFEU against any form of discrimination on grounds of nationality as against the Member State on whose territory he is lawfully present:

‘A citizen of the European Union who does not enjoy a right of residence in the host Member State under Articles [45 TFEU, 49 TFEU or 56 TFEU] may, simply as a citizen of the Union, enjoy a right of residence there by direct application of Article [21 TFEU]. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities must ensure that those limitations and conditions are applied in compliance with the general principles of Community law, in particular the principle of

⁴² [2010] UKUT 265 (AAC).

⁴³ [2010] EWCA Civ 909.

proportionality. However, once it is ascertained that a person in a situation such as that of the claimant in the main proceedings [who had been living in Belgium for at least two years] is in possession of a residence permit [issued on the basis of the national immigration rules], he may rely on Article [21 TFEU] in order to be granted a social assistance benefit such as the *minimex*.’ (*Trojani* at para 46).

As a result, in a situation where an EU citizen has never fulfilled the conditions of the Directive, although he may not have a right to reside under the Directive, the citizen must still be able to claim the benefit of the other fundamental rights provided to EU citizens under the Treaty, such as enjoying equal treatment with nationals of the host country.

The above situation is arguably different from one where an EU citizen does have a right of residence in the UK under the Directive, but then at some point in his stay becomes unable to comply with the conditions of art 7. In these circumstances, as noted by Judge Jacobs in *Secretary of State for Work and Pensions v AH* at para 7, the Directive is ‘not comprehensive of all possibilities’. It would therefore appear that there is a lacuna in the Directive: an EU citizen ceases to have a right to reside in the UK because he no longer fulfils the requirements of the Directive, art 7, yet he cannot be expelled by the UK authorities unless and until he becomes an unreasonable burden on the social assistance system (art 14(3) and recital 14) or his personal conduct constitutes a ‘genuine, present and sufficiently serious threat’ to public order or public security (art 27(2)).

Could the argument therefore be made that art 21 TFEU should provide a direct right of residence and fill this lacuna in the Directive? It could be argued on the basis of *Trojani* that the direct effect of art 21 TFEU could be invoked to bridge any gaps in continuity of residence when determining whether a citizen has resided continuously in a Member State for five years for the purposes of permanent residence under the Directive, provided the person’s presence on the national territory is not unlawful and where it would be disproportionate for the national authorities to decide otherwise, based on that person’s degree of integration in the UK or his links to its job market.

The CJEU has taken a different approach. In its recent ruling in *Dias* Case C-325/09⁴⁴, the Court appears to have decided to resolve the issue by applying other provisions of the Directive by analogy. The case concerned a Portuguese national who had resided in the UK for a continuous period of five years prior to 30 April 2006, which was followed by a further period of over a year where she had no right of residence under the Directive. The question was whether this subsequent period affected her right to acquire permanent residence. The Court decided to resolve the question by applying ‘the rule laid down in Article 16(4) of Directive 2004/38 ... by analogy to periods in the host Member State completed on the basis solely of a residence permit’ (para 65). As a result, it held that ‘periods of residence of less than two consecutive years, completed ... without the conditions governing entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years’ legal residence completed prior to that date, are not such as to affect the acquisition of the right of permanent residence’ (para 67).

It is submitted that extending the Court’s reasoning to other situations where an EU citizen ceases to fulfil the conditions of entitlement to a right of residence under the Directive this would resolve the lacuna in the Directive in circumstances where a person remains in the host member state without having a right to do so prior to the acquisition of a permanent right of residence. Applying the rule contained art 16(3) by analogy, it could be argued that gaps in ‘legal residence’ in the host member state would be permitted for a period of up to six months in a given year or ‘a maximum of

⁴⁴ [2011] ECR not yet reported (21 July 2011).

12 consecutive months for important reasons such as pregnancy and childbirth, serious illness, study or vocational training' prior to the acquisition of permanent residence.

