



Brussels, 6.12.2023  
C(2023) 8500 final

## **COMMISSION NOTICE**

### **Guidance on the right of free movement of EU citizens and their families**

(Text with EEA relevance)

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## 1 Introduction

Article 20 of the Treaty on the Functioning of the European Union (TFEU) confers the status of EU citizen on every person holding the nationality of a Member State. According to this provision, EU citizens enjoy the rights and are subject to the duties established by the Treaties. The Court of Justice of the European Union (the Court) has consistently held that citizenship of the European Union is intended to be ‘the fundamental status of nationals of the Member States’<sup>1</sup>.

Article 21(1) TFEU stipulates that every EU citizen has the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect. The respective limitations and conditions are to be found in Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (Directive 2004/38/EC)<sup>2</sup>. As the TFEU also enshrines the freedom of movement of workers (Article 45), the freedom of establishment (Article 49) and the freedom to provide services (Article 56), Directive 2004/38/EC also gives effect to those freedoms.

Moreover, the right to move and reside freely is a fundamental right enshrined in Article 45(1) of the Charter of Fundamental Rights of the European Union (the Charter of Fundamental Rights).

As announced in the 2020 Citizenship report<sup>3</sup>, the purpose of this Guidance Notice (this Notice) is to contribute to a more effective and uniform application of the free movement legislation across the EU and to thereby provide greater legal certainty to EU citizens exercising their free movement rights.

This Notice focuses primarily on the application of Directive 2004/38/EC.

In addition, there are circumstances where, although Directive 2004/38/EC does not apply directly to the facts of a particular case, its provisions have nevertheless been recognised to apply, by analogy, in combination with Articles 20 and 21 TFEU.

Furthermore, the Court has recognised in its *Ruiz Zambrano* judgment<sup>4</sup>, that Article 20 TFEU can constitute a specific basis for granting non-EU parents and carers of EU children a derived right of residence in the Member State of nationality of such children, where the children have not exercised free movement rights.

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<sup>1</sup> Initially in Case C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458, paragraph 31.

<sup>2</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, 30.4.2004, p. 77).

<sup>3</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Citizenship Report 2020 Empowering citizens and protecting their rights, COM(2020) 730 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0730>

<sup>4</sup> C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124.

In view of these developments, this Notice therefore also offers some guidance on specific applications of Articles 20 and 21 TFEU.

Where relevant, some guidance and references to relevant European Commission's documents on the free movement of workers, self-employed persons and service providers are also included.

This Notice builds on and replaces the 2009 Guidance on better transposition and application of Directive 2004/38/EC<sup>5</sup> as well as the Commission's 2013 Communication on 'Free movement of EU citizens and their families: Five actions to make a difference'<sup>6</sup>. Unless this Notice states otherwise, it also replaces the Commission's 1999 Communication on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health<sup>7</sup>.

This Notice also aims at providing updated guidance for all interested parties, and at supporting the work of national authorities, courts and legal practitioners.

Where quotations from the text of Directive 2004/38/EC or from Court judgments contain visual highlighting, this highlighting has been added by the Commission for emphasis.

It is recalled that Directive 2004/38/EC must be interpreted and applied in accordance with fundamental rights, in particular the right to respect for private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy as guaranteed in the Charter of Fundamental Rights and the European Convention of Human Rights (ECHR) as applicable<sup>8</sup>. Furthermore, as part of the rights of the child, Member States must always, when implementing Directive 2004/38/EC, take into account the best interests of the child as a primary consideration, as provided for in the Charter of Fundamental Rights and the United Nations Convention on the Rights of the Child of 20 November 1989.

In this context, when applying the principle of non-discrimination, national authorities shall—among others but not exclusively—pay special attention to persons with a minority ethnic or racial background and take into account relevant instruments—see, for example, the Racial Equality Directive<sup>9</sup>, the Commission's EU anti-racism action plan 2020-2025<sup>10</sup>, the

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<sup>5</sup> Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52009DC0313&qid=1674553368591>

<sup>6</sup> COM(2013) 837 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52013DC0837>

<sup>7</sup> COM(1999) 372 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A51999DC0372>

<sup>8</sup> See the following cases for example:

- C-673/16, *Coman*, ECLI:EU:C:2018:385, paragraphs 47-50;
- C-129/18, *SM*, ECLI:EU:C:2019:248, paragraphs 64-67;
- C-482/01 and C-493/01, *Orfanopoulos and Oliveri*, ECLI:EU:C:2004:262, paragraphs 97 and 98; and
- C-127/08, *Metock*, ECLI:EU:C:2008:449, paragraph 79.

<sup>9</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ L 180, 19.7.2000, p. 22).

<sup>10</sup> COM(2020) 565 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0565>

Commission's EU Roma Strategic Framework<sup>11</sup> and the 2021 Council Recommendation on Roma<sup>12</sup>.

The Commission also reminds Member States that such fundamental rights, in particular the right to private and family life, the rights of the child and the prohibition of discrimination based on sexual orientation, equally protect LGBTIQ<sup>13</sup> citizens and their family members. The Commission LGBTIQ Equality Strategy announced that this Notice would reflect the diversity of families and contribute to facilitating the exercise of free movement rights for all families, including rainbow families. This Notice will support national authorities' rigorous application of free movement rules – irrespective of sexual orientation, gender identity/expression and sex characteristics, in line with the Commission's LGBTIQ Equality Strategy 2020-2025<sup>14</sup>.

Since Directive 2004/38/EC is incorporated into the European Economic Area (EEA) Agreement, this Notice is also relevant for the interpretation and application of Directive 2004/38/EC in relations with Iceland, Liechtenstein and Norway<sup>15</sup>. References to the EU, European Union or the Union should therefore be understood as covering also these States and their nationals, where relevant.

This Notice is intended purely as a guidance document – only the text of the EU legislation itself, as interpreted by the Court, has legal force. This Notice takes into account rulings of the Court published until 2<sup>nd</sup> October 2023 and the guidance offered may be modified at a later date in view of further developments in the Court's case law.

The views expressed in this document cannot prejudge the position that the Commission might take before the Court. The information in this document is of a general nature only and does not specifically address any particular individuals or entities. Neither the Commission nor any person acting on behalf of the Commission is responsible for any use that may be made of this information.

## **2 Beneficiaries (Articles 2 and 3 of Directive 2004/38/EC)**

### **2.1 The EU citizen**

#### **2.1.1 General rules**

Directive 2004/38/EC<sup>16</sup> applies only to EU citizens who move to or reside in a Member State other than that of which they are a national, and to their family members who accompany or join them.

*Example:*

<sup>11</sup> COM(2020) 620 final, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2020:620:FIN>

<sup>12</sup> Council Recommendation of 12 March 2021 on Roma equality, inclusion and participation, OJ C 93, 19.3.2021, p. 1, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC\\_2021\\_093\\_R\\_0001](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2021_093_R_0001)

<sup>13</sup> Lesbian, gay, bisexual, trans, non-binary, intersex and queer people.

<sup>14</sup> COM(2020) 698 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0698>

<sup>15</sup> EEA Joint Committee Decision 158/2007 of 7 December 2007 (OJ L124, 8.5.2008, p.20).

<sup>16</sup> Article 3(1).



*T., a non-EU citizen, resides in a Member State. She wants to be joined there by her non-EU spouse. As no EU citizen is involved, the couple cannot benefit from the rights under Directive 2004/38/EC.*

EU citizens residing in the Member State of their nationality do not normally benefit from the rights granted by EU law on free movement of persons and their non-EU family members are covered by national immigration rules<sup>17</sup>.

**Examples:**

*-P. resides in the Member State of his nationality. He has not resided in another Member State before. When he wants to bring his non-EU spouse, the couple cannot benefit from the rights under Directive 2004/38/EC and it remains fully up to the Member State concerned to lay down rules on the right of non-EU spouses to join its own nationals.*

*-L. holds the nationality of Member State A. He has been living in a non-EU country for 5 years. He now travels to Member State B where he intends to relocate – Directive 2004/38/EC applies.*

However, as explained further below, EU citizens who return to their Member State of nationality after having resided in another Member State<sup>18</sup> and, in certain circumstances, also those EU citizens who have exercised their rights to free movement in another Member State without residing there<sup>19</sup> (for example by providing services in another Member State without residing there) benefit as well from the rules on free movement of persons (see Sections 2.1.2 - *Returning nationals* and 2.1.3 - *Frontier workers, cross-border self-employed persons and cross-border service providers*). Specific rules also apply to dual nationals (see Section 2.1.4 - *Dual nationals*).

### **2.1.2 Returning nationals**

The Court has held that EU law not only applies to and confers rights on EU citizens exercising their right to move and reside freely in a Member State other than the one of which they are nationals, but that it also applies to those EU citizens who return to their Member State of nationality after having exercised their right of free movement by residing in another Member State<sup>20</sup>.

While EU citizens' entry to, and residence in, their Member State of nationality is governed by national law, family members of a returning EU citizen may be granted a derived right of residence in the Member State of nationality of that EU citizen on the basis of the rules on free movement of persons. However, as developed by the case law, this possibility is subject to the fulfilment of conditions further explained in Section 18 - *Right of residence of the family members of returning nationals*.

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<sup>17</sup> See Section 19 - *Ruiz Zambrano case law*

<sup>18</sup> C-370/90, *Singh*, ECLI:EU:C:1992:296 and C-291/05, *Eind*, ECLI:EU:C:2007:771.

<sup>19</sup> C-60/00, *Carpenter*, ECLI:EU:C:2002:434.

<sup>20</sup> C-370/90, *Singh*, ECLI:EU:C:1992:296; C-224/98, *D'Hoop*, ECLI:EU:C:2002:432; C-109/01, *Akrich*, ECLI:EU:C:2003:491; C-291/05, *Eind*, ECLI:EU:C:2007:771; C-456/12, *O. & B*, ECLI:EU:C:2014:135; C-89/17, *Banger*, ECLI:EU:C:2018:570 or C-230/17, *Deha Altiner and Ravn*, ECLI:EU:C:2018:497.

### **2.1.3 Frontier workers, cross-border self-employed persons and cross-border service providers**

#### **a) Where the frontier workers or the cross-border self-employed persons hold a nationality other than the one of their Member State of residence**

Frontier workers are EU workers who do not reside in the Member State where they work and cross-border self-employed persons are EU citizens who pursue self-employed activity in one Member State but reside in another Member State.

Where they hold a nationality other than the one of their Member State of residence, they are covered by EU law in both countries (as a mobile worker/self-employed person in the Member State of employment/self-employment and, on the basis of Directive 2004/38/EC, as a self-sufficient person in the Member State of residence).

#### **b) Where the frontier workers or the cross-border service providers reside in their Member State of nationality**

Cross-border service providers and frontier workers residing in their Member State of nationality are not covered by Directive 2004/38/EC but may rely on Articles 56 and 45 TFEU respectively. More specifically, for EU providers of services who are established in the Member State of their nationality but who provide services to recipients established in other Member States, the Court ruled in the *Carpenter* case<sup>21</sup> that they may rely on the freedom to provide services (Article 56 TFEU) to obtain a right to reside in their Member State of nationality for their spouse. Indeed, although Directive 2004/38/EC does not apply in such a case, the Court considered that a derived right of residence may be conferred if the refusal of such a right would discourage EU providers of services from exercising their rights<sup>22</sup>. The *Carpenter* case law has been extended to cover, on the basis of the free movement of workers (Article 45 TFEU), the situation of EU citizens who are cross-border workers residing in their Member State of nationality<sup>23</sup>.

This means that, in each specific situation, it is necessary to assess whether the grant of a derived right of residence to the family member of an EU citizen is necessary in order to ‘guarantee the EU citizen’s effective exercise of the fundamental freedom’ (free movement of workers or freedom to provide services)<sup>24</sup>. It is therefore for the competent authorities to determine whether a refusal would discourage an EU citizen from effectively exercising such freedoms<sup>25</sup>.

### **2.1.4 Dual nationals**

There is case law which makes it possible to identify cases in which a dual national and their family members are covered by Directive 2004/38/EC and cases in which their situation is governed by national law.

#### **a) Dual EU/EU nationals or EU/non-EU nationals residing in a Member State other than the one(s) of which they hold nationality**

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<sup>21</sup> C-60/00, *Carpenter*, ECLI:EU:C:2002:434.

<sup>22</sup> C-457/12, *S & G*, ECLI:EU:C:2014:136.

<sup>23</sup> C-457/12, *S & G*, ECLI:EU:C:2014:136, paragraph 40.

<sup>24</sup> C-457/12, *S & G*, ECLI:EU:C:2014:136, paragraph 42.

<sup>25</sup> C-457/12, *S & G*, ECLI:EU:C:2014:136, paragraph 42.

These dual nationals are covered by the personal scope of Directive 2004/38/EC.

**Examples:**

*-A. holds the nationalities of Member State A and of Member State B and resides in Member State C. A. is covered by the personal scope of Directive 2004/38/EC.*

*-L. holds the nationality of Member State A. She also holds the nationality of a non-EU country. She resides in Member State B. L. is covered by the personal scope of Directive 2004/38/EC.*

**b) Dual EU/EU nationals, whether by birth or by naturalisation, who have moved to reside in a Member State of which they hold nationality**

EU citizens who move to reside in a Member State of which they are nationals are not beneficiaries of Directive 2004/38/EC and their residence is governed by the domestic law of the host Member State. However, those who have exercised their free movement rights under Article 21 TFEU by moving to reside in the host Member State of which they also hold the nationality have a continuing right to lead a normal family life there, together with their family members. Directive 2004/38/EC therefore applies, by analogy, to their family members<sup>26</sup>.

**Examples:**

*-Y. holds both the nationalities of Member State A and Member State B from birth. She resided in Member State A until 2020. In 2020, she moved to Member State B with her non-EU spouse. She has been working since then in Member State B. In Member State B, Y. is not covered by the personal scope of Directive 2004/38/EC. Her residence is ruled by domestic law. However, Directive 2004/38/EC applies, by analogy, to her spouse.*

*-Z. holds the nationality of Member State A from birth. In 2010, he moved to Member State B where he has been residing pursuant to the conditions set under Directive 2004/38/EC. In 2017, he acquired the nationality of Member State B while also retaining his nationality from Member State A and is therefore no longer covered in Member State B by the personal scope of Directive 2004/38/EC. In 2020, he married a non-EU citizen. Directive 2004/38/EC applies, by analogy, to his spouse.*

**c) Dual EU/non-EU nationals who came to the host Member State as non-EU nationals, naturalised later and then their country of initial nationality acceded to the EU**

Having obtained the nationality of their host Member State, these citizens do not become beneficiaries of Directive 2004/38/EC in the host Member State merely by virtue of the fact that their other state of nationality joins the EU. Their residence in the host Member State continues to be governed by the domestic law of the host Member State.

However, given that they are – from the moment of accession to the EU of their other state of nationality – nationals of one Member State and are lawfully residing in the territory of another Member State, their situation falls within the scope of EU law<sup>27</sup>. They enjoy, on the basis of

<sup>26</sup> See, for example, in cases of naturalisation C-165/16, *Lounes*, ECLI:EU:C:2017:862, paragraphs 51, 52 and 61 and C-541/15, *Freitag*, ECLI:EU:C:2017:432 paragraph 34.

<sup>27</sup> C-541/15, *Freitag*, ECLI:EU:C:2017:432, paragraph 34, where the Court found that a link with EU law exists in regard to nationals of one Member State lawfully resident in the territory of another Member State of which they are also nationals.

Article 21 TFEU, the right to lead a normal family life, together with their family members, in the host Member State. Directive 2004/38/EC therefore applies, by analogy, to their family members<sup>28</sup>.

**Example:**

*M. holds the nationality of state A (a non-EU country) from birth. Until 2007, she resided in state A. In 2007, she moved to Member State B where she has been residing as a self-employed person. In 2009, she married a non-EU citizen. Until 2012, she resided as a non-EU national in accordance with the national law of Member State B. In 2012, she acquired the nationality of Member State B and became an EU citizen (dual EU/non-EU national). In 2013, state A acceded to the EU and M. became a person with dual EU/EU nationality. The residence of M. in Member State B is not covered by the Directive. However, Directive 2004/38/EC applies, by analogy, to her wife.*

**d) Dual EU/non-EU nationals who came to the host Member State as non-EU nationals, then their country of initial nationality acceded to the EU and they later naturalised in the host Member State**

Where there is no transitional provision concerning the application to the new Member State of the EU's legal provisions on freedom of movement of persons in the relevant act of accession, these citizens can, **from the moment of accession to the EU of their state of initial nationality**, rely on the provisions of Directive 2004/38/EC with regard to residence periods prior to the accession – provided that they met the relevant conditions during their residence in the host Member State as non-EU nationals. The provisions of Directive 2004/38/EC can be applied to the present and future effects of the situations of such citizens and their family members that arose before the accession<sup>29</sup>.

However, **once they obtain the nationality of the host Member State**, these citizens are no longer beneficiaries of Directive 2004/38/EC and their residence is governed by the domestic law of the host Member State. However, as they have exercised their free movement rights under Article 21 TFEU in the host Member State of which they now also hold nationality, they enjoy the right to lead a normal family life there, together with their family members. Directive 2004/38/EC therefore applies, by analogy, to their family members<sup>30</sup>.

**Example:**

*L. holds the nationality of state A (a non-EU country) from birth. Until 2007, he resided in state A. Since 2009, he has been residing in Member State B as a worker. In 2013, state A acceded to the EU. In 2014, he acquired the nationality of Member State B (and became a dual EU/ EU national). In 2022, his non-EU dependent mother wants to join him in Member State B. Once he obtained the nationality of Member State B, the residence of L. in Member State B ceased to*

<sup>28</sup> C-541/15, *Freitag*, ECLI:EU:C:2017:432, paragraph 34 – read in conjunction with:

- C-165/16, *Lounes*, ECLI:EU:C:2017:862, paragraphs 51 and 61;
- C-424/10 and C-425/10, *Ziolkowski and Szeja*, ECLI:EU:C:2011:866; and
- C-147/11 and C-148/11, *Czop and Punakova*, ECLI:EU:C:2012:538.

<sup>29</sup> C-424/10 and C-425/10, *Ziolkowski and Szeja*, ECLI:EU:C:2011:866 and C-147/11 and C-148/11, *Czop and Punakova*, ECLI:EU:C:2012:538.

<sup>30</sup> C-165/16, *Lounes*, ECLI:EU:C:2017:862, paragraphs 51 and 61.

*be covered by Directive 2004/38/EC. However, Directive 2004/38/EC applies, by analogy, to his dependent mother.*

**e) Dual EU/EU nationals who have always resided in one of the Member States of which they are a national and have never exercised their free movement rights**

These citizens are not covered by Directive 2004/38/EC<sup>31</sup>. This is a purely internal situation.

***Example:***

*Y. holds both the nationality of Member State A and of Member State B from birth. She is married to a non-EU citizen. She has always resided in Member State A. Directive 2004/38/EC does not apply to their residence in Member State A.*

**f) Dual EU/non-EU nationals who came to the host Member State as non-EU nationals, and are later naturalised in that host Member State**

These citizens are not covered by Directive 2004/38/EC. This is a purely internal situation.

***Example:***

*Y. is a non-EU national. He has been residing in Member State A since 2015. In 2020, he acquired the nationality of Member State A. In 2022, his 16-year-old non-EU daughter wants to join him in Member State A. Directive 2004/38/EC does not apply to their residence in Member State A.*

## **2.2 Family members and other beneficiaries**

### **2.2.1 General considerations**

Family members as defined in Directive 2004/38/EC (even if they are not nationals of an EU Member State) are covered by Directive 2004/38/EC.

The right of free movement of EU citizens would not have any useful effect without accompanying provisions ensuring that EU citizens may be accompanied by their families<sup>32</sup>. Directive 2004/38/EC therefore provides a derived right of free movement to family members of EU citizens.

In principle, Directive 2004/38/EC applies only to those EU citizens who travel to a Member State other than the Member State of their nationality or already reside there (i.e. the EU citizen exercises or has already exercised his or her right of free movement)<sup>33</sup>. This means that, in order to assess whether a family member is covered by Directive 2004/38/EC, it needs first to be analysed if the EU citizen, from whom the family member may derive rights, is in a situation covered by the Directive.

As regards proof of status, the Court has clarified that ‘the administrative and judicial authorities of a Member State must accept certificates and analogous documents relative to personal status

<sup>31</sup> C-434/09, *McCarthy*, ECLI:EU:C:2011:277, paragraphs 36-43.

<sup>32</sup> See recitals 5 and 6 of Directive 2004/38/EC.

<sup>33</sup> See, however, Section 2.1 - *The EU citizen*, which explains other situations where Directive 2004/38/EC might be applicable.

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’<sup>34</sup>. This applies to documents concerning an EU citizen or attesting a family relationship with an EU citizen. This acceptance does not require any formal recognition of the family relationship in the law of the other Member States<sup>35</sup>. This also applies for the purposes of Directive 2004/38/EC. Relationships such as same-sex marriages and same-sex parenthood that are duly attested by a certificate issued by a Member State must therefore be accepted by the other Member States for the purposes of Directive 2004/38/EC and EU law, even if such relationships are not legally provided for in national law<sup>36</sup>. Requirements laid down in the law of the host Member State, including possession of a birth certificate drawn up under such law, cannot be imposed for the exercise of the rights derived from EU law by same sex-couples and their children<sup>37</sup>.

### 2.2.2 Core family members

‘Core’ family members, listed in Article 2(2) of Directive 2004/38/EC, have an automatic right of entry and residence, irrespective of their nationality. The following persons are listed in Article 2(2):

- the spouse;
- the partner with whom the EU citizen has contracted a registered partnership, on the basis of the legislation of any Member State, if the legislation of the host Member State treats registered partnership as equivalent to marriage;
- the direct descendants who are under the age of 21 or are dependent as well as those of the spouse or partner as defined above;
- the dependent direct relatives in the ascending line and those of the spouse or partner as defined above.

The ‘family members’ covered by Directive 2004/38/EC correspond to the ‘family members’ covered by Regulation (EU) No 492/2011 on freedom of movement for workers<sup>38</sup>. This means that the family members of workers and self-employed persons benefit not only from the application of the provisions of Directive 2004/38/EC, but also from the application of the provisions of Regulation (EU) No 492/2011 on freedom of movement for workers within the Union<sup>39</sup> (see Section 11.2 - *Relationship between Article 24 of Directive 2004/38/EC and Regulation (EU) No 492/2011* for further information).

In addition to persons listed in Article 2(2) of Directive 2004/38/EC, it results from the case law that non-EU citizens who are primary carers of minor EU citizens exercising free movement rights (who are not dependent on the minor EU citizen, but are the persons on whom the minor EU citizens are dependent) must be recognised a right of residence in the host Member State,

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<sup>34</sup> C-336/94, *Dafeki*, ECLI:EU:C:1997:579, paragraph 19 and C-731/21, *Caisse nationale d’assurance pension*, ECLI:EU:C:2022:969.

<sup>35</sup> Opinion of Advocate General Kokott, C-490/20, *VMA*, ECLI:EU:C:2021:296, paragraph 160.

<sup>36</sup> However, specific rules apply to registered partnerships. These are covered by Directive 2004/38/EC if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State.

<sup>37</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008.

<sup>38</sup> C-401/15 to C-403/15, *Depesme and Others*, ECLI:EU:C:2016:955, paragraph 51.

<sup>39</sup> Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ L 141, 27.5.2011, p. 1).

since failure to do so would deprive the child’s right of residence of any useful effect (see Section 2.2.2.5 - *Primary carers of minor EU citizens*).

### 2.2.2.1 Spouses

Marriages validly contracted anywhere in the world must be in principle recognised for the purpose of the application of Directive 2004/38/EC. **Forced marriages**, in which one or both parties is married without his or her consent or against his or her will, are not protected by international<sup>40</sup> or EU law. Forced marriages must be distinguished from **arranged marriages**, where both parties fully and freely consent to the marriage, although a third party takes a leading role in the choice of partner, and from marriages of convenience, which are defined in Section 16.4 - *Marriages of convenience*.

Member States are not obliged to recognise polygamous marriages<sup>41</sup>, contracted lawfully in a non-EU country, which may be in conflict with their own legal order<sup>42</sup>. This is without prejudice to the obligation to take due account of the best interests of children of such marriages.

The Court has clarified in the *Coman* case that the term ‘spouse’ under Directive 2004/38/EC is gender-neutral and includes spouses in same-sex marriages<sup>43</sup>. EU law therefore precludes a Member State’s authorities from refusing entry and residence rights to the same-sex spouse of an EU citizen based on the non-recognition of same-sex marriage in the Member State. In its judgment, the Court referred specifically to same-sex marriages concluded in the host Member State.

The Court also clarified in the *Coman* case that a same-sex spouse, as a family member of a mobile EU citizen, must enjoy entry and residence rights and all the rights derived from EU law<sup>44</sup> (such as the right to work and the right to equal treatment<sup>45</sup>). The compulsory recognition of the spouse as family member in the context of free movement is enough. The same-sex marriage does not need to be recognised in national law (for further information, see Section 2.2.1 - *General considerations* and Section 2.2.4 - *Supporting documents to attest the family relationship with the EU citizen*).

In the *Coman* case, the Court did not limit its analysis to the provisions related to free movement. It also analysed the provisions of Directive 2004/38/EC in the light of the fundamental right to respect for private and family life that is guaranteed by the Charter of Fundamental Rights and as interpreted by the European Court of Human Rights. On that basis, the Court concluded that ‘it is apparent from the case law of the European Court of Human Rights that the relationship of a homosexual couple may fall within the notion of “private life” and that of “family life” in the same way as the relationship of a heterosexual couple in the same situation.’<sup>46</sup> The protection of private life and family life are important elements to be

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<sup>40</sup> Inter alia, Article 16(2) of the Universal Declaration of Human Rights or Article 16(1)(b) of the Convention to Eliminate All Forms of Discrimination Against Women.

<sup>41</sup> It is to be noted that Article 2(2)(a) refers to ‘the spouse’ in singular.

<sup>42</sup> European Court of Human Rights, *Alilouch El Abasse v. The Netherlands*, Application no. 14501/89, judgment of 6 January 1992.

<sup>43</sup> C-673/16, *Coman*, ECLI:EU:C:2018:385, paragraphs 35, 48-51 and 56.

<sup>44</sup> C-673/16, *Coman*, ECLI:EU:C:2018:385, paragraph 45.

<sup>45</sup> For further information, see Section 10 - *Right to work (Article 23 of Directive 2004/38/EC)* and Section 11 - *Right to equal treatment (Article 24 of Directive 2004/38/EC)*.

<sup>46</sup> C-673/16, *Coman*, ECLI:EU:C:2018:385, paragraph 50.

taken into account for ensuring a proper exercise of free movement rights by couples with an LGBTIQ member.

The Court has also clarified that, in order to benefit from a right of residence in the host Member State, the spouses need to live in the same host Member State – but that there is no requirement for the spouses to live together in the same home<sup>47</sup>.

In addition, a marital relationship cannot be considered dissolved as long as it has not been terminated by the competent authority – even if the spouses live apart<sup>48</sup>.

### 2.2.2.2 Registered partners

There is currently no case law interpreting Article 2(2)(b) of Directive 2004/38/EC.

In order for a registered partner to be considered as a ‘core family member’, the registered partnership has to meet all three of the following conditions:

**a) The registered partnership has to be concluded ‘on the basis of the legislation of a Member State’**

Registered partnerships concluded outside the EU are not covered by Directive 2004/38/EC.

**b) The host Member State treats registered partnership as equivalent to marriage**

A host Member State that does not provide for registered partnership under its national legislation does not have to recognise a registered partnership concluded in another Member States as equivalent to marriage.

**c) The registered partnership meets the conditions laid down in the relevant legislation of the host Member State**

Member States benefit from a certain margin of discretion when defining which registered partnerships they consider as equivalent to marriages. A particular registered partnership might therefore be recognised in one Member State for the purpose of the implementation of Directive 2004/38/EC – but not in another Member State.

With a view to achieving greater legal certainty, the Commission invites each Member State to publish on the website [Your Europe](https://your-europe.eu)<sup>49</sup> a list of the registered partnerships concluded in other Member States that it considers equivalent to marriage and to keep this list up to date.

If a registered partnership does not meet these three conditions, the potential right of entry and residence of the partner should be assessed under Article 3(2)(b) of Directive 2004/38/EC.

**Example:**

*T. is a non-EU citizen and P. is an EU citizen who holds the nationality of Member State A. In 2020, they concluded a registered partnerships on the basis of the legislation of Member State A. They now intend to relocate to Member State B which does not provide for registered*

<sup>47</sup> 267/83, *Diatta*, ECLI:EU:C:1985:67, paragraph 18, C-40/11, *Iida*, ECLI:EU:C:2012:691, paragraph 58; and C-244/13, *Ogieriakhi*, ECLI:EU:C:2014:2068, paragraph 37.

<sup>48</sup> 267/83, *Diatta*, ECLI:EU:C:1985:67, paragraph 20, C-40/11, *Iida*, ECLI:EU:C:2012:691, paragraph 58 and C-244/13 *Ogieriakhi*, ECLI:EU:C:2014:2068, paragraph 37.

<sup>49</sup> <https://europa.eu/youreurope>



*partnership under its national legislation. Member State B does not have to recognise the registered partnership. However, a potential right of entry and residence of T. should be assessed under Article 3(2)(b) of Directive 2004/38/EC.*

### **2.2.2.3 Descendants and ascendants**

The Court has clarified that the concept of ‘direct descendant’ of an EU citizen covers any parent-child relationship, whether biological or legal, and therefore covers both the biological and the adopted child of the EU citizen<sup>50</sup>. Article 2(2)(c) also covers the ‘direct descendant’ of the spouse or registered partner of the EU citizen. In the same vein, Article 2(2)(d) covers the dependent ascendants of the spouse or registered partner of the EU citizen.

**The notion of direct relatives in the descending and ascending lines extends thus to adoptive relationships.**

**As regards children of same-sex parents exercising free movement rights**, the Court has clarified that, if one parent is an EU citizen, all Member States have to recognise the parent-child relationship as established in the birth certificate drawn up by a Member State for the purposes of the exercise of the rights enjoyed under EU law, without any additional formality. This applies regardless of the status of such a relationship in the law of other Member States and particularly the Member State(s) of nationality of the child. This ‘does not require the Member State of which the child concerned is a national to provide, in its national law, for the parenthood of persons of the same sex, or to recognise, for purposes other than the exercise of the rights which that child derives from EU law, the parent-child relationship between that child and the persons mentioned on the birth certificate drawn up by the authorities of the host Member State as being the child’s parents’<sup>51</sup>. In other words, the compulsory recognition of the parenthood in the context of free movement is sufficient. The same-sex parenthood does not need to be recognised in national law for other purposes<sup>52</sup>.

In the *VMA* case, the Court also insisted on the importance of fundamental rights, in particular the right to private and family life and the rights of the child – ‘in the situation with which the main proceedings are concerned, the right to respect for private and family life guaranteed in Article 7 of the Charter of Fundamental Rights and the rights of the child guaranteed in Article 24 of the Charter of Fundamental Rights, in particular the right to have the child’s best interests taken into account as a primary consideration in all actions relating to children, and the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, are fundamental’<sup>53</sup>. The Court concluded its analysis with a focus on the fundamental rights by explaining that depriving a child of its relationship with one parent or making that relationship very difficult, when exercising his or her right to free movement would

<sup>50</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraph 54.

<sup>51</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008, paragraphs 47-49, 52, 57, 67 and 68.

As difficulties may arise from the lack of recognition in some areas not covered by “rights derived from EU law” (for example for matters such as succession, maintenance, etc), the Commission adopted on 7 December 2022 a proposal for a Regulation aimed at harmonising at EU level the rules of private international law relating to parenthood (COM(2022) 695 final: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52022PC0695> ). This proposal is based on Article 81(3) TFEU related to measures concerning family law with cross-border implications.

<sup>52</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008, paragraph 52.

<sup>53</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008, paragraph 59.

be contrary to Articles 7 and 24 of the Charter of Fundamental Rights<sup>54</sup>. Moreover, under EU law, the recognition of a parent-child relationship for the purposes of the rights which the child derives from EU law cannot be refused by invoking public policy on the grounds that the parents are of the same sex<sup>55</sup>.

Concerning the extent of the recognition of same-sex parenthood, the Court held in the *VMA* case<sup>56</sup> that Member States are obliged to recognise parenthood for the purposes of rights that the child derives from EU law. A few examples of such rights, which have been expressly addressed by the Court, are admission to education<sup>57</sup>, scholarships<sup>58</sup> and reductions of public transportation costs for large families<sup>59</sup>.

There is no restriction as to the degree of relatedness between EU citizens and their ascendants or descendants. This means, for example, that grandchildren and dependent grandparents are covered. National authorities may request evidence of the claimed family relationship (see Section 2.2.4 - *Supporting documents to attest the family relationship with the EU citizen*)

It is to be noted that a legal relationship between a mobile EU citizen and a minor which falls short of a parent-child relationship (e.g. legal guardians and foster children) but which leads to the creation of a genuine family life enjoys protection under Directive 2004/38/EC – provided that this relationship can be duly attested. The child does not benefit from an automatic right of entry and residence in such a case, but the child's entry and residence do need to be facilitated by the host Member State pursuant to Article 3(2) of Directive 2004/38/EC<sup>60</sup> (see Section 2.2.3 - *Extended family members* for further information).

#### 2.2.2.4 Dependency of direct descendants and direct ascendants

According to the current case law<sup>61</sup> of the Court, the status of '**dependent**' family member is the result of a factual situation characterised by the fact that **material support** for that family member is provided by the EU citizen or by the spouse/partner of that EU citizen. The status of dependent family members does not presuppose a right to maintenance and the reasons for the dependency are irrelevant<sup>62</sup>. There is no need to examine whether the family members concerned would in theory be able to support themselves, for example by taking up paid employment. The fact that the family member is deemed to be well placed to obtain employment and also intends to start work in the host Member State does not affect the interpretation of the requirement to be '**dependent**'<sup>63</sup>.

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<sup>54</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008, paragraph 65.

<sup>55</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008, paragraph 56.

<sup>56</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008, paragraph 57.

<sup>57</sup> 9/74, *Casagrande*, ECLI:EU:C:1974:74.

<sup>58</sup> 235/87, *Matteucci*, ECLI:EU:C:1988:460.

<sup>59</sup> 32/75, *Cristini*, ECLI:EU:C:1975:120. Other rights may result from the right to equal treatment in respect of social and tax advantages which EU children or their EU parents enjoy when exercising the right of free movement (see Section 11 - *Right to equal treatment (Article 24 of Directive 2004/38/EC)*).

<sup>60</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraph 57.

<sup>61</sup> 316/85, *Lebon*, ECLI:EU:C:1987:302, paragraph 22 and C-1/05, *Jia*, ECLI:EU:C:2007:1, paragraphs 36-37, C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraph 21.

<sup>62</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraph 23.

<sup>63</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraphs 28 and 33.

In its judgments on the concept of dependency the Court did not refer to any level of standard of living for determining the need for financial support by the EU citizen.

Directive 2004/38/EC does not lay down any requirement as to the minimum duration of the dependency or the amount of material support provided as long as the dependency is genuine and structural in character.

In order to determine whether family members are dependent, it must be assessed in the individual case whether, having regard to their financial and social conditions, they need material support to meet their essential needs in their country of origin or the country from which they came (*i.e. not in the host Member State where the EU citizen resides*). The determination of whether a person is the 'dependent' of an EU citizen must be based on an assessment of the situation **at the time** when the family member seeks to accompany or join that EU citizen<sup>64</sup>.

Dependent family members are required to present documentary evidence that they are dependent. Evidence may be adduced by any appropriate means, as confirmed by the Court<sup>65</sup>. Where the family members concerned are able to provide evidence of their dependency by means other than a certifying document issued by the relevant authority of the country of origin or the country from which the family members are arriving, the host Member State may not refuse to recognise their rights. However, a mere undertaking from the EU citizen to support the family member concerned is not sufficient in itself to establish the existence of dependence. On the assessment of supporting documents, see Section 7.1 - *Supporting documents for issuing residence cards*.

***Examples of evidence attesting dependence:***

- *a document of the competent authority of the country of origin or the country from which the dependent family member comes attesting the existence of a situation of dependence*<sup>66</sup>;
- *evidence of regular payments of a sum of money made by the EU citizen to the dependent family member during a significant period necessary in order for the dependent family member to support himself or herself in the country of origin or the country from which the dependent family member comes*<sup>67</sup> (*this means that it needs to be proven that regular payments are made and that the payments are necessary to support the family member*);
- *evidence of regular payments of basic costs (e.g. school, accommodation, electricity and water) made directly by the EU citizen during a significant period necessary in order for the dependent family member to support himself or herself in the country of origin or the country from which the dependent family member comes (this means that it needs to be proven that regular payments are made and that the payments are necessary to support the family member)*.

***Examples of evidence that cannot be required:***

<sup>64</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraph 22 and C-1/05, *Jia*, ECLI:EU:C:2007:1, paragraphs 37 and 43.

<sup>65</sup> C-215/03, *Oulane*, ECLI:EU:C:2005:95, paragraph 53 and C-1/05, *Jia*, ECLI:EU:C:2007:1, paragraphs 41 and 42.

<sup>66</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraph 27.

<sup>67</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraph 24.

- certificates stating that the dependent family member has unsuccessfully tried to find employment or to obtain a social allowance in the country of origin or the country from which the applicant comes and/or has otherwise tried to support himself or herself<sup>68</sup>;
- (if the EU citizen is already residing in the host Member State) proof that the family member was a dependant of that EU citizen shortly before or at the time when the latter settled in the host Member State<sup>69</sup>.

There is no requirement for the family member to reside in the same country as the EU citizen or to be a dependant of that EU citizen shortly before or at the time when the EU citizen settled in the host Member State<sup>70</sup>.

**Example:**

*R. is a non-EU citizen. He has always resided in a non-EU country. His daughter, M., is an EU citizen who holds the nationality of Member State A. She resided in Member State A until she relocated to Member State B in 2016. M. has been sending monthly payments to R. to cover his subsistence costs since 2018. In 2020, R. moved to Member State B and applied for a residence card as a 'dependent ascendant' family member pursuant to Article 2(2)(d). R. cannot be refused the residence card on the ground that he has not lived in the same country as his daughter. In addition, he cannot be denied the residence card on the ground that he was not a dependant of his daughter shortly before or at the time when his daughter settled in Member State B.*

Family members whose residence right is derived from their being dependent on a mobile EU citizen do not cease to be covered by the Directive when they cease to be dependent, for example by making use of their rights under Article 23 to take up employment or self-employment in the host Member State<sup>71</sup>.

By the same token, descendants whose residence right is derived from their being under 21 years of age remain covered by Directive 2004/38/EC when they reach the age of 21.

**Example:**

*M. is a non-EU citizen. He had been residing and studying in a non-EU country since September 2018. His non-EU mother and his EU father reside in Member State A. They began to make monthly payments to their son to cover his study and subsistence costs in January 2020. M. moved to Member State A in October 2020, when he was 22 years of age, and applied for a residence card as a dependent direct descendant of an EU citizen (Article 2(2)(c)). He obtained his residence card in December 2020. In February 2021, he started to work in Member State A and moved away from his parents by renting a flat in Member State A. M.'s right of residence cannot be called into question by the fact that after his move to Member State A, M. is no longer dependent on his parents, due to his taking up work in accordance with Article 23 of the Directive.*

<sup>68</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraph 28.

<sup>69</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraph 22.

<sup>70</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraph 33. The Court may provide further clarifications in this regard in case C-607/21 - *Belgian State*.

<sup>71</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraphs 31-32. To be noted that the Court might provide further clarifications in this regard in case C-488/21- *Chief Appeals Officer and Others*.

### 2.2.2.5 Primary carers of minor EU citizens

The Court has clarified that minor EU citizens enjoy full free movement rights, despite the fact that they cannot decide for themselves where to reside or where to travel: the capacity of an EU citizen to be the holder of rights guaranteed by the Treaty and by secondary law on the free movement of persons cannot be made conditional upon the attainment by the person concerned of the age prescribed for the acquisition of legal capacity to exercise those rights personally, or upon the attainment of a minimum age<sup>72</sup>. Such decisions are taken by their parents/primary carers who have the rights of custody of the EU child.

Accordingly, the Court has held that in addition to persons listed in Article 2(2) of Directive 2004/38/EC, where minor EU citizens exercise their free movement rights, their non- EU primary carers (who are not dependent on the minor EU citizen, but are the persons on whom the minor EU citizen is dependent) must be recognised a right of residence in the host Member State, since failure to do so would deprive the child's right of residence of any useful effect<sup>73</sup>. The relevant provisions of Directive 2004/38/EC are applicable by analogy to such primary carers.

#### **Example:**

*A. is an EU minor citizen who is a national of Member State A, where she was born. Six months after her birth, she moved to Member State B with her parents and her elder sister, who are non-EU citizens. All four reside in Member State B. Her parents as primary carers, are covered by free movement rules, and so may be her sister.*

For further information on the right of residence of more than 3 months and less than 5 years of minor EU citizens and their primary carers see Section 5.2.4 - *Primary carers of minor EU citizens*.

### 2.2.3 Extended family members

Member States must, in accordance with their national legislation, facilitate the entry and residence of EU citizens' 'extended' family members.

Article 3(2) of Directive 2004/38/EC refers to:

- any other (*i.e. those not falling under Article 2(2) of Directive 2004/38/EC*) family members who:
  - o are dependants;
  - o are members of the household of the EU citizen;
  - o strictly require the personal care by the EU citizen on serious health grounds; or
- partners with whom the EU citizen has a durable relationship, duly attested.

The term family members in Article 3(2) must be given an independent and uniform interpretation throughout the EU. The reference to 'national legislation' concerns not the

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<sup>72</sup> C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639, paragraph 20 and case law cited.

<sup>73</sup> C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639, paragraphs 45 and 46.

definition of the persons mentioned in that provision but the conditions under which the host Member State must facilitate the entry and residence of those persons<sup>74</sup>.

Directive 2004/38/EC does not lay down any restrictions as to the degree of relatedness when referring to the ‘other family members’.

Article 3(2) of Directive 2004/38/EC stipulates that ‘extended’ family members have the right to have their entry and residence facilitated in accordance with national legislation. In contrast to ‘core’ family members, ‘extended’ family members do not have an automatic right of entry and residence. This means that Member States are not required to grant every application for entry or residence submitted by persons falling under this category<sup>75</sup>. Member States are nevertheless obliged to confer a certain advantage on such applications by comparison with other non-EU citizens<sup>76</sup>.

In order to maintain the unity of the family in a broad sense, the national legislation must provide for a careful examination of the relevant personal circumstances of the applicants concerned, taking into consideration their relationship with the EU citizen or any other circumstances, such as their financial or physical dependence, as made clear in Recital 6 of the Preamble to Directive 2004/38/EC. To meet that obligation, in accordance with Article 3(2) of Directive 2004/38/EC, Member States must establish criteria in their national legislation for this facilitation which enable applicants to obtain a decision on their application based on an extensive examination of personal circumstances and that, in the event of a refusal, is justified by reasons<sup>77</sup>. Member States have a certain degree of discretion in laying down criteria in their national legislation to be taken into account when deciding whether to grant the rights under Directive 2004/38/EC to ‘extended’ family members, provided that these criteria are consistent with the normal meaning of the term ‘facilitation’ and do not deprive the provision of its effectiveness<sup>78</sup>.

In addition, when implementing their Article 3(2) obligation to facilitate the entry and residence of ‘other family members’, Member States must exercise their discretion ‘in the light of and in line with’ the provisions of the Charter of Fundamental Rights, including the right to (respect for) family life (Article 7) and the best interests of the child (Article 24)<sup>79</sup>. They are accordingly obliged to ‘make a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interests in play and, in particular, of the best interests of the child concerned’<sup>80</sup>.

Based on the *Coman* judgment in which the Court stated that the term ‘spouse’ within the meaning of Directive 2004/38/EC is gender-neutral<sup>81</sup>, there are no grounds for interpreting other terms in Directive 2004/38/EC (e.g. ‘any other family member’ (Article 3(2)(a)) and ‘partner’ (Article 3(2)(b))) as not being gender-neutral.

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<sup>74</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraphs 18 and 19.

<sup>75</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraph 18.

<sup>76</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraph 21.

<sup>77</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraphs 21-24.

<sup>78</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraph 24, C-89/17, *Banger*, ECLI:EU:C:2018:570, paragraph 40 and C-129/18, *SM*, ECLI:EU:C:2019:248, paragraph 63.

<sup>79</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraphs 64-67.

<sup>80</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraph 68.

<sup>81</sup> C-673/16, *Coman*, ECLI:EU:C:2018:385, paragraph 35.