Furthermore, it is also arguable that periods of residence completed under national immigration law should also count towards 'legal residence' under the Directive. Such a view was expressed by Advocate General Kokott in her Opinion in *McCarthy* at para 53, although the issue was not ultimately addressed in the Court's ruling in that case⁴⁵. The issue should hopefully be settled by the CJEU in *Ziolkowski & Szaja*, in which Advocate General Bot has recently recommended that the Court should hold that periods of residence acquired solely under national immigration law must be taken into account for the purposes of acquiring permanent residence⁴⁶. The issue is likely to come before the Court in references pending before it in *Czop*⁴⁷ and *Punakova*⁴⁸ which both concern the UK.

Finally, it should also be noted in this context that other international instruments may prevent the United Kingdom from expelling EU citizens from their territory. For example, the European Convention on Social and Medical Assistance CETS No 14 (Paris, 11 December 1953) ratified by the UK along with fourteen other Member States, provides that '[a] Contracting Party in whose territory a national of another Contracting Party is lawfully resident shall not repatriate that national on the sole ground that he is in need of assistance.' (art 6). Under the Convention, art 11(2) a person's residence only becomes unlawful once a deportation order has been made against him.

We will now turn our attention to the circumstances where Member States are permitted to take action to remove EU citizens and their family members from their territory.

Unreasonable burden on social assistance

Under the Directive, art 14(3), Member States have the right to take steps to remove EU citizens and their family members in circumstances where they become an unreasonable burden on the social assistance system.

Your Europe Advice has dealt on a number of occasions with citizens who have complained of being informed they had become a burden on the UK and notified that they would be required to depart from the UK within four weeks as a result of claiming benefits in the UK.

The Directive, art 14(3) provides that citizens cannot be expelled solely because they have recourse to the social assistance system of the Member State where they reside. This provision, read in combination with arts 15 and 30(2), also requires the host authorities to make an individual assessment of every citizen to determine whether or not they have become an unreasonable burden on the state's social assistance system.

Aside from the questionable legality of the UK's actions in cases referred to Your Europe Advice, this problem appears to be the result of an inconsistency in the Directive itself: recital 16 (and the CJEU case law) refers to citizens having a right to remain as long as they do not become an 'unreasonable burden' on the host country's social assistance system, whereas Article 7(1) simply refers to citizens having a right to reside as long as they can demonstrate that they have sufficient resources not to become a 'burden' on the social assistance system.

⁴⁵ *McCarthy* Case C-434/09 [2011] ECR not yet reported, judgment of 5 May 2011.

⁴⁶ Opinion of Advocate General Yves bot in Joined Cases C-424/10 and C-425/10 (14 September 2011), at para. 59.

⁴⁷ Case C-147/11 [2011] OJ C 152/17.

⁴⁸ Case C-148/11 ([2011] OJ C 152/18).

Recital 16 of the Directive states that ‘as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled’. However, in the provisions of the Directive the word ‘unreasonable’ is absent in art 7(1) of the Directive regarding the right of residence for more than three months for students and self-sufficient persons and art 13(2) concerning conditions for the retention of right of residence in case of divorce, annulment of marriage or termination of registered partnership. In contrast, there is no such inconsistency between recital 16 and Article 14(1), which both concern the conditions applicable to the right of residence for an initial period of three months, since they both include the word ‘unreasonable’.

The effect of such inconsistency is that some Member States are considering that a person accessing social assistance will automatically lose their right of residence under art 7(1) because they no longer have the necessary resources to sustain themselves without recourse to social assistance. This is contrary to recital 16 which requires that an individual assessment of the person’s situation be made in order to determine ‘whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system’.

It is clear from the Directive itself that citizens may be permitted to have recourse to social assistance in the host Member State where they reside, subject to the condition that they do not become an unreasonable burden on the host Member State. Recourse to social assistance is an intrinsic part of the right to equal treatment. Indeed, since Article 24(2) allows ‘the host Member State ... not ... to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b)’ (ie job-seekers), the Directive foresees that Member State should confer entitlement to social assistance to other migrant citizens after three months have elapsed as an intrinsic element of the right to equal treatment.