Once their status as a family member has been recognised, extended family members who fall under Article 3(2) of Directive 2004/38/EC may rely upon all the provisions of the Directive (including the right to work). This recognition usually takes place via the issue of the residence card under Article 10 of Directive 2004/38/EC, but it may also take place through another procedure (e.g. the issue of a visa for nationalities subject to a visa requirement).

Any negative decision (particularly a refusal of entry, a refusal of a visa and/or a refusal of a residence card) is subject to all the material and procedural safeguards of Directive 2004/38/EC. These include access to judicial proceedings in which ‘the national court must be able to ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with’<sup>82</sup>. A negative decision must be fully justified in writing and open to appeal.

### **2.2.3.1 Situations covered by Article 3(2)(a): financial dependence, physical dependence and household membership**

The three situations covered by Article 3(2)(a) (financial dependence, physical dependence and household membership) are not cumulative. This means that a person can benefit from Article 3(2)(a) if he or she falls within one of these three situations<sup>83</sup>.

Extended family members are required, pursuant to Articles 8(5)(e) and 10(2)(e), to present a document issued by the relevant authority in the country of origin or country from which they are arriving that certifies that they are dependants or members of the household of the EU citizen or proof of the existence of serious health grounds which strictly require the personal care of the family member by the EU citizen<sup>84</sup>.

#### **The concept of ‘dependants’ concerns ‘a situation of financial dependence’<sup>85</sup>.**

Member States may, when exercising their discretion, lay down in their legislation particular requirements as to the nature and duration of dependence in order in particular to satisfy themselves that the situation of dependence is genuine and stable and has not been brought about with the sole objective of obtaining entry into and residence in the host Member State<sup>86</sup>.

However, such requirements must be consistent with the normal meaning of the term ‘facilitate’ and of the words relating to dependence which are used in Article 3(2), and they must not deprive that provision of its effectiveness<sup>87</sup>.

The situation of dependence must exist in the country from which the extended family member comes (and not in the country in which the EU citizen resided before settling in the host Member State)<sup>88</sup>. The determination of whether a person is the ‘dependent’ of an EU citizen must be based on an assessment of the situation **at the time** when the family member seeks to accompany or join that EU citizen. There is no requirement for the family member to reside in the same country as the EU citizen or to be a dependant of that citizen shortly before or at the

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<sup>82</sup> C-89/17, *Banger*, ECLI:EU:C:2018:570, paragraph 52.

<sup>83</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 23.

<sup>84</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraphs 30 and 43.

<sup>85</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 23.

<sup>86</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraph 38.

<sup>87</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraph 39.

<sup>88</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraph 35.

time when the EU citizen settled in the host Member State<sup>89</sup>. This means that, if the EU citizen is already residing in the host Member State, the dependent family member cannot be required to prove dependency on that EU citizen shortly before or at the time when the latter settled in the host Member State<sup>90</sup>.

Dependent extended family members do not cease to be covered by the Directive when they cease to be dependent, for example by making use of their rights under Article 23 to take up employment or self-employment in the host Member State<sup>91</sup>.

**The term ‘member of the household’** refers to persons **having a relationship of dependence with the EU citizen** based on ‘close and stable personal ties, forged within the same household, in the context of a shared domestic life going beyond a mere temporary cohabitation entered into for reasons of pure convenience’<sup>92</sup>.

Members of the household need to prove close and stable ties with the EU citizen, ‘demonstrating a situation of genuine dependence between those two persons and a shared domestic life which has not been brought about with the sole objective of obtaining entry into and residence in the host Member State’<sup>93</sup>.

Factors to be considered when assessing whether such ties exist include the degree of kinship and, depending on the specific circumstances of the case, ‘the closeness of the family relationship in question, reciprocity and the strength of the ties between those two persons’<sup>94</sup>. These ties must be of such a nature that, if the family member were prevented from being a member of the household of the EU citizen in the host Member State, ‘at least one of those two persons would be affected’<sup>95</sup>. It is, however, not necessary to demonstrate that the EU citizen would not exercise free movement rights if the family member were not granted entry and residence<sup>96</sup>. The duration of the shared domestic life is also an important factor and, in that regard, it is necessary to also take into account the period prior to the acquisition of EU citizenship by the person concerned<sup>97</sup>. The EU citizen and the other family member need to be members of the same household, but the EU citizen does not need to be the head of this household<sup>98</sup>.

Where genuine family life exists between an EU citizen and the children of that citizen’s durable partner, Article 3(2)(a) can also cover the situation of the children of the durable partner, including in the case of same-sex partnerships.

**Example:**

<sup>89</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraphs 33 and 35. The Court may provide further clarifications in this regard in case C-607/21- *Belgian State*.

<sup>90</sup> C-83/11, *Rahman*, ECLI:EU:C:2012:519, paragraphs 33 and 35.

<sup>91</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraphs 31 and 32. The Court may provide further clarifications in this regard in case C-488/21- *Chief Appeals Officer and Others*.

<sup>92</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 30.

<sup>93</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 26.

<sup>94</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 27.

<sup>95</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 27.

<sup>96</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 28.

<sup>97</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 29.

<sup>98</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 22.



*Y. is an EU citizen from Member State A. She is married to O., a non-EU citizen. During the last 5 years, they have been living with Y.'s sister L., who is a non-EU citizen, in Member State A. In 2022, all three decide to relocate to Member State B. L. might be covered by Directive 2004/38/EC as a member of the household of Y.*

**A legal relationship between an EU citizen exercising his or her right of free movement and a minor which falls short of a parent-child relationship but leads to the creation of genuine family life** is protected under Article 3(2) of Directive 2004/38/EC<sup>99</sup>. This can in particular be the case for minors in the custody of a permanent legal guardian and for foster children. In such cases, national authorities need to carry out ‘a balanced and reasonable assessment of all the current and relevant circumstances of the case, taking account of all the interests in play and, in particular, of the best interests of the child concerned’<sup>100</sup>. If the assessment leads to the conclusion that the child and the guardian are called to lead a genuine family life and that the former is dependent on the latter, the fundamental right to respect for family life and the best interests of the child demand, in principle, a host Member State to grant the child concerned the right to enter and reside under Article 3(2)(a) of Directive 2004/38, read in the light of Article 7 and Article 24(2) of the Charter of Fundamental Rights, in order to enable the child to live with his or her guardians in their host Member State<sup>101</sup>.

The factors to be taken into account in the assessment include, among others, the age of the child when the legal relationship was established; whether the child has since lived with the EU citizen; the closeness of the personal relationship which has developed between the child and the EU citizen; and the extent to which the child is dependent upon the EU citizen (inasmuch as the latter assumes parental responsibility and legal and financial responsibility for the child)<sup>102</sup>.

It is also necessary to consider ‘possible tangible and personal risks that the child concerned will be the victim of abuse, exploitation or trafficking’<sup>103</sup>. However, such risks cannot be assumed merely because the procedure for establishing the relevant legal relationship is less extensive than the one carried out in the host Member State for adoption or placement of the child, or merely because the 1996 Hague Convention concerning parental responsibility and measures for the protection of children<sup>104</sup> was not applicable in the specific case<sup>105</sup>. These factors must be weighed against the other relevant factual elements<sup>106</sup>.

**As regards family members who strictly require the personal care by the EU citizen on serious health grounds** as referred to under Article 3(2)(a), there is currently no case law specifically covering such family members. The Court has nevertheless stressed that this scenario refers to a situation of ‘physical dependence’<sup>107</sup>. However, this requires an overall

<sup>99</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraphs 56 and 57.

<sup>100</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraph 68.

<sup>101</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraphs 69-73.

<sup>102</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraph 69.

<sup>103</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraph 70.

<sup>104</sup> Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, signed at The Hague on 19 October 1996.

<sup>105</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraph 70.

<sup>106</sup> C-129/18, *SM*, ECLI:EU:C:2019:248, paragraph 70.

<sup>107</sup> C-22/21, *Minister for Justice and Equality*, ECLI:EU:C:2022:683, paragraph 23.

assessment which must be made on a case-by-case basis and must take into account the circumstances specific to each situation.

### **2.2.3.2 Situations covered by Article 3(2)(b): durable partnerships**

**Partners with whom an EU citizen has a de facto durable relationship, duly attested**, are covered by Article 3(2)(b). This category covers both opposite-sex and same-sex relationships. Persons who derive their rights under Directive 2004/38/EC from being **durable partners** may be required to present documentary evidence that they are partners of an EU citizen and that the partnership is durable. Evidence may be adduced by any appropriate means.

The following are some of the elements that can establish the existence of a duly attested de facto durable relationship:

- proof of being in a close relationship for a long time;
- proof of shared parental responsibility for one or more children and an equal involvement in the exercise of this responsibility;
- proof of having entered into a serious long-term legal or financial commitment together (e.g. a mortgage to buy a home or documentation attesting the establishment of a civil union);
- proof of a common domicile or household;
- where the partners do not live together, proof of the regularity and frequency of their contacts.

The requirement of durability of the relationship must be assessed in the light of the objective of Directive 2004/38/EC to maintain the unity of the family in a broad sense<sup>108</sup>. National rules on durability of partnership can refer to a minimum amount of time, set in line with the principle of proportionality, as a criterion for whether a partnership can be considered as durable. However, in this case, national rules would need to provide that other relevant aspects (such as the ones listed above) are also taken into account.

National rules can require the partnership to be exclusive (i.e. it is acceptable to require that neither the EU citizen nor the partner should be married or in a registered partnership with a third person), but national rules would, where relevant, need to take other factors into account.

When applying this provision, special attention should be paid to the situation of those same-sex couples which could not access marriage or enter into a registered partnership and who cannot therefore qualify for a right of residence under Article 2(2) of Directive 2004/38/EC.

### **2.2.4 Supporting documents to attest the family relationship with the EU citizen**

When applying for a residence document or an entry visa under Directive 2004/38/EC, applicants have the right to choose the documentary evidence by which they wish to prove that they are covered by Directive 2004/38/EC (i.e. evidence of the family link, dependency, etc.). Member States may ask for specific documents (e.g. a marriage certificate as the means of proving the existence of marriage) but should not refuse other means of proof. For example, presenting a marriage certificate is not the only acceptable means of establishing family ties.

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<sup>108</sup> Recital 6.

Family members applying for a residence document or an entry visa under Directive 2004/38/EC have to present a ‘document attesting to the existence of a family relationship’. This means that they cannot be required to have the document or relationship first registered in the Member State of the EU citizen’s nationality or in the EU citizen’s host Member State. Requiring such registration amounts to an undue obstacle to the exercise of the right of free movement as it is likely to significantly delay the processing of some applications or even to make it impossible in some cases, given that some Member States do not have a system for registering foreign family relationship documents.

In the case of descendants who are minors of age, considerations of the best interest of the child as enshrined in Article 24 of the Charter of Fundamental Rights may justify in particular verification that free movement takes place consistently with applicable custody rules. Possible requirements in this respect need to comply with general principles of EU law, in particular proportionality and non-discrimination<sup>109</sup>.

#### **a) Documents issued by an EU Member State**

Documents attesting a family relationship issued by one Member State must be accepted by the host Member State without any further administrative steps. As further explained in Section 2.2.1 - *General considerations*, for the purposes of Directive 2004/38/EC and EU law in general, the acceptance of these certificates and of the family relationship covered by these certificates cannot be made conditional on formal recognition by the other Member States<sup>110</sup>.

Furthermore, pursuant to Regulation (EU) 2016/1191<sup>111</sup>, certain public documents attesting the family relationship such as marriage certificates, registered partnership certificates, birth certificates, and certain notarial documents and judgments (for instance, those attesting parenthood or adoption) issued by one Member State are exempted from the requirement of legalisation or an apostille. For some documents (particularly certificates of birth, marriage or registered partnership), the issuing Member State is required to issue the corresponding multilingual standard form upon request by the person concerned. In that context, a Member State should not require a certified translation of birth, marriage or registered partnership certificates if the original has been issued by another Member State and is accompanied by a multilingual standard form. In exceptional circumstances, the authority of a Member State to which the public document is presented may require a translation if it considers that the information contained in the document is insufficient to process the document (this may happen, for instance, when a free text field in a multilingual standard form has been filled in in a language other than the official language of the receiving authority, and this information is necessary for processing the document). A multilingual standard form is not available for other types of documents (e.g. those establishing adoption or nationality). In that case, the authorities of the receiving Member State may require a certified translation of a public document presented by the citizen, but they must accept a certified translation made in any Member State (i.e. not only one made in the receiving Member State).

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<sup>109</sup> See by analogy C-454/19, *ZW*, ECLI:EU:C:2020:947, paragraphs 36, 40 and 42.

<sup>110</sup> Opinion of Advocate General Kokott, C-490/20, *VMA*, ECLI:EU:C:2021:296, paragraph 160.

<sup>111</sup> Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012 (OJ L 200, 26.7.2016, p. 1).

## **b) Documents issued by a non-EU country**

If the original document is drawn up in a language that is not understood by the authorities of the Member State concerned, the Member State may require that the relevant documents be translated. If there are doubts as to the authenticity of the document (e.g. concerning the issuing authority and the correctness of the data appearing on a document), a Member State may ask for the documents to be notarised, legalised or verified (e.g. by means of an apostille). However, the suspicion must be specific in that it concerns a specific document of an individual applicant as it would be disproportionate to systematically require verification and/or legalisation of all supporting documents in all cases.

In a situation where it is established on the basis of an assessment carried out by a Member State that there are sufficiently solid grounds based on objective data for considering that a specific type of document (e.g. a certificate of marriage) issued by a specific non-EU country is unreliable (due in particular to a high rate of forged or fraudulently obtained documents), the national authorities of such Member State might in a specific case require verification or legalisation of the document in question. Such a measure must be limited to the types of documents of the issuing non-EU country in respect of which there are indications that justify the measure. For further information on how to tackle abuse and fraud see Section 16 - *Fraud and abuse (Article 35 of Directive 2004/38/EC)*.

## **3 Right of exit and entry (Articles 4 and 5 of Directive 2004/38/EC)**

### **3.1 Right of exit and entry**

#### **3.1.1 For EU citizens**

Without prejudice to the application of the limitations provided under Chapter VI of Directive 2004/38/EC, Articles 4(1) and 5(1) of Directive 2004/38/EC stipulate that EU citizens have a right to leave a Member State and to enter another Member State with a valid identity card or passport. No other formalities can be required.

Member States are therefore obliged to issue a passport or an identity card to their own nationals, in accordance with their national laws.

Member States must recognise a child's surname as determined and registered in the Member State of birth and residence of the child<sup>112</sup>. The passport or identity card issued by the Member State of nationality must state the forename and surname of the child as it appears on the birth certificate issued by a Member State<sup>113</sup>. This also applies to EU citizens who are children of same-sex parents. In addition, for these children, the Member State of nationality must issue a passport or an identity card without requiring that a birth certificate is issued by the Member State of nationality of the child<sup>114</sup>.

Moreover, in order to enable an EU child to exercise his or her right to move and reside freely within the territory of the Member States with each of the two parents, the parents are entitled

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<sup>112</sup> C-353/06, *Grunkin and Paul*, ECLI:EU:C:2008:559, paragraph 39.

<sup>113</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008, paragraph 44.

<sup>114</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008, paragraph 69.

to have a document that mentions them as being persons entitled to travel with that child (this document may consist in a birth certificate). The other Member States are obliged to recognise that document <sup>115</sup>.

### **3.1.2 Non-EU family members**

Non-EU citizens who are members of the family of an EU citizen need a valid passport. They may also be required to have a visa if they are non-EU citizens subject to the visa obligation (see Section 3.3 - *Visa rules*). For exemption from the visa obligation, see Section 3.2 - *Visa exemption for non-EU family members*.

### **3.1.3 Requirements applicable to the travel documents**

Apart from the requirements flowing from Regulation (EU) 2019/1157 regarding identity cards of EU citizens and from Council Regulation (EC) No 2252/2004 regarding passports of EU citizens <sup>116</sup>, the only requirement relating to travel documents of EU citizens and their family members is that they have to be valid (Article 5(1) of Directive 2004/38/EC). In particular, Member States cannot refuse a travel document which:

- does not have a certain future validity – it is enough that the travel document is valid on the day of entry into the territory;
- is an old document without the latest security features.

### **3.1.4 Format of identity cards for EU citizens**

Regulation (EU) 2019/1157 <sup>117</sup>, which applies as from 2 August 2021 <sup>118</sup>, introduced minimum security and format standards for identity cards issued by Member States <sup>119</sup>. Regulation (EU) 2019/1157 also provides for the gradual phasing out of identity cards that do not comply with its requirements. Such identity cards cease to be valid on their expiry or by 3 August 2031 (whichever is earlier) <sup>120</sup>.

### **3.1.5 The Practical Handbook for Border Guards (Schengen Handbook)**

For the EU Member States implementing the Schengen *acquis* related to external borders as well as Schengen Associated Countries <sup>121</sup>, a Practical Handbook for Border Guards (Schengen

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<sup>115</sup> C-490/20, *VMA*, ECLI:EU:C:2021:1008, paragraph 50.

<sup>116</sup> Council Regulation (EC) No 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States (OJ L 385, 29.12.2004, p. 1).

<sup>117</sup> Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement (OJ L 188, 12.7.2019, p. 67).

<sup>118</sup> Regulation (EU) 2019/1157 is EEA relevant and needs to be integrated into the EEA Agreement (this process is ongoing).

<sup>119</sup> As noted in its Recital 11, Regulation (EU) 2019/1157 does not require Member States to introduce identity cards if they are not provided for under national law.

<sup>120</sup> Article 5(2) nevertheless provides for two derogations. Identity cards that do not meet the minimum security standards set out in part 2 of ICAO document 9303 or that do not include a functional MRZ (machine-readable zone) cease to be valid on their expiry or by 3 August 2026, whichever is earlier. Identity cards of persons aged 70 and above on 2 August 2021, which do meet the minimum security standards set out in part 2 of ICAO document 9303 and which do have a functional MRZ, cease to be valid on their expiry.

<sup>121</sup> All EU Member States, except Ireland, together with Norway, Iceland, Switzerland and Liechtenstein.

Handbook)<sup>122</sup> contains common guidelines, best practices and recommendations on border control, and takes into account the specificities that derive from the free movement *acquis* (see in particular Part II, Section I: Subsection 2, which deals with checks on persons enjoying the right of free movement under EU law; Subsection 6.2 on the stamping of travel documents; and Subsection 8.3, which deals with refusals of entry to persons enjoying the right of free movement under EU law).

### 3.1.6 Missing travel documents

If an EU citizen or the non-EU family member accompanying or joining the EU citizen does not have the necessary travel documents or, if required, the necessary visas, the Member State concerned must, before turning them back, give such a person every reasonable opportunity to obtain the necessary documents, or have them brought to him or her within a reasonable period of time, or corroborate or prove by other means that the person is covered by the right of free movement (Article 5(4) of Directive 2004/38/EC). **In such circumstances, the burden of proof lies on the EU citizen or the non-EU family member to prove that the person is a beneficiary of the Directive.**

However, **it is always highly recommended** to hold the required travel documents (passport or ID card) or visas so that EU citizens and their family members can identify themselves if needed (if stopped by police, boarding a plane, etc.). Member States can adopt national rules that oblige persons who are present on their territory to hold or carry papers and documents and sanctions can be imposed when this obligation is not fulfilled.

### 3.1.7 Entry-exit refusal

EU law enables Member States to prohibit EU citizens and their family members from entering and leaving their territory where they represent a risk to the requirements of public policy, public security or public health within the meaning of Chapter VI of Directive 2004/38/EC or in the event of abuse or fraud (see Section 13 - *Restrictions on the right to move and reside freely on grounds of public policy, public security or public health (Articles 27, 28 and 29 of Directive 2004/38/EC)* and Section 16 - *Fraud and abuse (Article 35 of Directive 2004/38/EC)*).

## 3.2 Visa exemption for non-EU family members

Article 5(2) of Directive 2004/38/EC provides that possession of a valid residence card referred to in Article 10 of Directive 2004/38/EC exempts non-EU family members from the visa requirement<sup>123</sup>.

### a) Residence cards that have a visa-exempting effect under Directive 2004/38/EC

The following residence cards have a visa-exempting effect under Directive 2004/38/EC:

- The ‘Article 10’ residence cards issued to family members of those EU citizens who have moved to a Member State other than that of their nationality.

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<sup>122</sup> Commission recommendation establishing a common “Practical Handbook for Border Guards (Schengen Handbook)” to be used by Member States’ competent authorities when carrying out the border control of persons and replacing Recommendation (C (2019) 7131 final), C(2022)7591 final, [https://ec.europa.eu/transparency/documents-register/detail?ref=C\(2022\)7591&lang=en](https://ec.europa.eu/transparency/documents-register/detail?ref=C(2022)7591&lang=en)

<sup>123</sup> Although not applying Directive 2004/38/EC, Switzerland also grants visa exempting effects to residence cards issued by Member States, except to the ones issued by Bulgaria, Ireland, Cyprus or Romania.

- The permanent residence cards issued under Article 20 of Directive 2004/38/EC (replacing the five-year residence card issued under Article 10 of Directive 2004/38/EC).

Possession of a residence card issued under Article 10 and Article 20 of Directive 2004/38/EC<sup>124</sup> constitutes sufficient proof that the holder of that card is a family member of an EU citizen<sup>125</sup>. The residence card has visa-exempting effect in every Member State, including in the EU citizen's Member State of nationality<sup>126</sup> and regardless of the participation of the issuing or visited Member State in the Schengen area without controls at internal borders (the Schengen area)<sup>127</sup>.

The visa exemption enshrined by Article 5(2) of Directive 2004/38/EC covers family members who are in possession of a residence card or permanent residence card – both when such a card has been issued to them by a Member State that is not part of the Schengen area and when it has been issued by a Member State that is part of that area<sup>128</sup>.

Residence cards relevant under Article 5(2) of Directive 2004/38/EC exempt their holders from the visa requirement independently of whether or not the holder of the card accompanies or joins the EU citizen. Indeed, in contrast to what is specified in other articles of Directive 2004/38/EC (e.g. Articles 6 or 7), there is no requirement under Article 5(2) of Directive 2004/38/EC to accompany or join the mobile EU citizen.