This right to equal treatment is a corollary of the prohibition contained in Article 18 TFEU against any form of discrimination based on nationality and the CJEU has consistently held that any difference in treatment must be objectively justified. Regulation 1612/68, art 7(2) also gives such an entitlement to workers. Furthermore, in a long line of cases including *Martínez Sala*⁴⁹, *Jauch*⁵⁰, *Trojani*, *Vatsouras & Koupatantze*, the CJEU has consistently made it clear that EU citizens enjoy a right to equal treatment as regards recourse to assistance from the state. In *Bidar* at para 56 and *Förster* at para 48 the Court observed that national measures that limit recourse to social assistance are only justified by the need to ensure that the grant of such assistance to citizens from other Member States ‘does not become an *unreasonable burden* which could have consequences for the overall level of assistance which may be granted by that State’ (emphasis added).

This is further explained by the Commission’s guidance on better implementation of the Directive (COM (2009) 313) which requires the following factors to be taken into account to determine whether a person can be considered to be an unreasonable burden on the social assistance system:

- the duration of the social assistance;
- the likelihood that the EU citizen will get out of the safety net;
- the duration of the residence already completed in the host Member State;
- the level of connection which the EU citizen and his family members has achieved the society of the host Member State;

⁴⁹ Case C-85/96 [1998] ECR I-2691.

⁵⁰ Case C-215/99 [2001] ECR I-1901.

- whether there are there any personal considerations pertaining to the age, state of health, family and economic situation that need to be taken into account;
- the amount of social assistance provided as opposed to the amount of contributions paid;
- whether the EU citizen has a history of dependence on social assistance; and
- whether the EU citizen has a history of contributing to social insurance in the host Member State.

In general the above shows that the more limited the assistance, the less likely the social assistance creates an unreasonable burden on the system.

To clear up the inconsistency contained in the Directive, it is therefore proposed that arts 7(1) and 13(2) of the Directive should be amended by inserting the word ‘unreasonable’ in order to bring those provisions into line with the legislative intent that underpins the Directive as evidenced by the Directive’s recital 16 and as supported by the Court’s case law.

Having discussed action that can be taken against EU citizens and their family members in the event they become unreasonable burdens on the state, we will now examine the circumstances in which Member States may take measures to restrict their freedom of movement when such measures are in the public interest.

Restrictions in the Public Interest

Under the Directive, arts 27(2) and 29 Member States may take measures to restrict the free movement and residence of EU citizens and their family members on grounds of public order or public security, where their conduct represents a ‘genuine, present and sufficiently serious threat affecting one of the fundamental interests of society’ or, on grounds of public health if the individual is infected with a contagious disease as defined by the World Health Organisation. The EEA Regulations, regs 19-21 appear to correctly transpose these provisions into UK law.

Detention of family members who are not EU citizens

In a few disturbing instances, Your Europe Advice has been informed that the UK had detained non-EU nationals who enjoy rights as family members under the Directive even though it was highly questionable whether the UK had sufficient grounds to consider that the person’s conduct represented a serious threat to the public interest. It should be observed that detention constitutes a serious restriction on the rights of residence of family members of EU citizens and can only be justified if the person constitutes a ‘genuine, present and sufficiently serious threat’ to public order, public security or for reasons of public health as required under arts 27(2) and 29 of the Directive⁵¹. These citizens were referred to SOLVIT which intervened on behalf of their family members.

Procedural safeguards against deportation

Under art 28 before a Member State can proceed to deport an EU citizen (or his family member) as a result of his personal conduct, the national authorities must make an individual assessment of the person’s situation including ‘how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin’. A citizen who is the subject of an expulsion must be provided with extensive procedural safeguards contained in arts 30-31, including a right of appeal.

⁵¹ See further UK Border Agency’s Enforcement Instructions and Guidance on Detentions and Removals, Chapter 53 (Extenuating Circumstances).

The mere fact that a person commits a criminal offence cannot of itself justify deportation of that person (*Commission v Netherlands* Case C-50/06⁵²). The Court went on to explain that a ‘previous criminal conviction can therefore be taken into account only in so far as the circumstances which gave rise to that conviction are evidence of personal conduct constituting a present threat to the requirements of public policy’ (at para 43).

In *Jipa*⁵³, the Court added at para 24 that ‘measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned, and justifications that are isolated from the particulars of the case in question or that rely on considerations of general prevention cannot be accepted.’ In all cases, the national authorities will need to ensure that ‘the restrictive measure envisaged is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it’ (para 30).

The Directive foresees escalating levels of protection according to the level of integration of EU citizens and their family members in the host Member State. Thus, those who enjoy a permanent right of residence can only be deported on ‘serious grounds of public policy or public security’ (art 28(2)). EU minors cannot be deported except on ‘imperative grounds of public security or public policy’ and only when it is in the best interests of the child to do so (art 28(3)(b)). Likewise, EU citizens who have resided in the host Member State for over ten years can only be deported on ‘imperative grounds of public security or public policy’. The Court has explained what such ‘imperative grounds’ might be in *Tsakouridis*⁵⁴, judgment of 23 November 2010, at paras 49-53 and how the national authorities should go about determining when the deportation of a permanent resident may be justified:

‘a balance must be struck more particularly between the exceptional nature of the threat to public security as a result of the personal conduct of the person concerned, assessed if necessary at the time when the expulsion decision is to be made ... by reference in particular to the possible penalties and the sentences imposed, the degree of involvement in the criminal activity, and, if appropriate, the risk of reoffending ..., on the one hand, and, on the other hand, the risk of compromising the social rehabilitation of the Union citizen in the State in which he has become genuinely integrated, which ... is not only in his interest but also in that of the European Union in general.

The sentence passed [ie prior conviction] must be taken into account as one element in that complex of factors. A sentence of five years’ imprisonment cannot lead to an expulsion decision, as provided for in national law, without the factors described in the preceding paragraph being taken into account, which is for the national court to verify.

In that assessment, account must be taken of the fundamental rights whose observance the Court ensures ..., in particular the right to respect for private and family life as set forth in Article 7 of the Charter of Fundamental Rights of the European Union and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

To assess whether the interference contemplated is proportionate to the legitimate aim pursued, in this case the protection of public security, account must be taken in particular of the nature and seriousness of the offence committed, the duration of residence of the person concerned in the host Member State, the period which has passed since the offence was

⁵² [2007] ECR I-4383 at para 41.

⁵³ Case C-33/07 [2008] ECR I-5157.

⁵⁴ Case C-145/09 [2010] ECR not yet reported.

committed and the conduct of the person concerned during that period, and the solidity of the social, cultural and family ties with the host Member State. In the case of a Union citizen who has lawfully spent most or even all of his childhood and youth in the host Member State, very good reasons would have to be put forward to justify the expulsion measure ...’

It is worth noting that the incidence of the UK making use of its powers to deport EU citizens is declining, although the percentage of deportations affecting EU citizens from the new member states is again on the increase. The Home Office has reported to the House of Commons that approximately 160 EEA nationals were deported in 2006⁵⁵, which more than tripled to 500 deportations in 2007⁵⁶. The figures appear much higher when the Home Office’s own control of immigration statistics are analysed. In 2009, it would appear that a total of 2,055 citizens from EEA Member States were deported, removed or left voluntarily following notice of an enforcement order (33.8% of these being from the new member states), as compared to 2,305 in 2008 (24.3% from accession states), 2,845 in 2007 (17.6% from accession states), and 3,345 in 2006 (71.9% from accession states). The Home Office offers no explanation for the difference.

In cases where a Member State takes action to restrict the free movement of EU citizens and their family members, the latter are entitled to a certain number of procedural rights as will now be discussed.

Procedural Rights and Appeals

The Directive, art 30(1) provides that EU citizens and their family members who are the subject of a decision that restricts their rights on grounds of public policy, public security or public health are ‘to be notified in writing ... in such a way that they are able to comprehend its content and the implications for them.’ Art 30(3) also requires this notice to ‘specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State’ which cannot be less than a month except ‘in duly substantiated cases of urgency’.

Furthermore, art 15 further specifies that arts 30 and 31 ‘shall apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.’

The Directive does not provide for any cases where EU citizens or their family members may be denied a right of appeal. This is in contrast to the EEA Regulations, reg 26(3) which denies the right of appeal to family members who are unable (in the opinion of the Home Office) to provide evidence of their relationship to an EU citizen. As was noted above, this is a particular problem in practice for family members claiming a right to retain residence following a divorce or termination of a registered partnership where the Home Office deems they were not able to demonstrate the nationality of their former spouse or partner.