**Examples:**

*-R. is an EU citizen holding the nationality of Member State A and resides with her Chinese spouse, M., in Member State B, which is not part of the Schengen area<sup>129</sup>. M. has a residence card issued under Article 10 of Directive 2004/38/EC by Member State B. R. and M. travel to Member State C, which is part of the Schengen area. M. has a residence card issued under Article 10 of Directive 2004/38/EC, so he is exempted from the visa requirement under the Directive, even when travelling to Member State C which is part of the Schengen area.*

*-T. is an EU citizen holding the nationality of Member State B and resides with his Indian spouse, S., in Member State D, which is part of the Schengen area. S. has a residence card issued under Article 10 of Directive 2004/38/EC by Member State D. S. travels to Member State E, which is not part of the Schengen area. S. has a residence card issued under Article 10 of Directive 2004/38/EC, so she is exempted from the visa requirement under the Directive, even when travelling alone to Member State E which is not part of the Schengen area.*

*-P. is an EU citizen holding the nationality of Member State A. He resides with his Chinese spouse, L., in Member State B, which is not part of the Schengen area. L. holds a residence card, issued by Member State B under Article 20 of Directive 2004/38/EC. L. travels alone to Member State C, which is part of the Schengen area, and then, to Member State E, which is not*

<sup>124</sup> Residence cards issued to beneficiaries under Articles 2(2) and 3(2) of Directive 2004/38/EC.

<sup>125</sup> C-754/18, *Ryanair Designated Activity Company*, ECLI:EU:C:2020:478, paragraph 55.

<sup>126</sup> C-202/13, *Sean McCarthy and Others*, ECLI:EU:C:2014:2450, paragraph 41.

<sup>127</sup> All Member States, except Bulgaria, Ireland, Cyprus and Romania.

<sup>128</sup> C-754/18, *Ryanair Designated Activity Company*, ECLI:EU:C:2020:478, paragraphs 41-47.

<sup>129</sup> In these examples, this refers to Member States that are not part of the Schengen area, i.e. Bulgaria, Ireland, Cyprus and Romania.

*part of the Schengen area. The residence card has visa-exempting effect in Member State C and in Member State E, even if L. travels alone.*

*-Y. is an EU citizen holding the nationality of Member State A, which is not part of the Schengen area. He resides with his Indian spouse, T., in Member State C, which is part of the Schengen area. T. holds a residence card issued by Member State C under Article 20 of Directive 2004/38/EC. The residence card has visa-exempting effect in Member State A. The residence card has visa-exempting effect in Member State A even if T. travels alone.*

As regards the format of residence cards, see Section 12.2 - *Residence cards and permanent residence cards issued to non-EU family members (Articles 10 and 20 of Directive 2004/38/EC and Articles 7 and 8 of Regulation 2019/1157): format and validity period.*

Moreover, the visa exemption also applies to:

- (permanent) residence cards issued to ‘Zhu and Chen parents’ (see Section 2.2.2.5 - *Primary carers of minor EU citizens*);
- (permanent) residence cards issued to family members of EU citizens who have returned to the Member State of their nationality (see Section 18 - *Right of residence of the family members of returning nationals*); and
- (permanent) residence cards issued to family members of dual nationals where Directive 2004/38/EC applies to such family members by analogy (see Section 2.1.4 - *Dual nationals*).

Indeed, as further explained in Section 12.2 - *Residence cards and permanent residence cards issued to non-EU family members (Articles 10 and 20 of Directive 2004/38/EC and Articles 7 and 8 of Regulation 2019/1157): format and validity period*, these three categories of non-EU family members should also be issued with a (permanent) residence card pursuant to Directive 2004/38/EC because the latter applies to them by analogy.

#### **b) Residence documents that do not have visa-exempting effect under Directive 2004/38/EC**

Any other residence document issued to family members of EU citizens does not exempt its holder from the visa requirement under Directive 2004/38/EC.

It is to be noted that residence documents issued under national legislation in a purely internal situation (family reunification with nationals of the issuing Member State who have not exercised the right of free movement) do not concern beneficiaries of free movement rules. Accordingly, Member States must issue these residence documents under Regulation (EC) No 1030/2002<sup>130</sup>. Where the residence permit is issued by a Member State which is part of the Schengen area, residence permits issued under Regulation (EC) No 1030/2002 have visa-exempting effects towards the Member States that are part of the Schengen area.

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<sup>130</sup> Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals (OJ L 157, 15.6.2002, p. 1).



However, residence documents not issued under Directive 2004/38/EC may exempt the holder from the visa requirement under the Schengen rules<sup>131</sup>. For further information in this regard, see the Practical Handbook for Border Guards (Schengen Handbook).

**Example:**

*Member State A is part of the Schengen area. An EU citizen from Member State A resides with his non-EU spouse in Member State A. They travel to another Member State which is also part of the Schengen area. As the non-EU spouse holds a residence permit issued under national law by a Member State which is part of the Schengen area, there is no need for an entry visa under the Schengen rules.*

### 3.3 Visa rules

As provided in Article 5(2), Member States may require non-EU family members moving with or joining an EU citizen to whom Directive 2004/38/EC applies to have an entry visa in accordance with Regulation (EU) 2018/1806<sup>132</sup> or, in the case of Ireland, in accordance national law. Such family members **have the right to enter** the territory of the Member State and **to obtain an entry visa**<sup>133</sup>. This distinguishes them from other non-EU citizens, who have no such right.

The right to obtain a visa applies irrespective of the purpose of the travel – provided that the non-EU family member accompanies or joins the EU citizen (e.g. in order to settle or for tourism in the host Member State).

Under Article 5(2), Member States must grant such persons **every facility** to obtain the necessary visa, which must be issued **free of charge, as soon as possible and on the basis of an accelerated procedure**.

However, Directive 2004/38/EC does not set other rules for the procedures that relate to the issuance of visas.

For the Member States that apply the Schengen *acquis* on the common visa policy in full<sup>134</sup>, a Handbook for the processing of visa applications and the modification of issued visas was adopted via a Commission implementing decision under the Visa Code<sup>135</sup>. An entire section of the Handbook (Part III) deals with the specific rules relating to the processing of visa applications from family members of EU citizens and takes into account the specificities that derive from the free movement *acquis*. The Visa Code and the Handbook are not applicable to

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<sup>131</sup> Article 6 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (OJ L 77, 23.3.2016, p. 1).

<sup>132</sup> Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (OJ L 303 28.11.2018, p. 39).

<sup>133</sup> Case C-503/03, *Commission v Spain*, ECLI:EU:C:2006:74, paragraph 42.

<sup>134</sup> Belgium, Czechia, Denmark, Germany, Estonia, Greece, Spain, France, Croatia, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Slovenia, Slovakia, Finland and Sweden.

<sup>135</sup> Annex to the Commission Implementing Decision amending Commission Decision C(2010) 1620 final as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas (Visa Code Handbook I), C(2020) 395 final,

[https://ec.europa.eu/home-affairs/system/files/2020-06/visa\\_code\\_handbook\\_consolidated\\_en.pdf](https://ec.europa.eu/home-affairs/system/files/2020-06/visa_code_handbook_consolidated_en.pdf)

Ireland, Bulgaria, Cyprus and Romania, but most of the operational instructions contained in Part III of the Visa Handbook are also relevant for those EU Member States.

Processing times for visa applications of non-EU family members exceeding 15 days ‘should be exceptional and duly justified’ and delays of more than 4 weeks are not reasonable.

The authorities of the Member States should guide the family members as to the type of visa they should apply for (i.e. short stay visa), and they cannot require them to apply for long-term, residence or family reunification visas.

Member States may use premium call lines or services of an external company to set up an appointment but must offer the possibility of direct access to the consulate to non-EU family members.

Non-EU family members should be able to obtain appointments with the external service providers or at consulates as soon as possible so as to ensure that they can genuinely benefit from an accelerated procedure.

Where family members decide not to make use of their right to lodge their application directly at the consulate but to use the services of an external company or extra services, they may be required to pay for these services (but not the fee for the visa itself). By contrast, if their application is lodged directly at the consulate, the visa application should be processed without any costs.

As the right to be issued with an entry visa is derived from the family link with the EU citizen, Member States may require only the **presentation of a valid passport and of documents relevant for the purposes of proving that:**

- a) there is an EU citizen from whom the visa applicant can derive any rights.

The burden of proof is discharged by presenting evidence as regards the EU citizen’s identity and nationality (e.g. a valid identity card or passport).

- b) the visa applicant is a family member of such an EU citizen

The burden of proof is discharged by presenting evidence as regards their family ties (e.g. a marriage certificate, birth certificate, etc.) and, if applicable, proof of meeting the other conditions of Articles 2(2) or 3(2) of Directive 2004/38/EC (e.g. evidence relating to dependency, membership of the household, serious health grounds, durability of partnerships, etc.).

- c) the visa applicant will accompany or join an EU citizen in the host Member State.

No additional documents, such as a proof of accommodation, sufficient resources, an invitation letter, return ticket or travel medical insurance, can be required.

As regards visa refusals, the relevant applicable procedural safeguards explained under Section 15 - *Procedural safeguards (Articles 30 to 33 of Directive 2004/38/EC)* apply.

#### **4 Right of residence of up to 3 months (Article 6 of Directive 2004/38/EC)**

Under Article 6 of Directive 2004/38/EC, EU citizens have the right of residence on the territory of another Member State for a period of up to 3 months without any conditions or any formalities other than the requirement to hold a valid identity card or passport. Non-EU family members who are accompanying or joining the EU citizen only need to be in possession of a valid passport.

For the first 3 months, Article 6 of Directive 2004/38/EC applies to all EU citizens and their family members, irrespective of the intention with which they enter the host Member State (e.g. tourism, seeking employment or seeking to reside in the host Member State) and no condition for residence other than holding a valid identity document can be required<sup>136</sup>.

EU citizens and their family members cannot be obliged to leave a Member State for a minimum period (e.g. 3 months) in order to be able to rely on a new right of residence on the territory of that Member State, under Article 6 of Directive 2004/38/EC<sup>137</sup>.

Checks on compliance with Article 6 of Directive 2004/38/EC cannot be carried out systematically. An individual who claims a residence right under Article 6 of Directive 2004/38/EC benefits in principle from the assumption that this stay is covered by Article 6. The person may only be asked to provide evidence confirming that the person is in a situation covered by Article 6 if there are substantiated doubts that the person is not in fact covered by Article 6<sup>138</sup> (which may be the case where the person comes into contact with the national authorities several times over a period of more than 3 consecutive months).

The assessment of the duration of a stay (whether 3 months or longer) requires an individual examination. This should be based on objective factors and must also take into account the intention of the person concerned and relevant evidence.

If an EU citizen or their non-EU family members were subject to **an expulsion decision** adopted by a Member State under Article 15(1) of Directive 2004/38/EC because they no longer enjoyed a right of residence under Article 7 of Directive 2004/38/EC, they can only claim a new right of residence on that territory under Article 6 of that Directive under specific conditions (for further information see Section 14 - *Restrictions on grounds other than public policy, public security or public health (Article 15 of Directive 2004/38/EC)*).

#### **5 Right of residence of more than 3 months for EU citizens and administrative formalities (Articles 7, 8, 14 and 22 of Directive 2004/38/EC)**

In accordance with Article 7(1) of Directive 2004/38/EC, EU citizens have a right of residence in the host Member State for more than 3 months if they:

- a) are workers or are self-employed in the host Member State (Article 7(1)(a));
- b) have sufficient resources and comprehensive sickness insurance cover in the host Member State (Article 7(1)(b));

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<sup>136</sup> C-710/19, *G.M.A.*, ECLI:EU:C:2020:1037, paragraphs 28, 35 and 36.

<sup>137</sup> C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraph 89.

<sup>138</sup> C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraph 100.

- c) are following a course of study in the host Member State and have comprehensive sickness insurance cover there (Article 7(1)(c)); or
- d) are family members joining or accompanying an EU citizen who meets one of the above conditions (Article 7(2)).

Article 8(1) of Directive 2004/38/EC allows the host Member State to require an EU citizen to register with the relevant authorities for residence longer than 3 months. The Member States that have not implemented this obligation are not required to issue registration certificates to EU citizens. In these Member States, mobile EU citizens falling under the scope of Directive 2004/38/EC might prove their status of beneficiaries of Directive 2004/38/EC by any relevant means.

The residence right and continuity of legal residence are not affected when the provision of Directive 2004/38/EC on which the right is based changes. It is also possible to comply with different provisions on the right of residence at the same time and thus hold multiple statuses (e.g. a student who is simultaneously a worker)<sup>139</sup>. A change in status does not require issuance of a new residence document nor does it have to be reported to national authorities.

Member States may encourage integration of EU citizens and their non-EU family members by offering language and other targeted courses on a voluntary basis<sup>140</sup>. No consequence can be attached to the refusal to attend them.

## 5.1 Workers and self-employed persons

### 5.1.1 Definition of worker and self-employed persons

Neither EU primary nor secondary legislation gives a definition of the term ‘worker’ or ‘self-employed person’.

According to the Court’s jurisprudence, the notion of ‘worker’ has, for the purposes of freedom of movement in the EU, a specific meaning<sup>141</sup> and must be given a broad interpretation<sup>142</sup>. It is not possible to apply diverging national definitions (e.g. a definition of worker in domestic labour law) that would be more restrictive.

The Court has defined a ‘worker’ as a person who undertakes genuine and effective work for which he or she is paid under the direction of someone else, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary<sup>143</sup>. The essential features of an employment relationship are that:

- for a certain period of time a person performs services<sup>144</sup>;

<sup>139</sup> C-46/12, *LN*, ECLI:EU:C:2013:97.

<sup>140</sup> See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on multilingualism: an asset for Europe and a shared commitment, COM(2008) 566 final.

<sup>141</sup> For example, case 66/85, *Lawrie-Blum*, ECLI:EU:C:1986:284

<sup>142</sup> 139/85, *Kempf*, ECLI:EU:C:1986:223

<sup>143</sup> C-138/02, *Collins*, ECLI:EU:C:2004:172, paragraph 26; C-456/02, *Trojani*, ECLI:EU:C:2004:488, paragraph 15 or C-46/12, *LN*, ECLI:EU:C:2013:97, paragraphs 40-42.

<sup>144</sup> See for example cases 139/85, *Kempf*, ECLI:EU:C:1986:223; 344/87, *Bettray*, ECLI:EU:C:1989:226; 171/88, *Rinner-Kühn*, ECLI:EU:C:1989:328; C-1/97, *Birden*, ECLI:EU:C:1998:568; 102/88, *Ruzius-Wilbrink*, ECLI:EU:C:1989:639.

- for and under the direction of another person<sup>145</sup>;
- in return for which he or she receives remuneration (benefits in kind are also considered remuneration)<sup>146</sup>.

For further information, consult the 2010 Commission Communication ‘Reaffirming the free movement of workers: rights and major developments’<sup>147</sup>. The condition of a subordination link distinguishes ‘workers’ from ‘self-employed persons’. Work in a relationship of subordination is characterised by the employer determining the choice of activity, remuneration and working conditions<sup>148</sup>.

For self-employed persons, while evidence of self-employment may be required, this may not justify excessive evidentiary requirements. In the same vein, national requirements must not create situations where registration for exercising an activity as self-employed is a precondition for obtaining a residence registration certificate, and at the same time possession of a residence registration certificate is a precondition for registration for taking up an activity as self-employed.

### 5.1.2 Retention of worker or self-employed status

Article 7(3) of Directive 2004/38/EC provides that EU citizens retain the status of worker/ self-employed person in certain situations, even when they are no longer employed (and therefore qualify for equal treatment, see Section 11 - *Right to equal treatment (Article 24 of Directive 2004/38/EC)*). In accordance with the case law of the Court<sup>149</sup>, the list of circumstances in Article 7(3) under which the status of worker/self-employed person can be retained is not exhaustive.

To retain worker status under Articles 7(3)(b) and (c), workers or self-employed persons who have stopped working must register as jobseekers with the relevant employment offices<sup>150</sup>. The host Member State may also impose other requirements for jobseekers, provided these requirements are also imposed on its own nationals, such as the condition to be available to the employment office and its services (for example, counselling, profiling, training, sending applications following information on available jobs, attending interviews, respect provisions of job-integration agreement, if applicable, etc.).

EU citizens who no longer retain the status of workers can continue to search for a job but may be required to provide evidence ‘that they are continuing to seek employment and that they have a genuine chance of being engaged’<sup>151</sup>. They may be denied social assistance by the host

<sup>145</sup> 152/73, *Sotgiu*, ECLI:EU:C:1974:13; 196/87, *Steymann*, ECLI:EU:C:1988:475; 344/87, *Bettray*, ECLI:EU:C:1989:226 and C-151/04, *Nadin*, ECLI:EU:C:2005:775.

<sup>146</sup> See for example 196/87, *Steymann*, ECLI:EU:C:1988:475; 344/87, *Bettray*, ECLI:EU:C:1989:226; C-27/91, *Hostellerie Le Manoir*, ECLI:EU:C:1991:441 and C-270/13, *Haralambidis*, ECLI:EU:C:2014:2185.

<sup>147</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, ‘Reaffirming the free movement of workers: rights and major developments’, 13 July 2010, COM(2010)373 final, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0373:FIN:EN:PDF>

<sup>148</sup> C-268/99, *Jany*, ECLI:EU:C:2001:616.

<sup>149</sup> C-507/12, *Saint Prix*, ECLI:EU:C:2014:2007, paragraph 38; C-544/18, *Daknėvičiūtė*, ECLI:EU:C:2019:761, paragraph 28.

<sup>150</sup> C-483/17, *Tarola*, ECLI:EU:C:2019:309, paragraph 54.

<sup>151</sup> C-67/14, *Alimanovic*, ECLI:EU:C:2015:597, paragraphs 52 and 56.

Member State under Article 24(2) of the Directive<sup>152</sup> (see also Section 11 - *Right to equal treatment (Article 24 of Directive 2004/38/EC)*).

### 5.1.3 EU citizens working for international organisations or with diplomatic/ consular status

It is settled case law<sup>153</sup> that EU citizens who work in a Member State other than that of their nationality for an international organisation are covered by EU Treaty rules on freedom of movement for workers and that they cannot be deprived of their rights under EU free movement of workers law just because they work for an international organisation.

This is the case irrespective of the fact that:

- they also benefit from a hosting agreement between their organisation and the host Member State (that may exempt them from immigration controls);
- they may hold a special residence document issued under such hosting agreement; or
- they arrived in the host Member State to work in that international organisation (so have no history of residence before the start of employment).

The same applies to EU citizens who have diplomatic or consular agent status in a Member State under the Vienna Conventions<sup>154</sup>.

## 5.2 Students and economically non-active EU citizens

Students and economically non-active EU citizens must have **sufficient resources** for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence. They must also have **comprehensive sickness insurance** cover for themselves and their family members<sup>155</sup>.

Directive 2004/38/EC does not preclude an EU citizen from having a ‘right of residence’ in the Member State of work or where he or she is self-employed and, at the same time, in another Member State where the EU citizen spends time (e.g. weekends and holidays) if the relevant conditions are met. Thus, in the Member State in which an EU citizen resides as a student or economically non-active person, that EU citizen may obtain or keep a ‘right of residence’, if the conditions of sufficient resources and comprehensive sickness insurance coverage are met, and, where applicable, if the EU citizen is enrolled as a student.

#### **Example:**

*P. is a national of Member State A. She works in Member State B, where she usually stays during the workweek. However, she spends every weekend and various months per year in Member State C, where she owns a house near the beach. She has a right to reside in Member State B as a worker, but she may also benefit from a right to reside in Member State C.*

<sup>152</sup> C-67/14, *Alimanovic*, ECLI:EU:C:2015:597 paragraph 58.

<sup>153</sup> See for example C-233/12, *Gardella*, ECLI:EU:C:2013:449.

<sup>154</sup> See C-392/05, *Alevizos*, ECLI:EU:C:2007:251.

<sup>155</sup> C-535/19, *A*, ECLI:EU:C:2021:595, paragraph 55 and C-247/20, *VI*, ECLI:EU:C:2022:177, paragraph 63.

### 5.2.1 Sufficient resources

**The notion of ‘sufficient resources’** must be interpreted in the light of the objective of Directive 2004/38/EC, which is to facilitate free movement, as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State.

The first step to assess the existence of sufficient resources should be whether the EU citizen (*and family members who derive their right of residence from him or her*) would meet the national criteria to be granted the **basic social assistance benefit**.

EU citizens have sufficient resources where the level of their resources is equal to or higher than the threshold under which a minimum subsistence benefit is granted in the host Member State. Where this criterion is not applicable, the minimum social security pension should be taken into account.

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

**Member States can refuse to provide social benefits to economically non-active EU citizens who exercise their right to free movement and do not have sufficient resources to claim a residence right** based on Directive 2004/38/EC<sup>156</sup>. Therefore, when assessing whether the sufficient resources requirement under Article 7(1)(b) is met, ‘the financial situation of each person concerned should be examined specifically, **without taking account of the social benefits claimed**’<sup>157</sup>. Indeed, Article 7(1)(b) aims to prevent **economically non-active EU citizens ‘from using the host Member State’s welfare system to fund their means of subsistence’**<sup>158</sup>.

In *Brey*, it was considered that, for an economically non-active EU citizen, the fact of being eligible for social assistance ‘could be an indication’ that the person lacks sufficient resources to avoid becoming an unreasonable burden on the host Member State’s social assistance system under Article 7(1)(b)<sup>159</sup>.

National authorities can, when necessary, undertake checks as to the existence of the resources, their lawfulness<sup>160</sup>, amount and availability. These checks can be carried out when EU citizens apply to register their residence or when their family members apply for a residence document.

After the residence document has been issued, this verification, as provided by Article 14(2) of Directive 2004/38/EC, must not be carried out systematically but only in specific cases where there is a reasonable doubt as to whether the EU citizens or their family members meet the condition relating to sufficient resources.

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<sup>156</sup> C-709/20, *The Department for Communities in Northern Ireland*, ECLI:EU:C:2021:602, paragraph 78; See also Section 11.1 - *Entitlement to equal access to social assistance: content and conditions*.

<sup>157</sup> C-333/13, *Dano*, ECLI:EU:C:2014:2358, paragraph 80 and C-709/20, *The Department for Communities in Northern Ireland*, ECLI:EU:C:2021:602, paragraph 79.

<sup>158</sup> C-333/13, *Dano*, ECLI:EU:C:2014:2358, paragraph 76.

<sup>159</sup> C-140/12, *Brey*, ECLI:EU:C:2013:565, paragraph 63.

<sup>160</sup> But see C-93/18, *Bajratari*, ECLI:EU:C:2019:809, paragraph 42.

The Court has confirmed that Article 14(2) also applies in connection with the grant of social benefits<sup>161</sup>. The Court found that it was in line with that provision to provide for a system where, for each of the social benefits at issue, the claimant had to provide, on the claim form, a set of data which revealed whether or not there was a right to reside, those data being checked subsequently by the authorities responsible for granting the benefit concerned, and it was only in specific cases that claimants were required to prove that they in fact enjoyed a right to reside, as declared by them<sup>162</sup>.

The Court has clarified that the conditions laid down in Article 7(1)(b) of Directive 2004/38/EC must be construed narrowly<sup>163</sup>, in compliance with the limits set by EU law and the proportionality principle<sup>164</sup>, and without compromising the practical effectiveness of Directive 2004/38/EC<sup>165</sup>. Furthermore, the fact that Directive 2004/38/EC's preamble envisages that beneficiaries of the right of residence must not become an 'unreasonable' burden on the public finances of the host Member State entails a certain degree of financial solidarity, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary<sup>166</sup>.

In light of this, due attention should be paid to the fact that an EU citizen's situation may change over time and they may acquire new sources of income. For example, EU citizens who are economically non-active at the beginning of their stay could find employment later on.

Furthermore, the type of evidence of sufficient resources cannot be limited<sup>167</sup>. Therefore, Member States may not establish that certain specific types of documents are the only acceptable evidence of sufficient resources, precluding EU citizens from proving their resources by other means.

**As regards the form and origin of the resources**, they do not have to be periodic and can be in the form of accumulated capital.

Moreover, the Court has clarified that the expression 'have' sufficient resources in Article 7(1)(b) in Directive 2004/38/EC 'must be interpreted as meaning that it suffices that such resources are available to the Union citizen'<sup>168</sup>. EU citizens are not required to prove that they hold sufficient resources themselves, as 'EU law does not ... lay down any requirement whatsoever' as to the **origin** of the resources<sup>169</sup>. Thus, resources from a third person must be accepted<sup>170</sup>.

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<sup>161</sup> C-308/14, *Commission v United Kingdom*, ECLI:EU:C:2016:436, paragraphs 81 and 82.

<sup>162</sup> C-308/14, *Commission v United Kingdom*, ECLI:EU:C:2016:436, paragraphs 83 and 84.

<sup>163</sup> C-140/12, *Brey*, ECLI:EU:C:2013:565, paragraph 70.

<sup>164</sup> C-140/12, *Brey*, ECLI:EU:C:2013:565, paragraph 70 and C-93/18, *Bajratari*, ECLI:EU:C:2019:809, paragraph 35.

<sup>165</sup> C-140/12, *Brey*, ECLI:EU:C:2013:565, paragraph 71.

<sup>166</sup> C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458, paragraph 44.

<sup>167</sup> C-424/98, *Commission v Italy*, ECLI:EU:C:2000:287, paragraph 37.

<sup>168</sup> C-218/14, *Singh and Others*, ECLI:EU:C:2015:476, paragraph 74 and case law cited.

<sup>169</sup> C-93/18, *Bajratari*, ECLI:EU:C:2019:809, paragraph 30; see also C-218/14, *Singh and Others*, ECLI:EU:C:2015:476, paragraph 74; C-165/14, *Rendón Marin*, ECLI:EU:C:2016:675, paragraph 48 and C-86/12, *Alokpa*, ECLI:EU:C:2013:645, paragraph 27.

<sup>170</sup> See for example C-408/03, *Commission v Belgium*, ECLI:EU:C:2006:192, paragraphs 40 et seq.; C-218/14, *Singh and Others*, ECLI:EU:C:2015:476; C-200/02, *Zhu and Chen*, ECLI:EU:C:2004:639; C-86/12, *Alokpa*, ECLI:EU:C:2013:645 and C-165/14, *Rendón Marin*, ECLI:EU:C:2016:675.



The Court furthermore considered that the sufficient resources requirement could be fulfilled through resources deriving from work that the EU citizen's parent had carried out after his or her residence card expired, in a situation where tax and social security contributions were paid on that income and these resources had allowed the EU citizen to support himself or herself and the family members for 10 years without needing to rely on the social assistance system of the host Member State <sup>171</sup>.

**Examples of evidence of resources:**

- bank statements or bank letters proving funds. The host Member State cannot refuse to consider bank documents due to these originating in another Member State, nor can national authorities require the EU citizen to open a bank account in the host Member State and deposit funds there;
- pension certificates;
- proof of income deriving from the lease of immovable property;
- proof of investment income;
- proof of income or funds originating from the EU citizen's family members (e.g. spouse, partner, parent, carer...);
- proof of income from an economic activity, wherever it was carried out;
- proof of assets received through inheritance.

Where a national authority refuses/terminates a right of residence or, where applicable, adopts an expulsion decision on the ground that the EU citizen does not satisfy the requirement of sufficient resources, **a thorough proportionality and individualised assessment is required** <sup>172</sup>. In addition, the fundamental rights guaranteed by the Charter of Fundamental Rights should be taken into account. In particular the importance of freedom of movement as a fundamental right guaranteed under Article 45 of the Charter of Fundamental Rights should be considered when examining whether the measure complies with the principle of proportionality including that the measure must be appropriate and necessary to attain the objective pursued <sup>173</sup>.

In any case, Article 14(3) of Directive 2004/38/EC provides that **expulsion 'shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State'**.

To carry out the assessment, Member States may develop for example a points-based scheme as an indicator. Recital 16 of Directive 2004/38/EC provides **three sets of criteria** for this purpose:

**(1) duration**

For how long is the benefit being granted?

Outlook: is it likely that the EU citizen will cease to use the safety net soon?

<sup>171</sup> C-93/18, *Bajratari*, ECLI:EU:C:2019:809.

<sup>172</sup> However, for the purposes of access to social assistance when assessing the burden that a claim for social assistance might create, the Court has acknowledged that 'while an **individual claim** might not place the Member State concerned under an **unreasonable burden, the accumulation** of all the individual claims which would be submitted to it would be bound to do so' (see C-67/14, *Alimanovic*, ECLI:EU:C:2015:597, paragraph 62 and C-299/14, *García-Nieto*, ECLI:EU:C:2016:114, paragraph 50).

<sup>173</sup> In accordance with Article 52(1) of the Charter of Fundamental Rights

How long has the residence lasted in the host Member State?

**(2) personal situation**

What is the level of connection of the EU citizen and his or her family members with the society of the host Member State?

Are there any considerations pertaining to age, state of health, family and economic situation that need to be taken into account?

**(3) amount**

Total amount of aid granted?

Does the EU citizen have a history of relying heavily on social assistance?

Does the EU citizen have a history of contributing to the financing of social assistance in the host Member State?

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 cannot be expelled for this reason <sup>174</sup>.

Receipt of social assistance benefits can be considered relevant to determining whether the person concerned is a burden on the social assistance system.

Under Article 14(4) of Directive 2004/38/EC, expulsion measures can **in no case** be adopted against workers or self-employed persons and their family members (unless these are based on grounds of public policy, public security or public health). The same applies to jobseekers who entered the host Member State to seek employment and to those who stopped working and no longer retain worker status, for as long as they can provide evidence ‘that they are continuing to seek employment and that they have a genuine chance of being engaged’ <sup>175</sup> (see Section 6 - *Right of residence of jobseekers (Article 14(4)(b) of Directive 2004/38/EC)*).

On the relationship between the possession of sufficient resources and equal treatment under Article 24, see Section 11 - *Right to equal treatment (Article 24 of Directive 2004/38/EC)*.

### **5.2.2 Comprehensive sickness insurance**

Economically non-active EU citizens (including students) and members of their family must have comprehensive sickness insurance cover in the host Member State <sup>176</sup>.

This requirement is satisfied both where the EU citizen has comprehensive sickness insurance which covers his or her family members, and in the inverse case where the family member has such insurance covering the EU citizen <sup>177</sup>.

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

<sup>174</sup> Article 14(3) and Recital 16.

<sup>175</sup> See Article 14(4)(b); see also C-292/89, *Antonissen*, ECLI:EU:C:1991:80, paragraph 22; C-181/19, *Jobcenter Krefeld*, ECLI:EU:C:2020:794, paragraph 69 and C-710/19, *G.M.A.*, ECLI:EU:C:2020:1037, paragraph 33.

<sup>176</sup> C-535/19, *A*, ECLI:EU:C:2021:595, paragraph 55 and C-247/20, *VI*, ECLI:EU:C:2022:177, paragraph 63.

<sup>177</sup> C-247/20, *VI*, ECLI:EU:C:2022:177, paragraph 67.

compliance with the limits imposed by EU law and in accordance with the principle of proportionality<sup>178</sup>.

Pensioners fulfil the condition of comprehensive sickness insurance cover if they are entitled to health treatment on behalf of the Member State which pays their pension<sup>179</sup>. In particular, pensioners in possession of a Portable Document S1 (**PD S1**) are entitled to access healthcare in the Member State of residence and fulfil the condition of comprehensive sickness insurance<sup>180</sup>.

When the EU citizen concerned does not move their residence in the sense of Regulation (EC) No 883/2004 to the host Member State and has the intention to return (e.g. studies or posting to another Member State), the European Health Insurance Card (the EHIC) issued by the Member State of origin proves such comprehensive cover (see Section 11.4 - *Entitlement to equal access to healthcare: content and conditions* and, on the notion of residence within the meaning of Regulation (EC) No 883/2004, Section 11.3 - *Relationship between Article 24 of Directive 2004/38/EC and Regulation (EC) No 883/2004 on the coordination of social security systems*).

However, the EHIC issued by the Member State of origin cannot be used by economically non-active EU citizens (in situations other than the ones above) to prove that they have a comprehensive sickness insurance when they fulfil the following two cumulative conditions:

- they are exercising their right of residence in the host Member State for a period of more than 3 months under Article 7(1)(b) of Directive 2004/38/EC and prior to the acquisition of permanent residence; and
- they move their residence to the host Member State in the sense of Regulation (EC) No 883/2004 (as explained in Section 11.3 - *Relationship between Article 24 of Directive 2004/38/EC and Regulation (EC) No 883/2004 on the coordination of social security systems*) and, as a consequence, are no longer covered by the social security system of their Member State of origin.

However, EU citizens in this latter situation have the right to be affiliated to the public sickness insurance scheme of the host Member State on the basis of Regulation (EC) No 883/2004<sup>181</sup>.

Nevertheless, under such circumstances, the host Member State may provide that, until the EU citizen obtains the right of permanent residence, access to this system is not free of charge, in order to prevent economically non-active EU citizens from becoming an unreasonable burden on its public finances<sup>182</sup>.

As a result, the host Member State may, subject to compliance with the principle of proportionality, make the affiliation to its public sickness insurance system of an economically non-active EU citizen subject to conditions intended to ensure that the EU citizen does not become an unreasonable burden on its public finances. These conditions may include the EU

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<sup>178</sup> Case C-413/99, *Baumbast*, ECLI:EU:C:2002:493, paragraphs 89-94.

<sup>179</sup> Pensioners covered by private insurance forming part of a statutory insurance scheme, certified by the insurer, also fulfil this condition where such an insurance is part of the Member State health general policy for their citizens or specific groups of citizens.

<sup>180</sup> Articles 17, 23, 24 and 25 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).

<sup>181</sup> C-535/19, *A*, ECLI:EU:C:2021:595, paragraphs 50 and 51.

<sup>182</sup> C-535/19, *A*, ECLI:EU:C:2021:595, paragraph 58.

citizen concluding or maintaining a comprehensive private sickness insurance enabling the host Member State to be reimbursed for the health expenses it has incurred for that citizen's benefit, or the EU citizen paying a contribution to that Member State's public sickness insurance system<sup>183</sup>. The Court has held that, in this context, the host Member State must ensure that the principle of proportionality is observed 'and, therefore, that it is not excessively difficult for that citizen to comply with such conditions'<sup>184</sup>.

In any case, once an EU citizen is affiliated to such a public sickness insurance system in the host Member State, that citizen has comprehensive sickness insurance within the meaning of Article 7(1)(b)<sup>185</sup> and no additional private insurance can be requested.

In addition, the host Member State may subject the affiliation to its public sickness insurance system to additional conditions (e.g. a one year previous residence in the EU), provided the latter are also applicable to its own nationals and they comply with the principle of proportionality.

**Examples:**

*-C. is a national of Member State A, where he is enrolled in University. He temporarily moves to Member State B to spend a few months there as an Erasmus student. The EHIC issued from Member State A is sufficient proof of comprehensive sickness insurance in Member State B.*

*-P. is a national of Member State A where he has been residing. Then, he buys a house in Member State B and moves there to join his wife and son and live on his savings. He terminates the rental contract for his apartment in Member State A and takes all his personal belongings with him to Member State B. He declares he has no intention to return to Member State A. He cannot use the EHIC issued from his Member State of origin A to prove comprehensive sickness insurance in Member State B.*

*-M. is a national of Member State A. She permanently moves to Member State B to join her husband, a national of Member State B. She is not economically active. Member State B has a system of State-financed medical care which is granted without any individual and discretionary assessment of personal needs, to persons falling within the categories of recipients defined by national legislation. M. fulfils all the requirements imposed on nationals of Member State B to be affiliated. Therefore, she has a right to be affiliated to the public sickness insurance scheme of Member State B. Member State B is not obliged to grant such affiliation free of charge, but any conditions in this regard must be proportionate and ensure that it is not excessively difficult for the EU citizen to comply with them.*

Once the EU citizen acquires a right of permanent residence, the requirement for comprehensive sickness insurance no longer applies to the EU citizen nor to his or her family members<sup>186</sup>.

For further information see Section 11.3 - *Relationship between Article 24 of Directive 2004/38/EC and Regulation (EC) No 883/2004 on the coordination of social security systems.*

<sup>183</sup> C-535/19, A, ECLI:EU:C:2021:595, paragraph 59 and C-247/20, VI, ECLI:EU:C:2022:177, paragraph 69.

<sup>184</sup> C-535/19, A, ECLI:EU:C:2021:595, paragraph 59.

<sup>185</sup> C-247/20, VI, ECLI:EU:C:2022:177, paragraph 69.

<sup>186</sup> C-247/20, VI, ECLI:EU:C:2022:177, paragraphs 59 and 60.

### 5.2.3 Students

For mobile EU students, pursuant Article 7(1)(c), Member States may require:

- proof that they are enrolled at a private or public accredited establishment, for the principal purpose of following a course of study, including vocational training;
- proof that they have comprehensive sickness insurance cover in the host Member State (see Section 5.2.2 - *Comprehensive sickness insurance*); and
- a declaration (or other equivalent means) that they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence.

### 5.2.4 Primary carers of minor EU citizens

As explained in Section 2.2.2.5 - *Primary carers of minor EU citizens*, the Court has held that in addition to persons listed in Article 2(2) of Directive 2004/38/EC, where minor EU citizens exercise their free movement rights, their non-EU primary carers must be recognised a right of residence in the host Member State.

The right of residence of more than 3 months and less than 5 years of minor EU citizens and their primary carers is subject to conditions. Minors will typically exercise their right of free movement without being involved in an economic activity. It is therefore necessary to examine whether the EU children exercising their right of free movement fulfil the conditions of (1) having sufficient resources for themselves and their primary carers not to become a burden on the social assistance system of the host Member State during their period of residence; and (2) having a comprehensive sickness insurance coverage for themselves and their primary carers (Article 7(1)(b) of Directive 2004/38/EC, see Section 5.2.1 - *Sufficient resources* and Section 5.2.2 - *Comprehensive sickness insurance*)<sup>187</sup>. The following must be considered in this regard:

- minor EU citizens can fulfil the sufficient resources requirement through their non-EU primary carers<sup>188</sup> (see Section 5.2.1 - *Sufficient resources* for further information, in particular as regards the form and origin of the resources);
- the comprehensive sickness insurance coverage requirement can be satisfied both:
  - o where minor EU citizens have comprehensive sickness insurance which covers their primary carers; and
  - o in the opposite case, where their primary carers have comprehensive sickness insurance which covers minor EU citizens<sup>189</sup>.

Once a minor EU citizen acquires a right of permanent residence, they and their primary carers are no longer subject to the requirements of sufficient resources and comprehensive sickness insurance<sup>190</sup>.

It is to be noted that primary carers of children can also derive residence rights from Article 12(3) of Directive 2004/38/EC if the child resides and is enrolled at an educational

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<sup>187</sup> C-535/19, *A*, ECLI:EU:C:2021:595, paragraph 55 and C-247/20, *VI*, ECLI:EU:C:2022:177, paragraph 63.

<sup>188</sup> See, for example, cases C-93/18, *Bajratari*, ECLI:EU:C:2019:809, paragraphs 30 and 31 and C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675, paragraph 48.

<sup>189</sup> C-247/20, *VI*, ECLI:EU:C:2022:177, paragraph 67.

<sup>190</sup> C-247/20, *VI*, ECLI:EU:C:2022:177, paragraphs 59 and 60.

establishment in the host Member State<sup>191</sup> (see Section 8 - *Retention of the right of residence by family members in the event of death or departure of the EU citizen and in the event of divorce, annulment of marriage or termination of registered partnership (Articles 12 and 13 of Directive 2004/38/EC)*).

### 5.3 Supporting documents for obtaining a registration certificate

Article 8(1) of Directive 2004/38/EC allows the host Member State to require an EU citizen to register with the relevant authorities for residence longer than 3 months. It is thus for each Member State to decide whether to impose this obligation upon mobile EU citizens (for further information on registration certificates see Section 12.1 - *Registration certificates and documents certifying permanent residence issued to EU citizens (Articles 8 and 19 of Directive 2004/38/EC and Article 6 of Regulation 2019/1157): format, minimum information and validity period*).

The **list of documents**<sup>192</sup> to be presented with the request for a registration certificate is exhaustive. No additional documents can be requested.

#### **Examples:**

*-M. is an EU mobile worker. He does not have to submit evidence that he complies with the sufficient resources requirement.*

*-L. is an EU citizen married to an EU mobile worker. She submits a registration certificate application as the spouse of an EU mobile worker. She cannot be asked to submit evidence that she works or that she complies with the sufficient resources requirement.*

*-R. is an EU citizen married to a non-EU worker. He submits a registration certificate application as an economically non-active EU citizen. He submits proof of sufficient resources for him and his husband (through the income of his non-EU spouse) and comprehensive sickness insurance for both of them (through their affiliation to the public health insurance scheme of the host Member State). R. does not need to submit evidence that he is a worker.*

However, for workers and self-employed, in case of doubts as to the genuineness or the veracity of the documents provided, the host Member State can request that they be confirmed by additional evidence (which can be in the form of salary strips).

In any case, Directive 2004/38/EC does not specify the supporting documents with respect to all possible situations (such as residence documents issued to jobseekers or to family members retaining right of residence under Articles 12 or 13 of Directive 2004/38/EC).

As regards registration certificate refusals, see Section 15 - *Procedural safeguards (Articles 30 to 33 of Directive 2004/38/EC)*.

A registration certificate has only declaratory and probative force (see Section 12.3 - *Nature and effects of residence documents (Article 25 of Directive 2004/38/EC)*). It certifies the right

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<sup>191</sup> Similar rules apply with regard to parents of EU citizens whose right of residence is based on Article 10 of Regulation (EU) No 492/2011 and relevant case law (see C-529/11, *Alarape*, ECLI:EU:C:2013:290 for more details).

<sup>192</sup> Articles 8(3) and 8(5) and Recital 14.

of residence and is not a precondition for the exercise of other rights to which the EU citizen is entitled.

#### 5.4 Processing times for issuing registration certificates

Pursuant to Article 8(2), registration certificates must be issued ‘immediately’. In Member States that have set up registration systems for EU citizens (see Section 12 - *Residence documents (Articles 8, 10, 19, 20 and 25 of Directive 2004/38/EC)*), this requirement is particularly relevant as these certificates might facilitate the exercise of the rights conferred on the EU citizen and their integration in the host Member State.

If the registration certificate cannot be issued on the spot upon handing in the application and supporting evidence, it should be so within the following few days (for instance after 7/10 days). In case of an ongoing investigation in a suspected case of abuse or fraud the issuance can be deferred, while respecting the principle of effectiveness and the objective of rapid processing of applications inherent to Directive 2004/38/EC<sup>193</sup>.

#### 5.5 Population registration systems

Some Member States require EU citizens to register in a national (or sub-national/ local) population register and obtain a personal identification number. Inscription in the population register is normally different from residence registration under Directive 2004/38/EC and is a matter for national law.

The Court has confirmed that Member States are entitled to use a population register to support the authorities responsible for applying the legislation relating to the right of residence<sup>194</sup>.

However, **the application of national rules on population registers must respect EU law.**

In particular, registration in the national population register and possession of a personal identification number must not be pre-conditions for an EU citizen to have the right to work in the host Member State and must not constitute an impediment to the exercise of an EU citizen’s free movement rights<sup>195</sup>.

Accordingly, if the personal identification number is necessary in the daily life in the host Member State but EU citizens cannot obtain it (for example because the conditions for obtaining such a number are different from the conditions for residence registration), such EU citizens should be offered alternatives means to such numbers. Based on the right to equal treatment in EU law, Member States are prohibited from taking measures which discriminate directly against nationals of other Member States. Member States are also not allowed to take indirect measures which, despite not making a distinction according to nationality, affect mobile EU citizens more than nationals of the host Member State and result in a consequent risk that such

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<sup>193</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 69.

<sup>194</sup> C-524/06, *Huber*, ECLI:EU:C:2008:724, paragraph 58.

<sup>195</sup> The right of free movement is conferred directly by the Treaty regardless of the accomplishment of any formality. See, for example, as regards residence documents, C-325/09, *Dias*, ECLI:EU:C:2011:498, paragraphs 48, 49 and 54; C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraphs 48 and 49, C-456/12. *O. and B.*, ECLI:EU:C:2014:135, paragraph 60. In the context of free movement of workers, services and freedom of establishment, see 48/75, *Royer*, ECLI:EU:C:1976:57.

measures will place mobile EU citizens at a particular disadvantage without objective justification<sup>196</sup>.

Host Member States can require EU citizens residing in their territory in the exercise of their rights of free movement to obtain a specific tax identification number. This number might be a basic element of control for the national tax authorities. Again, the obligation to hold a specific tax identification number in the host Member State must not lead to any direct or indirect discrimination against nationals of other Member States. In addition, the procedures put in place to obtain such a number should not create any obstacle to the fundamental freedoms or disrupt business transactions.