Furthermore, reg 27 denies the right to EU citizens to make an appeal whilst in the UK in a number of circumstances including a refusal to be admitted to the UK, a refusal to revoke a deportation order, or a refusal to issue an EEA family permit. The effect is that appellants must first leave the UK in order to have a right to appeal against such a decision, which will necessarily affect this person’s ability to access legal advice and by extension their ability to appeal.

⁵⁵ Hansard, HC Vol 454, col 1960w (19 December 2006).

⁵⁶ Hansard, HC Vol 472, col 2084w (3 March 2008).

These provisions appear to be in breach of the CJEU's well established case law on the right to judicial protection. As the Court has remarked on a number of occasions, including in *Unión de Pequeños Agricultores*⁵⁷ at para 39, the right to an effective judicial remedy is a general principle of EU law and as a result:

‘Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common to the Member States.’

Furthermore, in a long line of cases including *Unibel*⁵⁸ at paras 42-43, *Recheio*⁵⁹ at para 17, *Eribrand*⁶⁰ at para 62, *Safalero*⁶¹ at para 49, *Courage and Crehan*⁶² at para 29, *Edis*⁶³ at para 34, *Peterbroeck, Van Campenhout & Cie*⁶⁴ at para 12, the Court of Justice has consistently held that:

‘while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection ... It is for the Member States to establish a system of legal remedies and procedures which ensure respect for that right In that regard, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)’

It is arguable that the EEA Regulations, regs 26(3) and 27 are contrary to EU law because they render the exercise of the right of appeal that is guaranteed by the Directive, art 30 excessively difficult or practically impossible for EU citizens and their family members who may want to challenge a decision of the UK authorities in the circumstances falling within the scope of regs 26(3) and 27.

Conclusion

The experience of EU citizens and their family members in exercising their rights of residence over the last five years shows that the UK's approach in implementing the Directive still falls short of the required standards in many respects. This is particularly true when it comes to family members who are not EU citizens and who wish to retain the right of residence or obtain recognition of the right of permanent residence, as well as in the exercise of the rights of EU citizens and their family members as regards equal treatment and judicial protection. Some of these deficiencies can be addressed by amending the underlying UK legislation as recommended below.

In addition, the experience of EU citizens and their family members points to the existence of inconsistencies and gaps in the Directive. Recommendations may therefore also be formulated as to the ways in which the Directive may be amended so that it better reflects the legislative intent

⁵⁷ Case C-50/00 P [2002] ECR I-6677.

⁵⁸ Case C-432/05 [2007] ECR I-2271.

⁵⁹ Case C-30/02 [2004] ECR I-6051.

⁶⁰ Case C-467/01 [2003] ECR I-6471.

⁶¹ Case C-13/01 [2003] ECR I-8679.

⁶² Case C-453/99 [2001] ECR I-6297.

⁶³ Case C-231/96 [1998] ECR I-4951.

⁶⁴ Case C-312/93 [1995] ECR I-4599.

underlying the Directive and ensures its full compliance with the substantial case law of the Court of Justice of the European Union.

Recommendations on amending Directive 2004/38

The scope of the Directive should be extended to all situations of residence falling within the scope of arts 20 and 21 TFEU as interpreted by the CJEU. In particular, the Directive should provide that:

- EU citizens have a right to return to their home country after exercising their right of free movement (without having to satisfy any specific conditions as to sufficient resources or sickness insurance) and that this right also extends to their family members in line with the CJEU’s judgment in *Singh* and *Eind*;
- Primary carers (whatever their nationality) of EU minors have a right to reside with the child for an indefinite period as laid down in *Chen* and be entitled to take up employment in line with *Ruiz Zambrano*;
- Arts 7(1) and 13(2) should be amended to remove the inconsistency with recital 16 and clarify that students and self-sufficient persons are entitled to reside as long as they have sufficient resources so as not to become an unreasonable burden on the social assistance system of the host Member State;
- Art 7(1) should be amended to clarify that any sickness insurance falling within the scope of Regulation 883/2004 is sufficient to satisfy the requirements of ‘comprehensive sickness insurance cover’;
- Art 7(3) should clarify that a self-employed person has a right to retain the status of self-employed after ceasing their activity under the same circumstances as employed workers;
- Art 12(3) should clarify that the parents (whatever their nationality) of EU children who start or remain in education in the host Member State after departure of the Union citizen should be entitled to take up employment during the entire period of their children’s education in accordance with the *Ibrahim* and *Teixeira* cases;
- Art 16 should specifically address the position of EU citizens and their family members who lose a right of residence under art 7, but who remain lawfully in the host Member State and the effect this may have on their continuity of residence for the purposes of the acquisition of permanent residence;
- Art 24(2) should be clarified by defining ‘social assistance’ as ‘assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed’ in line with the CJEU’s ruling in *Chakroun* and exclude benefits covered by Regulation 883/2004.