## **6 Right of residence of jobseekers (Article 14(4)(b) of Directive 2004/38/EC)**

Article 14(4)(b) applies to jobseekers who entered the host Member State to seek employment and to those who stopped working and no longer retain worker status, for as long as they can provide evidence ‘that they are continuing to seek employment and that they have a genuine chance of being engaged’<sup>197</sup>.

Article 45 TFEU and Article 14(4)(b) of Directive 2004/38/EC require the host Member State to grant the EU citizen ‘a reasonable period of time’ to look for work which, should the EU citizen decide to register as a jobseeker in the host Member State, starts from the time of registration. This reasonable period of time should ‘allow that person to acquaint himself or herself with potentially suitable employment opportunities and take the necessary steps to obtain employment’. ‘During that period, the host Member State may require the jobseeker to provide evidence that he or she is seeking employment’<sup>198</sup>. A period of 6 months from the date of registration ‘does not appear, in principle, to be insufficient’<sup>199</sup>.

‘It is only after the reasonable period of time has elapsed that the jobseeker is required to provide evidence not only that he or she is continuing to seek employment but also that he or she has a genuine chance of being engaged’<sup>200</sup>.

Where an EU citizen enters a host Member State with the intention of seeking employment there, his or her right of residence during the first 3 months is also covered by Article 6 of Directive 2004/38/EC. Accordingly, during that three-month period, no condition other than the requirement to hold a valid identity document is to be imposed on that citizen<sup>201</sup>.

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<sup>196</sup> See for example C-57/96, *Meints*, ECLI:EU:C:1997:564, paragraphs 44 and 45.

<sup>197</sup> See Article 14(4)(b) and C-292/89, *Antonissen*, ECLI:EU:C:1991:80, paragraph 22, C-181/19, *Jobcenter Krefeld*, ECLI:EU:C:2020:794, paragraph 69 and C-710/19, *G.M.A.*, ECLI:EU:C:2020:1037, paragraph 33.

<sup>198</sup> C-710/19, *G.M.A.*, ECLI:EU:C:2020:1037, paragraph 51.

<sup>199</sup> C-710/19, *G.M.A.*, ECLI:EU:C:2020:1037, paragraph 42. See also C-292/89, *Antonissen*, ECLI:EU:C:1991:80, paragraph 21.

<sup>200</sup> C-710/19, *G.M.A.*, ECLI:EU:C:2020:1037, paragraph 46.

<sup>201</sup> C-710/19, *G.M.A.*, ECLI:EU:C:2020:1037, paragraphs 35 and 36. See also Recital 9 of Directive 2004/38/EC. On the other hand, the ‘reasonable period of time’ starts to run from the time when the EU citizen concerned has decided to register as a jobseeker in the host Member State.



When assessing the jobseeker's situation, the authorities may in particular take into account the following **factors** <sup>202</sup>:

- Regarding the fact that the person is seeking employment:
  - registration as a jobseeker with the national body responsible for jobseekers;
  - regular submission of applications to potential employers or attendance at employment interviews.
- Regarding the genuine chances of being engaged:
  - the situation of the national labour market in the sector matching the jobseeker's occupational qualifications;
  - the fact that a jobseeker refused offers of employment which did not match his or her professional qualifications cannot be taken into account;
  - the fact that the jobseeker has never worked in the host Member State cannot be taken into account.

For further information, consult the 2010 Commission Communication 'Reaffirming the free movement of workers: rights and major developments' and Section 11 - *Right to equal treatment (Article 24 of Directive 2004/38/EC)*.

## **7 Right of residence of more than 3 months and administrative formalities for non-EU family members and right to work (Articles 7, 9 to 11, 22 and 23 of Directive 2004/38/EC)**

### **7.1 Supporting documents for issuing residence cards**

The **list of documents** <sup>203</sup> to be presented with the application for a residence card is exhaustive, as confirmed by Recital 14. No additional documents can be requested by national authorities <sup>204</sup>.

In the framework of the administrative procedure for issuing a residence card, national authorities must only verify whether the non-EU family member 'is in a position to prove, through the submission of the documents stated in Article 10(2) of that directive, that he comes within the scope of the concept of "family member" of a Union citizen, within the meaning of Directive 2004/38, in order to benefit from the residence card' <sup>205</sup>. Therefore, non-EU citizens who submit proof that they fall within the definition of 'family member' of an EU citizen covered by Directive 2004/38, 'must be issued with a residence card certifying that status at the earliest opportunity' <sup>206</sup>.

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<sup>202</sup> C-710/19, *G.M.A.*, ECLI:EU:C:2020:1037, paragraph 47.

<sup>203</sup> Article 10(2).

<sup>204</sup> See C-127/08, *Metock and Others*, ECLI:EU:C:2008:449, where the Court clarified that EU citizens' family members who are non-EU citizens are entitled to accompany, join and live with the EU citizen in the host Member State, regardless of whether or not they had previously been lawfully resident in another Member State and irrespective of the date or circumstances of their entry into the host Member State. The Court also emphasised that they are entitled to reside in the host Member State as family members of an EU citizen regardless of whether they were already family members at the time the EU citizen moved to the host MS or only became family members after the EU citizen moved to the host Member State. See also C-459/99, *MRAX*, ECLI:EU:C:2002:461.

<sup>205</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 63.

<sup>206</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 65.

Accordingly, the status of beneficiary of Directive 2004/38/EC is established by presenting documents relevant for the purposes of proving that:

- a) there is an EU citizen from whom the residence card applicant can derive a right of residence.

The burden of proof is discharged by presenting evidence as regards the EU citizen's identity and nationality (e.g. a valid travel document).

- b) the residence card applicant is a family member of this EU citizen.

The burden of proof is discharged by presenting evidence as regards the family member's identity (e.g. a valid travel document), the family ties (e.g. a marriage certificate, birth certificate, etc.) and, if applicable, proof of meeting the other conditions of Articles 2(2) or 3(2) of Directive 2004/38/EC (e.g. evidence relating to dependency, serious health grounds, durability of partnerships, etc.). See Section 2.2 - *Family members and other beneficiaries*.

- c) the EU citizen resides in the host Member State in accordance with Directive 2004/38/EC. The level of evidence required depends on the basis of the **EU citizen's residence** in the host Member State.

- for residence of more than 3 months, EU citizens have to meet the conditions Directive 2004/38/EC sets for the right of residence and Member States may require them to possess registration certificates;

The burden of proof is discharged by presenting the registration certificate or, in its absence, any other proof of residence of the EU citizen in the host Member State in compliance with the conditions laid down by Directive 2004/38/EC (see Section 5 - *Right of residence of more than 3 months for EU citizens and administrative formalities (Articles 7, 8, 14 and 22 of Directive 2004/38/EC)*).

- for permanent residence (Article 16(1) of Directive 2004/38/EC), EU citizens do not have to meet any additional requirements.

The burden of proof is discharged by presenting the document certifying permanent residence or, in the absence, any other proof of the permanent residence of the EU citizen in the host Member State in compliance with the conditions laid down by Directive 2004/38/EC (see Section 9 - *Permanent residence (Articles 16 to 21 of Directive 2004/38/EC)*).

However, Directive 2004/38/EC does not list supporting documents with respect to all possible situations (such as residence cards issued to family members retaining right of residence under Articles 12 or 13 of Directive 2004/38/EC).

***Examples:***

*-M. is an EU mobile worker. His non-EU spouse, Y., wishes to join him in the host Member State. Y. does not have to submit evidence that her EU spouse has sufficient resources for them both.*

*-T. is a non-EU citizen married to J., a mobile EU worker. T. submits a residence card application as the spouse of an EU mobile worker. T. submits proof of her spouse's work, but T. does not need to submit evidence that she works nor of comprehensive sickness insurance coverage.*

- R. is a non-EU citizen married to W., an EU pensioner with sufficient resources. While the sufficient resources and the comprehensive sickness insurance need to be proven, R. does not need to submit any evidence regarding his entry visa.

- L. is the non-EU father of M., a mobile EU worker. L. applies for a residence card, providing documents showing his financial dependency on his daughter M. L. does not have to provide evidence that he and his daughter lived in the same household in the country from which he came, nor to prove that his daughter must assist him due to his state of health.

Member States may require that documents be **translated, notarised or legalised** only 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 document (e.g. concerning the issuing authority and the correctness of the data appearing on a document). For further information, see Section 2.2.4 - *Supporting documents to attest the family relationship with the EU citizen*.

## 7.2 Processing times for issuing residence cards

Non-EU family members can apply for a residence card as soon as they arrive in the host Member State, if they intend to stay in the host Member State for longer than 3 months.

Pursuant to Article 10(1), the residence card must be **issued within 6 months from the date of application**.

This requirement is of particular relevance as residence cards facilitate the exercise of the residence right by non-EU family members and their integration in the host Member State. The possession of a valid residence card exempts its holder from the obligation to obtain a visa to enter the territory of the Member States<sup>207</sup>. These cards might also, in practice, make it easier for non-EU citizens to exercise their right to work in the host Member State recognised under Article 23. Hence, it is important that national authorities issue those cards within the time limits prescribed by the Directive.

The concept of ‘issuing’ implies that within the six-month period from the date on which the application was submitted, ‘the competent national authorities must examine the application, adopt a decision and, in the case where the applicant qualifies for the right of residence on the basis of Directive 2004/38, issue that residence card to that applicant’<sup>208</sup>.

The obligation to issue the residence card within the mandatory period of 6 months ‘necessarily implies the adoption and notification of a decision to the person concerned before that period expires’<sup>209</sup>. ‘The same applies when the competent national authorities refuse to issue the residence card (...)’<sup>210</sup> (see Section 15 - *Procedural safeguards (Articles 30 to 33 of Directive*

<sup>207</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraphs 66 and 67.

<sup>208</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 36. However, national authorities cannot ‘issue automatically a residence card of a family member of a European Union citizen to the person concerned, where the period of six months, referred to in Article 10(1) of Directive 2004/38, is exceeded, without finding, beforehand, that the person concerned actually meets the conditions for residing in the host Member State in accordance with EU law’ (C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 56).

<sup>209</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 38.

<sup>210</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 39.

2004/38/EC)). During that six-month period, therefore, ‘the competent national authorities may ultimately adopt either a positive or negative decision’<sup>211</sup>.

Lastly, the Court has clarified that EU law precludes ‘national authorities automatically being allowed a new period of six months following the judicial annulment of an initial decision refusing to issue a residence card. They are required to adopt a new decision within a reasonable period of time, which cannot, in any case, exceed the period referred to in Article 10(1) of Directive 2004/38’<sup>212</sup>. Hence, following the judicial annulment of an initial decision refusing to issue a residence card, national authorities should adopt a new decision on the residence card application within a reasonable period of time, which cannot, in any case, exceed 6 months.

In addition, pursuant to Article 10(1), the certificate of application for a residence card must be issued ‘immediately’.

Where national authorities have put in place a system of appointments to apply for a residence card, the management of such system should ensure that these appointments are available without undue delay.

In some cases, the time it takes to be issued with a residence card might exceed the validity of the entry visa on the basis of which the non-EU family member entered the host Member State. **In these cases, where the entry visa expires while awaiting for the issuance of the residence card, non-EU family members do not have to return to their country of origin and obtain a new entry visa.** Indeed, the length of stay for non-EU family members is not subject to any time limits, as long as the non-EU family member and the EU citizen they are joining or accompanying meet the relevant residence conditions.

Non-EU family members cannot be expelled following the expiration of their visa<sup>213</sup>.

In order to overcome the difficulties that non-EU family members might face during the processing of their residence application, it is recommended that the certificate of application or any other document expressly acknowledges the non-EU family members’ right to reside and work while their application for a residence card is being processed.

In addition, during the processing of their residence card applications, non-EU family members might face practical difficulties in travelling (in particular in returning to the host Member State where they now reside), given that they will not yet – in the absence of the residence card – be exempt from entry visa requirements and their entry visa might have expired. A facilitation of their travel outside the host Member State and return to the host Member State should be provided especially where the residence card has not yet been issued due to delays on the part of the issuing Member State and (although not only) in emergency situations (e.g. to attend the funeral of a close relative). Where a document is required for their return, where possible, the person should be able to obtain it before their departure from the host Member State. In any case, all facilitations for a new visa application should be granted (see Section 3.3 - *Visa rules*).

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<sup>211</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 40.

<sup>212</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 69.

<sup>213</sup> C-459/99, *MRAX*, ECLI:EU:C:2002:461, paragraph 90.

A residence card has only declaratory and probative force (see Section 12.3 - *Nature and effects of residence documents (Article 25 of Directive 2004/38/EC)*). It certifies the right of residence and is not a precondition for other rights to which the family member is entitled.

## **8 Retention of the right of residence by family members in the event of death or departure of the EU citizen and in the event of divorce, annulment of marriage or termination of registered partnership (Articles 12 and 13 of Directive 2004/38/EC)**

Articles 12 and 13 are aimed at protecting the family life and human dignity of family members by ensuring that in some circumstances family members already residing within the territory of the host Member State retain their right of residence exclusively on a personal basis. Some conditions are nonetheless attached.

### **8.1 Situations giving right to the potential retention of the right of residence**

Article 12 covers situations where there is no longer an EU citizen to derive a right from (because the EU citizen passed away or left the host Member State).

Article 13 refers to situations where the family link (marriage or registered partnership) between the EU citizen and the family member disappears. When it comes to partnerships, Article 13 only refers to the ‘registered’ ones.

Family members who were granted a right of residence under Article 3(2)(b), as the durable partner of an EU citizen, will not benefit from Article 13<sup>214</sup>. However, based on Article 37 of Directive 2004/38/EC, Member States have the possibility to extend the provisions of Article 13 to cover situations where neither a marriage nor a registered partnership has been concluded, in particular in cases where there has been domestic violence (a right of residence being granted based on more favourable provisions will nonetheless not be considered as being granted on the basis of Directive 2004/38/EC<sup>215</sup>.)

Where the EU citizen has left the host Member State, only family members who are EU citizens and those who fall under Article 12(3) can retain a right of residence.

### **8.2 Right retained**

In situations covered by Articles 12 and 13, family members retain their rights on a personal basis<sup>216</sup>, meaning that it is not a right of residence derived from the EU citizen.

### **8.3 Conditions to retain the right of residence**

No condition applies if the family members have acquired a permanent right of residence before or at the time when the event (death or departure of the EU citizen, divorce...) occurs.

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<sup>214</sup> C-45/12, *Hadj Ahmed*, ECLI:EU:C:2013:390, paragraph 37.

<sup>215</sup> C-709/20, *The Department for Communities in Northern Ireland*, ECLI:EU:C:2021:602, paragraph 83.

<sup>216</sup> C-115/15, *NA*, ECLI:EU:C:2016:487, paragraph 45.

In cases covered by Article 12(3), no condition applies either to children in education or to the parent who has actual custody of the children: they are not subject to the condition of sufficient resources and comprehensive sickness insurance cover<sup>217</sup>. That remains the case until the children have completed their studies<sup>218</sup>.

The other situations are subject to conditions.

Before acquiring permanent residence, **family members who are EU citizens** and who fall under one of the situations covered by Articles 12 and 13 must comply with the conditions laid down in Article 7(1) of Directive 2004/38/EC.

Similarly, before acquiring permanent residence, **family members who are non-EU citizens** and who fall under one of the situations covered by Articles 12 and 13 must comply with the conditions set out in Article 7(1)(a), (b) or (d) of Directive 2004/38/EC or must be members of the family, already constituted in the host Member State, of a person satisfying these requirements. For non-EU citizens, meeting the Article 7(1)(c) conditions (persons enrolled in a private or public establishment for study purposes) does not allow them to retain a right of residence.

Directive 2004/38/EC does not provide any clarification as to the moment from when these conditions must be complied with. However, the aim of Articles 12 and 13 of Directive 2004/38 is to provide for legal safeguards for family members in the event of death or departure of the EU citizen and in the event of divorce, annulment of marriage or termination of a registered partnership<sup>219</sup>. Hence, in line with the case law of the Court, the provisions on the retention of the right of residence should not be applied in a way that would run counter this aim<sup>220</sup>. On the contrary, these provisions must be applied in a way that does not deprive them of their effectiveness.

**In addition, specific conditions apply to family members who are non-EU citizens** depending on the event that led to the loss of the derived right of residence (Article 12(2) first subparagraph and Article 13(2)(a), (b), (c) and (d)). These conditions relate to the length of residence in the Member State, the length of the marriage, the link with the children or ‘particularly difficult circumstances’.

**Examples:**

*-Z. is a national of Member State A. He has been working and residing in Member State B for the last 3 years. His spouse, M., is a non-EU citizen. She has been residing in Member State B with Z. for the last 3 years. Z. dies and M. inherits a large sum of money. She is then considered to have sufficient resources and is also covered by a comprehensive sickness insurance. M. has a right of residence in Member State B based on Article 12(2). After 2 more years, when she acquires permanent residence, her right of residence will no longer be subject to any conditions.*

<sup>217</sup> C-310/08 *Ibrahim*, ECLI:EU:C:2010:80, paragraph 56 and C-480/08 *Teixeira*, ECLI:EU:C:2010:83, paragraph 68.

<sup>218</sup> C-310/08 *Ibrahim*, ECLI:EU:C:2010:80, paragraph 57 and C-480/08 *Teixeira*, ECLI:EU:C:2010:83, paragraph 68.

<sup>219</sup> See recital 15.

<sup>220</sup> C-930/19, *Belgian State*, ECLI:EU:C:2021:657, paragraph 42.

*-P. is a national of Member State A. He has been working and residing in Member State B for the last 3 years. His spouse, M., is a non-EU citizen. She has been residing in Member State B as the spouse of P. for the last 3 years. She works. P. goes back to reside in Member State A without M. M. does not retain any right of residence in Member State B under Directive 2004/38/EC, because M. is a non-EU spouse and the departure of the EU citizen does not lead to a retention of the right of residence under Article 12 of Directive 2004/38/EC.*

In circumstances covered by Article 13(2)(a) of Directive 2004/38/EC, namely where the marriage lasted at least 3 years including 1 year in the host Member State, the retention of the right of residence of the non-EU family member following a divorce requires that the EU citizen remains in the host Member State until the initiation of the divorce procedure<sup>221</sup>.

However, where a non-EU citizen has been the victim of acts of domestic violence committed by his or her EU spouse, the non-EU citizen can rely on the retention of his or her right of residence based on Article 13(2)(c) as long as the divorce proceedings are initiated within a reasonable period following the departure of the EU citizen from the host Member State<sup>222</sup>.

**Examples:**

*-C. is a national of Member State A. She has been married to D. (non-EU citizen) and residing in Member State B for 2 years when she initiates divorce proceedings. D. does not retain a right of residence in Member State B under Directive 2004/38/EC because the marriage did not last at least 3 years.*

*-K. is a national of Member State A. He has been working and residing in Member State B for the last 2 years. His registered partner, N., is a non-EU citizen. During these 2 years, N. has been residing and working in Member State B as the registered partner of K. She has been the victim of acts of domestic violence committed by K., during their registered partnership. K. leaves Member State B and goes back to reside in Member State A without N. Two months after K.'s departure, N. initiates the procedure for terminating the registered partnership. N. is still working in Member State B. N. retains a right of residence in Member State B under Directive 2004/38/EC based on Article 13(2)(c).*

## **9 Permanent residence (Articles 16 to 21 of Directive 2004/38/EC)**

In accordance with **Article 16(1)** of Directive 2004/38/EC, EU citizens who **have resided legally** for a continuous period of 5 years in the host Member State have the right of permanent residence there. This right is not subject to the conditions provided for in Chapter III of Directive 2004/38/EC on the right of residence. Pursuant to **Article 16(2)**, this right also applies to non-EU family members who have legally resided in the host Member State for a continuous period of 5 years.

In accordance with Article 17 of the Directive the right of permanent residence may, in very specific circumstances, be acquired after a continuous period of less than 5 years<sup>223</sup>.

<sup>221</sup> C-218/14, *Singh and Others*, ECLI:EU:C:2015:476, paragraph 70.

<sup>222</sup> See C-930/19, *Belgian State*, ECLI:EU:C:2021:657, paragraphs 43 and 45, clarifying that initiating divorce proceedings almost 3 years after the EU spouse has left the host Member State does not appear to represent a reasonable period.

<sup>223</sup> C-32/19, *Pensionsversicherungsanstalt*, ECLI:EU:C:2020:25.

The acquisition of permanent residence operates by law. This means that EU citizens and non-EU family members acquire it when they meet the relevant substantive conditions<sup>224</sup>. The permanent residence documents are declaratory and do not create rights<sup>225</sup>.

### 9.1 The legal residence requirement

As a general rule, the acquisition of the right of permanent residence requires legal residence for a continuous period of 5 years in the host Member State.

**Legal residence means residence in accordance with the conditions of Directive 2004/38/EC<sup>226</sup> and its predecessors<sup>227</sup>.** In this regard, there are three points to highlight:

- residence that is in accordance with instruments that preceded Directive 2004/38/EC does not count for the purposes of the right of permanent residence where the conditions set out in Directive 2004/38/EC are not satisfied too<sup>228</sup>.
- a period of residence completed on the basis of other EU provisions (such as those of Regulation (EU) No 492/2011) or on the basis of the law of the host Member State does not count for the purposes of the right of permanent residence if the conditions set out in Directive 2004/38/EC are not satisfied<sup>229</sup>.
- in the case of accession of a new Member State to the EU, if there is no transitional provision limiting the application of EU rules on freedom of movement of persons in the relevant Act of Accession, residence in a host Member State by the nationals of the new Member State before accession must be taken into account for the purpose of the acquisition of the right of permanent residence if it was completed in compliance with the conditions laid down in Directive 2004/38/EC<sup>230</sup>.

In any case, a change of status (for example from student to worker) does not affect continuity of legal residence and thus the acquisition of the permanent residence as long as the residence complies with the conditions of Directive 2004/38/EC (see Section 5 - *Right of residence of more than 3 months for EU citizens and administrative formalities (Articles 7, 8, 14 and 22 of Directive 2004/38/EC)*).

Moreover, holding a valid residence document does not make the residence legal, including for the purposes of acquisition of right of permanent residence<sup>231</sup> (see Section 12.3 - *Nature and effects of residence documents (Article 25 of Directive 2004/38/EC)*).

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<sup>224</sup> C-325/09, *Dias*, ECLI:EU:C:2011:498, paragraph 57.

<sup>225</sup> C-123/08, *Wolzenburg*, ECLI:EU:C:2009:616, paragraph 51.

<sup>226</sup> C-424 and 425/10, *Ziolkowski and Szeja*, ECLI:EU:C:2011:866, paragraph 46.

<sup>227</sup> C-162/09, *Lassal*, ECLI:EU:C:2010:592, paragraph 59.

<sup>228</sup> C-529/11, *Alarape and Tijani*, ECLI:EU:C:2013:290, paragraph 48.

<sup>229</sup> C-529/11, *Alarape and Tijani*, ECLI:EU:C:2013:290, paragraph 48 and C-424 and 425/10, *Ziolkowski and Szeja*, ECLI:EU:C:2011:866, paragraph 47.

<sup>230</sup> C-424/10 and C-425/10, *Ziolkowski and Szeja*, ECLI:EU:C:2011:866, paragraph 63 and C-147/11 and C-148/11, *Czop and Punakova*, ECLI:EU:C:2012:538, paragraph 40.

<sup>231</sup> C-325/09, *Dias*, ECLI:EU:C:2011:498, paragraph 55.



Lastly, it is to be noted that once an EU citizen acquires the right of permanent residence, the conditions in Article 7(1)(a) to (c) no longer apply either to the EU citizen or to their family members, including the non-EU primary carer of a mobile EU minor<sup>232</sup>.

## 9.2 Calculation of the five-year continuous period of legal residence

The qualifying period of residence does not have to immediately precede the moment when the right of permanent residence is claimed<sup>233</sup>. Periods of continuous legal residence confer the right of permanent residence ‘with effect from the actual moment at which they are completed’<sup>234</sup>.

Residence periods counting towards acquisition of permanent residence are those complying with the conditions set out in Directive 2004/38/EC, in particular in its Articles 7, 12(2) and 13(2). Multiple successive short periods of residence completed on the basis of Article 6 of Directive 2004/38/EC, even when considered together, do not count for this purpose<sup>235</sup>.

EU citizens and their family members can be absent from the host Member State for some time without breaking the continuity of their residence in that Member State. Pursuant to Article 16(3) of Directive 2004/38/EC, continuity of residence is not interrupted by the following temporary absences:

- absences (one or more) not exceeding a total of 6 months a year;
- absences (one or more) of a longer duration for compulsory military service;
- one absence of a maximum of 12 consecutive months for important reasons, such as (NB: the list is not exhaustive): a. pregnancy and childbirth; b. serious illness; c. study or vocational training; or d. a posting abroad.

For the first two cases, the absences do not need to be consecutive. Multiple periods of non-consecutive absences will have to be cumulated.

The timeframe for the six-month absence must be counted per year of residence, with each year starting on the anniversary of the date when the person took up residence in the host Member State in compliance with the residence conditions of Directive 2004/38/EC<sup>236</sup> (see Section 9.1 - *The legal residence requirement*). As a consequence, **EU citizens and their family members may have temporary absences not exceeding a total of 6 months within each year** leading up to the acquisition of the right of permanent residence. Periods of continuous legal residence confer the right of permanent residence ‘with effect from the actual moment at which they are completed’<sup>237</sup>.

Continuity of residence is broken by any expulsion decision lawfully enforced against the person concerned (essentially, the right of residence has been terminated as such by any expulsion decision duly enforced against the person concerned).

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<sup>232</sup> C-247/20, *VI*, ECLI:EU:C:2022:177, paragraphs 59 and 60.

<sup>233</sup> C-162/09, *Lassal*, ECLI:EU:C:2010:592, paragraph 59.

<sup>234</sup> Case C-325/09, *Dias*, ECLI:EU:C:2011:498, paragraph 57.

<sup>235</sup> C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraph 77.

<sup>236</sup> The counting is not to be done on a rolling 12-month basis. Article 3 of Regulation 1182/71 determining the rules applicable to periods, dates and time limits (OJ L 124 8.6.1971, p. 1) applies.

<sup>237</sup> Case C-325/09, *Dias*, ECLI:EU:C:2011:498, paragraph 57.

A period of imprisonment before the right of permanent residence is acquired restarts the clock and a new period of 5 continuous years of residence has to be accumulated<sup>238</sup>.

### 9.3 Loss of the right of permanent residence

According to Article 16(4), once acquired, the right of permanent residence is only lost through absence from the host Member State for a period exceeding **2 consecutive years**.

Any physical presence in the territory of the host Member State during a period of 2 consecutive years, even if this presence is only for a few days, is sufficient to prevent the loss of the permanent residence<sup>239</sup>. The situation that exists in such a case (i.e. where a person who has acquired a right of permanent residence has spent a few days per year in the host Member State and has not been absent for a period of 2 consecutive years) must be distinguished from the situation where there is evidence that such a person has committed a misuse of rights<sup>240</sup>.

### 9.4 Supporting documents

For the purpose of assessing whether a right of permanent residence has been obtained, Member States are entitled to verify:

- the continuity of the residence;
- the duration of the residence;
- whether the residence can be regarded as ‘legal’ (see Section 9.1 - *The legal residence requirement*).

In most cases, proof of legal residence will encompass proof of continuous residence. Article 21 of Directive 2004/38/EC clarifies that ‘continuity of residence may be attested by any means of proof in use in the host Member State’.

#### **Examples:**

*-L., an EU citizen, has resided continuously in Member State A for the last 5 years. She provides proof that she had comprehensive sickness insurance and bank statements showing that she held sufficient resources throughout her stay. She cannot be asked to provide evidence that she worked, nor that she will find employment or continue to have sufficient resources for the period following her acquisition of permanent residence.*

*-N., an EU citizen, provides sufficient evidence that he had worker status during his five-year residence in the host Member State. He cannot be asked to provide evidence that he had comprehensive sickness insurance during his stay.*

<sup>238</sup> C-378/12, *Onuekwere*, ECLI:EU:C:2014:13, paragraph 32.

<sup>239</sup> C-432/20, *ZK*, ECLI:EU:C:2022:39, paragraph 47. While this case concerns Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, the Court explained in paragraph 43 that ‘Although Directives 2003/109 and 2004/38 differ from one another in terms of their subject matter and objectives, the fact remains that, as the Advocate General also pointed out, in essence, in points 40 to 43 of his Opinion, the provisions of those directives may lend themselves to a comparative analysis and, where appropriate, be interpreted in a similar way, which is justified, in particular in the case of Article 9(1)(c) of Directive 2003/109 and Article 16(4) of Directive 2004/38, which are based on the same logic’.

<sup>240</sup> C-432/20, *ZK*, ECLI:EU:C:2022:39, paragraph 46.

*-L., an EU citizen, entered the host Member State as a student. In her second and third year of studies, she also worked in a shop. After finishing her studies, she started a business. The fact that she provides documents attesting different statuses, and that some of these documents show an overlap between her student and worker status, does not have a bearing on the assessment of her application, as the authorities should focus on the continuity and legality of the residence.*

*-G., a non-EU citizen, resided in Member State B for 5 years with his spouse L., an EU mobile worker. As a family member of an EU mobile worker, the non-EU citizen cannot be asked to prove that he worked during his 5 years of residence.*

*-T., an EU citizen, has been residing continuously as an EU mobile worker in Member State A since 2014. Her non-EU husband, L., has been living with her in Member State A since 2016 but has never worked in Member State A. L. can acquire his permanent residence as from 2021.*

## **9.5 Processing times**

Pursuant to Article 19(2) of the Directive, **for EU citizens**, Member States must issue, upon application, the document certifying permanent residence ‘as soon as possible’.

If the document certifying permanent residence cannot be issued on the spot upon handing in the application and supporting evidence, it should be so within the following few days (for instance after 7/10 days). In case of an ongoing investigation in a suspected case of abuse or fraud the issuance can be deferred, while respecting the principle of effectiveness and the objective of rapid processing of applications inherent to Directive 2004/38/EC<sup>241</sup>.

**For non-EU family members**, the time limit to issue a permanent residence card under Article 20(2) of Directive 2004/38/EC is 6 months starting from the submission of the application.

The case law of the Court in relation to the processing time for issuing residence cards provided for in Article 10 of Directive 2004/38/EC (see Section 7.2 - *Processing times for issuing residence cards*) is relevant for the issuance of permanent residence cards.

As further explained in Section 12.3 - *Nature and effects of residence documents (Article 25 of Directive 2004/38/EC)*, the documents certifying permanent residence and permanent residence cards do not create rights but serve to attest the existence of rights under EU free movement law.

## **10 Right to work (Article 23 of Directive 2004/38/EC)**

According to Article 23 of the Directive, irrespective of nationality, family members of EU citizens with a right of residence in a host Member State are entitled to take up employment or start an activity as a self-employed person in the host Member State. This right applies to family members as defined under Article 2(2) of Directive 2004/38/EC and to ‘extended’ family members as defined under Article 3(2) of Directive 2004/38/EC.

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<sup>241</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 69.

In this context, the right to take up employment in the host Member State also includes dependent family members of EU citizens, who may continue to have a right of residence even after they have ceased to be dependants<sup>242</sup>.

The right to work of family members cannot be made conditional upon possession of a valid visa, residence card, permanent residence card or a certificate attesting submission of an application for a family member residence card. This is because entitlements to rights may be attested by any appropriate means of proof. Those documents do not create rights of residence, but simply serve to attest existing rights conferred directly by EU law<sup>243</sup>.

## **11 Right to equal treatment (Article 24 of Directive 2004/38/EC)**

According to the Court, ‘the principle of non-discrimination prohibits not only direct discrimination on grounds of nationality but also all indirect forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result’<sup>244</sup>. Direct discrimination based on nationality cannot be justified except when expressly provided for in EU law. ‘Indirect discrimination on grounds of nationality can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate objective of the national provisions’<sup>245</sup>.

Article 24 of Directive 2004/38/EC gives specific expression to the principle of non-discrimination on grounds of nationality laid down in Article 18 TFEU, in relation to EU citizens who exercise their right to move and reside within the territory of the Member States<sup>246</sup>, as well as under Article 21(2) of the Charter of Fundamental Rights.

Under Article 24(1) of Directive 2004/38/EC, all EU citizens residing in the host Member States on the basis of Directive 2004/38/EC enjoy equal treatment with nationals of the host Member State within the scope of the Treaties<sup>247</sup>. The same is true for their non-EU family members who have a right of residence or permanent residence pursuant to Directive 2004/38/EC.

**However, the principle of non-discrimination enshrined in Article 24(1) of Directive 2004/38/EC applies only to those persons who reside in the host Member State in**

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<sup>242</sup> C-423/12, *Reyes*, ECLI:EU:C:2014:16, paragraphs 31 and 32.

<sup>243</sup> C-344/95, *Commission v Belgium*, ECLI:EU:C:1997:81; C-459/99, *MRAX*, ECLI:EU:C:2002:461 and C-215/03, *Oulane*, ECLI:EU:C:2005:95.

<sup>244</sup> C-73/08, *Bressol*, ECLI:EU:C:2010:181, paragraph 40. See also C-75/11, *Commission v Austria*, ECLI:EU:C:2012:605, paragraph 49.

<sup>245</sup> C-75/11, *Commission v Austria*, ECLI:EU:C:2012:605, paragraph 52.

<sup>246</sup> C-709/20, *The Department for Communities in Northern Ireland*, ECLI:EU:C:2021:602, paragraph 66.

<sup>247</sup> Entitlement to social advantages might be based on Articles 21, 45, 49, 56 and 63 of the TFEU depending (among other factors) on the status (worker, self-employed, non-economically active, student) of the person. EU citizens who are workers, self-employed persons, economically non-active persons and students benefit from equal treatment with nationals of the host Member State as regards social advantages, i.e. any advantage that facilitates the mobility of EU citizens (e.g. reduced museum entrance fees in the host Member State, preferential mortgage loans, acquisition of real property in the host Member State,...). Economically non-active citizens and students can benefit from such access to the extent that the advantage at stake does not qualify as ‘social assistance’ (see Section 11.1 - *Entitlement to equal access to social assistance: content and conditions*) or as ‘maintenance aid for studies’ consisting in student grants or loans (see, however, C-75/11, *Commission v Austria*, ECLI:EU:C:2012:605 for benefits not qualifying as maintenance aid for studies).

**compliance with the residence conditions laid down in Directive 2004/38/EC and is therefore conditional on the fulfilment of those conditions.**

In addition, safeguards are in place to protect host Member States from unreasonable financial burdens. In that vein, Article 24(2) authorises specific derogations from the principle of equal treatment. It allows the host Member State:

a) not to confer social assistance to EU citizens during the first 3 months of residence or during the longer period of residence for jobseekers deriving from Article 14(4)(b) of Directive 2004/38/EC. However, this derogation does not apply to EU citizens who are workers or who are self-employed and their family members (see Sections 11.1 - *Entitlement to equal access to social assistance: content and conditions* and 11.2 - *Relationship between Article 24 of Directive 2004/38/EC and Regulation (EU) No 492/2011*).

This derogation only applies with regard to ‘social assistance’ benefits and does not extend to other kinds of benefits, in particular social security benefits. Where family benefits are granted independently of the individual needs of the beneficiary and are not intended to cover means of subsistence but to meet family expenses, they do not fall under the concept of ‘social assistance’ within the meaning of Directive 2004/38/EC. This is in particular the case for family benefits granted automatically to families meeting certain objective criteria relating in particular to their size, income and capital resources without any individual and discretionary assessment of personal needs<sup>248</sup>. However, such benefits may be subject to other conditions, in particular a legal habitual residence test (see Section 11.3 - *Relationship between Article 24 of Directive 2004/38/EC and Regulation (EC) No 883/2004 on the coordination of social security systems*).

b) prior to acquisition of the right of permanent residence, not to provide maintenance aid for studies (student grants and loans or student loans), including vocational training, to EU citizens who are economically non-active persons, students or jobseekers (including jobseekers who have not yet worked in the host Member State or where the EU citizen is a jobseeker who, after having worked there, no longer retains the status of worker in the host Member State) and members of their families.

## **11.1 Entitlement to equal access to social assistance: content and conditions**

### **11.1.1 Content of social assistance**

Social assistance benefits are typically benefits that a Member State grants to those who do not have sufficient resources to meet their basic needs. The Court has considered that social assistance is ‘all assistance introduced by public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that

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<sup>248</sup> C-411/20, *Familienkasse Niedersachsen-Bremen*, ECLI:EU:C:2022:602, paragraphs 34, 35, 47, 48, 53 and 55.

State’<sup>249</sup>. However, social assistance must be defined by reference to the objective pursued by the benefit and not by formal criteria. Benefits of a financial nature which are intended to facilitate access to the labour market cannot be regarded as constituting social assistance<sup>250</sup>. However, where a benefit fulfils different functions, if its predominant function is to cover the minimum subsistence costs necessary to lead a life in keeping with human dignity, then it falls under the definition of social assistance<sup>251</sup>.

For example, depending on their predominant function, which must be assessed case by case, the following could be regarded as ‘social assistance’:

- a cash subsistence benefit under a welfare system funded by taxation, the grant of which is means tested, and whose objective is to replace other social benefits, such as income-based jobseeker’s allowance, income-related employment and support allowance, income support, working tax credit, child tax credit and housing benefit<sup>252</sup>;
- rental support provided to persons with a short-term housing need who live in private rented accommodation and cannot meet their rent from their own resources.

### **11.1.2 Categories of persons who are entitled to the same social assistance benefits as nationals in the host Member State**

Equal treatment with nationals of the host Member State under Article 24(1) can only be claimed when the residence of the EU citizen in the host Member State complies with the conditions of Directive 2004/38/EC<sup>253</sup>.

This means that the following categories of person are entitled to the same social assistance benefits as nationals:

- EU citizens who are workers or who are self-employed persons (or those who retain that status<sup>254</sup>) and their family members. These categories of persons are entitled to equal treatment from the beginning of their stay<sup>255</sup>.
- EU citizens who have acquired permanent residence in the host Member State and their family members.

#### ***Example:***

*-Y. is an EU citizen married to an EU mobile worker. Y. lost his job and no longer retains worker status. He applied for social assistance. The host Member State cannot refuse to grant him social assistance on the ground that he is an economically non-active EU citizen and lacks sufficient resources. As the spouse of an EU worker, he is entitled to the same social assistance benefits as nationals from the host Member State.*

<sup>249</sup> C-140/12, *Brey*, ECLI:EU:C:2013:565, paragraph 61. See also C-709/20, *The Department for Communities in Northern Ireland*, ECLI:EU:C:2021:602, paragraph 68 and case law cited.

<sup>250</sup> C-22/08 and C-23/08, ECLI:EU:C:2009:344, *Vatsouras and Koupatantze*, paragraph 45.

<sup>251</sup> C-67/14, *Alimanovic*, ECLI:EU:C:2015:597, paragraphs 45 and 46.

<sup>252</sup> C-709/20, *The Department for Communities in Northern Ireland*, ECLI:EU:C:2021:602, paragraphs 69-71.

<sup>253</sup> C-333/13, *Dano*, ECLI:EU:C:2014:2358, paragraph 69; C-67/14, *Alimanovic*, ECLI:EU:C:2015:597, paragraph 49 and C-299/14, *García-Nieto*, ECLI:EU:C:2016:114, paragraph 38.

<sup>254</sup> C-67/14 *Alimanovic*, ECLI:EU:C:2015:597, paragraphs 53 and 54.

<sup>255</sup> C-299/14, *García-Nieto*, ECLI:EU:C:2016:114, paragraph 44. See also Section 11.2 - *Relationship between Article 24 of Directive 2004/38/EC and Regulation (EU) No 492/2011*.

*-M. is a mobile EU worker and has a same-sex spouse. The couple has a son. The worker is entitled to the same social assistance benefits for his family members as nationals from the host Member State, even if the legislation of the host Member State does not recognise such parenthood and/ or the marriage.*

While economically non-active EU citizens are not expressly excluded from equal treatment on social assistance, their right to equal treatment in this regard may be limited in practice until they acquire permanent residence (see section below on categories of persons who may be refused access to the same social assistance benefits as nationals in the host Member State).

### **11.1.3 Categories of persons who may be refused access to the same social assistance benefits as nationals in the host Member State**

During the first 3 months of residence in the host Member State, access to social assistance may be refused to EU citizens who are not workers, self-employed persons, persons who retain worker or self-employed status and their family members, without carrying out an individual assessment of the person's situation <sup>256</sup>.

For the ensuing period of residence up to 5 years, the host Member State may refuse to grant social assistance benefits to economically non-active EU citizens and EU students who do not comply with the requirement to possess sufficient resources for themselves and the members of their family and who therefore do not reside in the host Member State in accordance with Directive 2004/38/EC (Articles 7(1)(b) and (c)) <sup>257</sup>. This means that economically non-active EU citizens are unlikely in practice to be eligible for social assistance benefits, since to acquire the right to reside they would have needed to show the national authorities that they had sufficient resources, which are indicatively equal to or higher than the income threshold under which social assistance is granted. In such circumstances, 'the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he or she meets the condition of having sufficient resources laid down in Article 7(1)(b) of Directive 2004/38 and whether he or she can accordingly invoke, in the host Member State, the principle of non-discrimination laid down in Article 24(1) of that directive(...)' <sup>258</sup>.

For jobseekers and former workers who lost their worker status (i.e. where (a) the EU citizen is a jobseeker who has not yet worked in the host Member State, or (b) the EU citizen is a jobseeker who was previously employed but no longer retains the status of worker in the host Member State (see Section 5.1.2 - *Retention of worker or self-employed status*)), the competent authorities may refuse to grant social assistance benefits without carrying out an individual assessment of the person's situation <sup>259</sup>. For further information on jobseekers see Section 6 - *Right of residence of jobseekers (Article 14(4)(b) of Directive 2004/38/EC)* and Part II of the

<sup>256</sup> C-299/14, *García-Nieto*, ECLI:EU:C:2016:114, paragraphs 44-48.

<sup>257</sup> C-709/20, *The Department for Communities in Northern Ireland*, ECLI:EU:C:2021:602, paragraph 78.

<sup>258</sup> C-709/20, *The Department for Communities in Northern Ireland*, ECLI:EU:C:2021:602, paragraph 79 and case law cited.

<sup>259</sup> C-67/14 *Alimanovic*, ECLI:EU:C:2015:597, paragraphs 57-62. This is without prejudice to any independent right flowing from Regulation (EU) No 492/2011, in particular Article 10 thereof as regards primary carers of children in education.

2010 Commission Communication ‘Reaffirming the free movement of workers: rights and major developments’.

These exclusions are intended to ensure that there are no unreasonable burdens placed on the social assistance schemes of the host Member State.

Where Article 24 of Directive 2004/38/EC does not apply because the EU citizen does not reside in accordance with Directive 2004/38/EC but resides legally on the basis of national law in the territory of the host Member State, the competent national authorities may only refuse an application for social assistance after ascertaining that that refusal does not expose the mobile EU citizen to an actual and current risk of violation of their fundamental rights, as enshrined under the Charter of Fundamental Rights <sup>260</sup>.

***Examples:***

*-M. is a national of Member State A. She relocated to Member State B to look for a job. The competent authorities of Member State B may refuse to grant social assistance benefits to M.*

*-T. is a national of Member State A. He relocated to Member State B where he worked for a certain period of time. He lost his job but retains his worker status (see Section 5.1.2 - Retention of worker or self-employed status). He applied for social assistance. T. is entitled to receive social assistance benefits on the same basis as if he were a national of Member State B.*

*-R. is a national of Member State A. She relocated to Member State B where she works as a self-employed person. R. is entitled to receive social assistance benefits on the same basis as if she were a national of Member State B.*

## **11.2 Relationship between Article 24 of Directive 2004/38/EC and Regulation (EU) No 492/2011**

Regulation (EU) No 492/2011 sets out the rights that apply to EU mobile workers and their family members. According to the case law of the Court <sup>261</sup>, self-employed EU citizens falling under Article 49 TFEU can enjoy the rights under Regulation (EU) No 492/2011 that applies by analogy.

There are two points to highlight regarding the interaction between Article 24 of Directive 2004/38/EC and Regulation (EU) No 492/2011.

Firstly, mobile EU workers and their family members benefit from specific and independent rights laid down in Regulation (EU) No 492/2011 <sup>262</sup>. These rights cannot be put into question by Article 24(2) of Directive 2004/38/EC. Thus, the derogations contained under Article 24(2) cannot, for example, be used against persons who have a right of residence and access to social assistance as primary carers of children in education under Article 10 of Regulation (EU) No 492/2011 <sup>263</sup>.

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<sup>260</sup> C-709/20, *The Department for Communities in Northern Ireland*, ECLI:EU:C:2021:602, paragraph 93.