Recommendations on amending the Immigration (EEA) Regulations 2006

In order to ensure their compatibility with the Directive and the relevant case law of the CJEU, the EEA Regulations should be amended as follows⁶⁵:

⁶⁵ Following publication of Part 1 of this article, the UK authorities have made amendments to the EEA Regulations to bring regulations 8 and 12 into line with the CJEU’s ruling in *Metock* as contained in the Immigration (European Economic Area) (Amendment) Regulations 2011 (SI 2011/1247).

- The definition of ‘civil partner’ in reg 2 should be redrafted so that it also applies to registered partnerships contracted between heterosexuals in another Member State;
- Reg 9 should be amended so that it applies to a British citizen and his family members returning home after having resided in another Member State without limiting its scope to workers;
- Reg 10(3) should be amended to remove the requirement for children to be enrolled in an educational requirement immediately before the death or departure of an EU citizen in line with the CJEU’s ruling in *Teixeira*;
- Reg 12 should provide a reasonable time-limit for the issue of an EEA family permit to ensure compliance with the injunction contained in the Directive, art 5(2) that an entry visa should be issued ‘as soon as possible on the basis of an accelerated procedure’ (which should as far as possible correspond to the 15 days provided under the Schengen Visa Code);
- The EEA Regulations should incorporate the Immigration Rules, para 257C concerning the *Chen* ruling, without prohibiting the primary carer of an EU minor from engaging in work in line with the judgment in *Teixeira*;
- The EEA Regulations (or alternatively the Immigration Rules) should make adequate provision for giving effect to the *Ruiz Zambrano* ruling concerning the rights of residence of the primary carer of British citizens living in the UK;
- The words ‘in accordance with the Regulations’ should be deleted from reg 15(1) to comply with the judgement in *Lassal*;
- Reg 26(3) which denies any right of appeal to a family member who has failed to show that evidence of their main sponsor’s EU nationality should be deleted because it contravenes the general principle of EU law on judicial protection;
- Reg 27 should be deleted in its entirety as it places limits on the right of appeal on EU citizens and their family members which are incompatible with the general principle of EU law on judicial protection.

Recommendations on amending related UK legislation

The following statutory instruments would also need to be amended to comply with EU law:

- The Social Security (Persons from Abroad) Amendment Regulations 2006 and the Employment and Support Allowance Regulations 2008 should be amended to remove the requirement for claimants of income-based Jobseeker’s Allowance, State Pension Credit and Employment and Support Allowance to demonstrate that they have a right to reside under the EEA Regulations, so that habitual residence under Regulation 883/2004 can be established by other means in accordance with the criteria contained in Regulation 987/2009, art 11⁶⁶.

⁶⁶ In this connection, the European Commission has recently announced that it had issued a reasoned opinion to the UK requesting it to end the discrimination consisting in the imposition of a ‘right to reside’ test on EU citizens claiming certain social security benefits in the UK (‘Commission requests United Kingdom to end

- The Education (Fees and Awards) (England) Regulations 2007, Education (Fees and Awards) (Wales) Regulations 2007 and the Education (Fees and Awards) (Scotland) Regulations 2007 should be amended by removing the requirement for students who are EU citizens and their family members to have been resident in the EEA for at least three year prior to the start of the academic year. They should also apply to all family members who have a right of residence under the Directive.

Anthony Valcke

Solicitor and adviser for Your Europe Advice

The views expressed in this article are personal to the author. They do not necessarily reflect the opinion of the European Commission or its services and are in no way binding upon them

discrimination of EU nationals residing in the UK regarding their rights to specific social benefits', Press Release IP 11/1118, 29 September 2011).