<sup>261</sup> 63/86, *Commission v Italy*, ECLI:EU:C:1988:9.

<sup>262</sup> In particular, those derived from Article 10 of Regulation (EU) No 492/2011 as regards primary carers of children in education.

<sup>263</sup> C-181/19, *Jobcenter Krefeld*, ECLI:EU:C:2020:794, paragraphs 64 and 69.



Secondly, the ‘family members’ covered by Regulation (EU) No 492/2011 correspond to the ‘family members’ covered by Directive 2004/38/EC<sup>264</sup>. This means that the family members of workers and self-employed persons benefit from the application of the provisions of Directive 2004/38/EC but also from the application of the provisions of Regulation (EU) No 492/2011 on equal treatment. These family members can therefore rely on that Regulation to claim equal treatment in the host Member State as regards **all social and tax advantages**<sup>265</sup>. A few examples of such rights include equal treatment as regards scholarships awarded under an agreement of the host Member State in an area outside the scope of the TFEU<sup>266</sup>, reductions in public transportation costs for large families<sup>267</sup> and entitlement to social benefits<sup>268</sup>. In addition, under Regulation (EU) No 492/2011, the child of a worker/ self-employed person should also benefit from equal treatment as regards admission to education if the child resides in the Member State where the worker/ self-employed works.

**Example:**

*A non-EU same-sex spouse of a worker/self-employed mobile EU citizen who is covered by Article 2(2)(a) of Directive 2004/38/EC<sup>269</sup> is entitled to the same social and tax advantages as nationals from the host Member State, even if the legislation of the host Member State does not recognise same-sex marriages.*

### **11.3 Relationship between Article 24 of Directive 2004/38/EC and Regulation (EC) No 883/2004 on the coordination of social security systems**

Social security rights of mobile EU citizens at EU level are governed by Regulations (EC) Nos 883/2004<sup>270</sup> and 987/2009<sup>271</sup> (‘the coordination Regulations’).

The coordination Regulations set out ‘conflict rules’ to determine which national social security legislation is applicable to a person in a cross-border situation<sup>272</sup>. EU law in this field provides for the coordination, not the harmonisation, of social security schemes. This means that every

<sup>264</sup> C-401/15 to C-403/15 *Depesme and Others*, ECLI:EU:C:2016:955, paragraph 51.

<sup>265</sup> 32/75, *Cristini*, ECLI:EU:C:1975:120. The Court referred to equal treatment of family members of EU workers ‘as regards all social and tax advantages, whether or not attached to the contract of employment’ in paragraph 13. The Court has defined “social advantages” as those ‘which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility’ (Case 207/78, *Even*, ECLI:EU:C:1979:144, paragraph 22).

<sup>266</sup> 235/87, *Matteucci*, ECLI:EU:C:1988:460.

<sup>267</sup> 32/75, *Cristini*, ECLI:EU:C:1975:120.

<sup>268</sup> 261/83, *Castelli*, ECLI:EU:C:1984:280, paragraph 11, C-802/18, *Caisse pour l'avenir des enfants*, ECLI:EU:C:2020:269, paragraph 45. For other examples of social and tax advantages, see also C-258/04, *Ioannidis*, ECLI:EU:C:2005:559, C-447/18, *UB*, ECLI:EU:C:2019:1098 or C-328/20, *Commission v Austria*, ECLI:EU:C:2022:468.

<sup>269</sup> C-673/16, *Coman*, ECLI:EU:C:2018:385, paragraph 35.

<sup>270</sup> Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ L 166, 30.4.2004, p. 1).

<sup>271</sup> Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ L 284, 30.10.2009, p. 1).

<sup>272</sup> See for example C-140/12, *Brey*, ECLI:EU:C:2013:565, paragraph 39; C-535/19, *A*, ECLI:EU:C:2021:595, paragraph 45.

Member State sets the details of its own social security system, including which benefits are to be provided, the conditions for eligibility, how these benefits are calculated and what contributions should be paid. Conditions for entitlement to social security benefits therefore vary from one Member State to another.

Typical social security benefits include old-age pensions, survivor's pensions, invalidity benefits, sickness benefits (including healthcare), maternity and paternity benefits, unemployment benefits, family benefits.

Under the coordination Regulations, workers or self-employed persons and their family members are covered by the social security system of the Member State where their activity as an employed or self-employed person is carried out<sup>273</sup>. They are covered under the same conditions as own nationals.

Economically non-active EU citizens are, in principle, subject to the social security legislation of the Member State in which they reside. To be entitled to benefits coordinated under the coordination Regulations, they must fulfil the conditions laid down by the legislation of the Member State of residence. It is to be noted that the notion of 'residence' is not the same under Directive 2004/38/EC and the coordination Regulations. Within the meaning of the latter, a person can only have one place of residence. This corresponds to the Member State in which the person habitually resides and where the habitual centre of his or her interests is to be found. In that context, particular account should be taken of: the person's family situation; the reasons which have led the person to move; the length and continuity of the person's residence; the fact (where this is the case) that the person is in stable employment; and the person's intention as it appears from all the circumstances<sup>274</sup>.

By contrast, persons who move only temporarily to another Member State remain habitually resident in their Member State of origin and are thus covered by the social security system of the Member State of origin (e.g. a student who moved temporarily from his or her Member State of origin to pursue studies in another Member State will be covered by the Member State of origin, not the Member State where he or she studies).

For more examples regarding the determination of the place of habitual residence, see the Commission's Practical Guide on the Applicable Legislation in the EU, EEA and in Switzerland (Part III)<sup>275</sup>.

Special non-contributory cash benefits which have characteristics of both social security benefits and social assistance fall in the scope of both Regulation (EC) No 883/2004<sup>276</sup> and Directive 2004/38/EC<sup>277</sup>. This means that the host Member State may refuse access to such benefits for economically non-active EU citizens who do not comply with the requirement in

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<sup>273</sup> However, Regulation (EC) No 883/2004 contains some exceptions to this general principle.

<sup>274</sup> This list is non-exhaustive. See Article 11 of Regulation (EC) 987/2009 and Practical Guide on the Applicable Legislation in the EU, EEA and In Switzerland, European Commission, DG EMPL, 2014, <https://ec.europa.eu/social/main.jsp?catId=868&langId=en>

<sup>275</sup> See: <https://ec.europa.eu/social/BlobServlet?docId=11366&langId=en>

<sup>276</sup> See Article 70 and Annex X of Regulation (EC) No 883/2004.

<sup>277</sup> C-333/13, *Dano*, ECLI:EU:C:2014:2358, paragraph 63; C-67/14, *Alimanovic*, ECLI:EU:C:2015:597, paragraph 44 and C-299/14, *García-Nieto*, ECLI:EU:C:2016:114, paragraphs 51 and 52.

Article 7(1)(b) of the Directive to possess sufficient resources (see Section 11.1 - *Entitlement to equal access to social assistance: content and conditions*)<sup>278</sup>.

Regulation (EC) No 883/2004 does not harmonise the concept of ‘family member’. However, when applying the Regulation, national authorities are implementing EU law within the meaning of Article 51(1) of the Charter of Fundamental Rights. They must therefore respect Article 21(1) of the Charter of Fundamental Rights (which covers in particular non-discrimination on grounds of sexual orientation), Article 24 of the Charter of Fundamental Rights (best interest of the child) and the Convention on the rights of the child<sup>279</sup>. This means that the definition that each Member State uses for ‘family members’ cannot lead to discrimination on grounds of sexual orientation. On that basis, a mobile same-sex couple cannot be refused access to a social security benefit (e.g. a survivor’s pension) on the ground that their family relationship is not recognised by the legislation of the competent Member State<sup>280</sup>. In the same vein, the child of a same-sex couple cannot be refused access to a social security benefit (e.g. affiliation to the public sickness insurance scheme) on the ground that such parenthood is not recognised by the legislation of the competent Member State. The compulsory recognition of the family relationship in the context of free movement is sufficient. The family relationship does not need to be recognised in the Member State’s national legislation.

#### **11.4 Entitlement to equal access to healthcare: content and conditions**

‘Medical care, financed by the host Member State, which is granted, without any individual and discretionary assessment of personal needs, to persons falling within the categories of recipients defined by national legislation, constitutes “sickness benefits” falling within the scope of Regulation (EC) No 883/2004’<sup>281</sup>.

As explained above, EU workers or self-employed persons and their family members are covered by the social security system of the Member State of employment/self-employment<sup>282</sup>. If an EU worker or self-employed person and their family members reside in a different Member State than the Member State of employment, they have access to healthcare where they reside under the same conditions as nationals of the Member State of residence, on behalf of the Member State of employment, on the basis of the PD S1 form<sup>283</sup>.

Students who temporarily study in another Member State have the right to receive any necessary medical treatment in the host Member State on the basis of the European Health Insurance Card (EHIC)<sup>284</sup>.

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<sup>278</sup> Annex X of Regulation (EC) No 883/2004 lists the special non-contributory cash benefits.

<sup>279</sup> C-243/19, *Veselības ministrija*, ECLI:EU:C:2020:872, paragraphs 82-84.

<sup>280</sup> Also note that the Court has held that Article 45 TFEU and Article 7 of Regulation (EU) No 492/2011 preclude legislation of a host Member State which provides that the grant, to the surviving partner of a partnership that was validly entered into and registered in another Member State, of a survivor’s pension due on account of the exercise, in the host Member State, of a professional activity by the deceased partner, is subject to the condition that the partnership was first recorded in the register kept by the host Member State (C-731/21, *Caisse nationale d’assurance pension*, ECLI:EU:C:2022:969).

<sup>281</sup> C-535/19, *A*, ECLI:EU:C:2021:595, paragraph 38.

<sup>282</sup> However, Regulation (EC) No 883/2004 contains some exceptions to this general principle.

<sup>283</sup> Article 17 of Regulation (EC) No 883/2004.

<sup>284</sup> See Article 19 of Regulation (EC) No 883/2004.

Pensioners who retire abroad remain covered by the public health scheme of the Member State that pays their pension. They are also entitled to access healthcare in the Member State of residence under the same conditions as persons insured in that Member State on behalf of the Member State that pays their pension, on the basis of the PD S1<sup>285</sup>.

Other economically non-active EU citizens who move to another Member State and exercise their right of residence for a period of more than 3 months under Article 7(1)(b) of Directive 2004/38/EC have the right to be affiliated to the public sickness insurance scheme of the host Member State. This right stems, in particular, from Article 11(3)(e) of Regulation (EC) No 883/2004, one aim of which is ‘to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them’<sup>286</sup>. However, prior to acquiring permanent residence, the host Member State may provide that access to the public sickness insurance system is not free of charge, in order to prevent the person from becoming an unreasonable burden on that Member State (see Section 5.2.2 - *Comprehensive sickness insurance*)<sup>287</sup>. Once they acquire permanent residence, this condition cannot longer be imposed on them (see Section 9 - *Permanent residence (Articles 16 to 21 of Directive 2004/38/EC)*).

Persons who temporarily stay in a Member State other than the one where they are insured (e.g. holiday, a business trip, studies) are entitled to any necessary medical treatment on the basis of the [EHIC](#)<sup>288</sup>.

Besides Regulation (EC) No 883/2004, persons may also access healthcare in any EU country other than the one in which they reside and be reimbursed for care abroad under Directive 2011/24/EU on patients’ rights in cross-border healthcare<sup>289</sup>. While Regulation (EC) No 883/2004 covers access to healthcare provided by the public and contracted providers, Directive 2011/24/EU covers all healthcare providers (private and public), regardless of their relationship with the public health system. In that framework, Directive 2011/24/EU sets out the conditions under which a patient may travel to another EU country to receive medical care and reimbursement. It covers healthcare costs, as well as the prescription and delivery of medications and medical devices, up to the amount the treatment would have cost in the country of residence.

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<sup>285</sup> See Articles 23, 24 and 25 of Regulation (EC) No 883/2004.

<sup>286</sup> C-535/19, A, ECLI:EU:C:2021:595, paragraph 46.

<sup>287</sup> C-535/19, A, ECLI:EU:C:2021:595, paragraphs 58 and 59.

<sup>288</sup> <https://ec.europa.eu/social/main.jsp?catId=559>

<sup>289</sup> Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients’ rights in cross-border healthcare (OJ L 88, 04.04.2011, p. 1).

## **12 Residence documents (Articles 8, 10, 19, 20 and 25 of Directive 2004/38/EC)**

### **12.1 Registration certificates and documents certifying permanent residence issued to EU citizens (Articles 8 and 19 of Directive 2004/38/EC and Article 6 of Regulation 2019/1157): format, minimum information and validity period**

Article 8(1) of Directive 2004/38/EC provides that, for periods of residence longer than 3 months, Member States may require mobile EU citizens to register with the relevant authorities. It is thus for each Member State to decide whether to impose this obligation upon mobile EU citizens (see Section 5 - *Right of residence of more than 3 months for EU citizens and administrative formalities (Articles 7, 8, 14 and 22 of Directive 2004/38/EC)*).

While the format of registration certificates and permanent registration documents for EU citizens is not harmonised, Regulation (EU) 2019/1157, which applies as from 2 August 2021, sets out the minimum information to be included in such documents. This includes, for instance, the title of the document in the official language or languages of the Member State concerned, in at least one other official language of the EU institutions and a clear reference that the document is issued to an EU citizen in accordance with Directive 2004/38/EC. Member States are, however, free to select the format in which these documents are issued.

While the Directive is silent on **the duration of validity** of registration certificates and permanent residence documents for EU citizens, in view of their similar function, there is no reason why their duration should not be at least the same as that of the corresponding documents issued to non-EU family members of EU citizens. **Accordingly, registration certificates provided for by Article 8(2) of Directive 2004/38/EC should have a validity period of at least 5 years from the date of issue. The document certifying permanent residence provided for by Article 19(1) Directive 2004/38/EC should have a validity period of at least 10 years from the date of issue.**

Furthermore, under no circumstances should the duration of these documents be linked to that of the EHIC or to other conditions, such as the duration of studies or employment contracts.

### **12.2 Residence cards and permanent residence cards issued to non-EU family members (Articles 10 and 20 of Directive 2004/38/EC and Articles 7 and 8 of Regulation 2019/1157): format and validity period**

Regulation (EU) 2019/1157 provides for harmonised formats for residence cards and permanent residence cards issued to non-EU family members of EU citizens. **Since 2 August 2021**, Member States are obliged to issue such residence cards or permanent residence cards in the same uniform format as used for residence permits. They must bear the title ‘Residence card’ or ‘Permanent residence card’ and include the standardised code ‘Family Member EU Art 10 DIR 2004/38/EC’ or ‘Family Member EU Art 20 DIR 2004/38/EC’<sup>290</sup>.

Residence cards or permanent residence cards issued up **until 2 August 2021** do not have to have a specific format. For these cards, Regulation (EU) 2019/1157 provides for a gradual

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<sup>290</sup> Article 7(2) of Regulation (EU) 2019/1157.

phasing out period<sup>291</sup>. This means that, for a certain number of years, there will be different formats of residence cards or permanent residence cards in circulation (the ones issued under Regulation (EU) 2019/1157 and the ones issued prior to 2 August 2021 without a harmonised format). In any event, cards that were issued after 2 August 2021 and that do not yet fully comply with the uniform format should be accepted by the other Member States until their expiry. However, if they do not meet the minimum security standards laid down in Regulation (EU) 2019/1157, they cease to be valid by 3 August 2023 or by 3 August 2026 depending on their level of security.

The harmonised format laid down under Regulation (EU) 2019/1157 must also be used with regard to residence cards issued to (i) the non-EU family members of returning nationals (see Section 18 - *Right of residence of the family members of returning nationals*) and (ii) the non-EU primary carers of minor EU citizens (see Section 2.2.2.5 - *Primary carers of minor EU citizens*). This is because Directive 2004/38/EC (and hence its Article 10) applies to them by analogy. In the same vein, the harmonised format laid down in Regulation (EU) 2019/1157 must also be used with regard to residence cards issued to the non-EU family members of those dual nationals to whom Directive 2004/38/EC applies by analogy (see Section 2.1.4 - *Dual nationals*). In all these cases, Member States must use the standardised codes provided for by Article 7(2) of Regulation (EU) 2019/1157.

By contrast, as Directive 2004/38/EC does not apply either directly or by analogy, Member States cannot use the harmonised format established by Regulation (EU) 2019/1157 for the residence documents of:

- beneficiaries of the *Ruiz Zambrano* case law (see Section 19 - *Ruiz Zambrano case law*);
- family members deriving a right of residence with reference to the *Carpenter* and *S and G* case law (see Section 2.1.3 - *Frontier workers, cross-border self-employed persons and cross-border service providers*).

In such cases, Member States should issue residence permits under Regulation (EC) No 1030/2002.

It is to be noted that residence documents issued under national legislation in a purely internal situation (family reunification with nationals of the issuing Member State who have not exercised the right of free movement) do not concern beneficiaries of free movement rules. Accordingly, Member States must issue these residence documents under Regulation (EC) No 1030/2002. Where the residence permit is issued by a Member State which is part of the Schengen area<sup>292</sup>, residence permits issued under Regulation (EC) No 1030/2002 have visa-exempting effects towards the Member States which are part of the Schengen area.

The residence card provided for by Article 10(1) is valid for 5 years from the date of issue or for the envisaged period of residence of the EU citizen, if this period is less than 5 years. In that

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<sup>291</sup> Article 8(1) of Regulation (EU) 2019/1157 states that residence cards of family members of EU citizens who are not nationals of a Member State, which do not meet the requirements of Article 7, will cease to be valid at their expiry or by 3 August 2026, whichever is earlier. Article 8(2) provides for a derogation from Article 8(1) with respect to residence cards which do not meet the minimum security standards set out in part 2 of ICAO document 9303 or which do not include a functional MRZ (machine-readable zone) that is compliant with part 3 of ICAO document 9303. The latter will cease to be valid at their expiry or by 3 August 2023, whichever is earlier.

<sup>292</sup> All Member States, except Bulgaria, Ireland, Cyprus and Romania.

regard, the minimum duration of 5 years remains the general rule. Where the ‘envisaged duration of residence’ is relevant in a particular case, it should be understood in a broad sense and that the ‘envisaged’ period of residence refers to the period during which the EU citizens intend to live and plan their life in the host Member State.

The permanent residence card provided for by Article 20(1) is valid for 10 years from the date of issue.

### **12.3 Nature and effects of residence documents (Article 25 of Directive 2004/38/EC)**

EU citizens and their family members enjoy all rights provided for in Directive 2004/38/EC, or based directly on Article 21 TFEU, as a matter of law if they meet the relevant substantive conditions for residence. Residence documents are declaratory in nature<sup>293</sup>, that is, they do not create rights but serve to certify the existence of rights under EU free movement law. Compliance with administrative procedures or the possession of a residence document are thus not a prerequisite for lawful residence in accordance with EU law on free movement of EU citizens and their family members<sup>294</sup>.

However, a Member State’s issuance of a residence document in accordance with Directive 2004/38/EC constitutes a formal finding of the factual and legal situation of the person concerned with regard to Directive 2004/38/EC, at the moment of issuance<sup>295</sup>. A (permanent) residence card issued by a Member State therefore serves as sufficient proof that the holder is a family member of an EU citizen<sup>296</sup>.

On the other hand, given that the situation of an EU citizen or a family member may change after the residence document is issued, possessing a residence document does not, in and of itself, mean that the holder’s residence is necessarily in compliance with EU law<sup>297</sup>. What matters is whether the EU citizen or the family member concerned fulfils the substantive conditions for residence under EU law on free movement of EU citizens and their family members at a certain moment in time.

Taking into account the declaratory nature of residence documents, Article 25 states that possessing a residence document may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality. According to Article 25, entitlement to rights (e.g. seeking the assistance of public employment agencies, affiliation in the public health insurance scheme) may be attested by any other means of proof. In that regard, in particular, but not exhaustively, the documents listed under Articles 8(2) and 10(2) might be relevant.

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<sup>293</sup> In the context of free movement of workers, services and freedom of establishment, see 48/75, *Royer*, ECLI:EU:C:1976:57.

<sup>294</sup> See also Recital 11 of Directive 2004/38/EC.

<sup>295</sup> C-754/18, *Ryanair Designated Activity Company*, ECLI:EU:C:2020:478, paragraphs 52 and 53. See also C-325/09, *Dias*, ECLI:EU:C:2011:498, paragraph 48; C-202/13, *McCarthy and Others*, ECLI:EU:C:2014:2450, paragraph 49, C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 48.

<sup>296</sup> C-754/18, *Ryanair Designated Activity Company*, ECLI:EU:C:2020:478, paragraph 54 and operative part of the judgment.

<sup>297</sup> C-325/09, *Dias*, ECLI:EU:C:2011:498, paragraphs 48-55.

## 12.4 Multiple residence/immigration statuses of non-EU family members

Provided this is not explicitly excluded under EU law, EU citizens' non-EU family members who have a derived right of residence under Directive 2004/38/EC and who also fulfil the conditions for residence under instruments of EU legal migration law are entitled to also exercise rights under such other instruments, that is, to hold multiple statuses in parallel<sup>298</sup>.

Where the non-EU family members hold multiple statuses, they should be issued with one residence document for each status (e.g. the residence card and, in addition, an EU blue card<sup>299</sup> or a long-term residence permit<sup>300</sup>), so they can prove such different statuses.

## 13 Restrictions on the right to move and reside freely on grounds of public policy, public security or public health (Articles 27, 28 and 29 of Directive 2004/38/EC)

This section builds on Section 3 of the Communication of 1999<sup>301</sup> on the special measures concerning the movement and residence of EU citizens which are justified on grounds of public policy, public security or public health (the 1999 Communication). The purpose of this section is to update the content of the 1999 Communication in the light of the case law of the Court and to clarify certain questions raised during the process of the implementation of Directive 2004/38/EC. However, in view of the lessons learned from the COVID-19 pandemic, Section 13.2 - *Restrictions of the right to move and reside freely on grounds of public health* supersedes Section 3.1.3 of the 1999 Communication.

**Freedom of movement for persons** is one of the foundations of the EU. Consequently, the provisions granting that freedom **must be given a broad interpretation**, whereas derogations from that principle must be interpreted strictly<sup>302</sup>. However, the right of free movement within the EU is not unlimited and carries with it obligations on the part of its beneficiaries, which implies - *inter alia* - to obey the laws of their host Member State.

Chapter VI of Directive 2004/38/EC cannot be regarded as imposing a precondition to the acquisition and maintenance of a right of entry and residence, but as providing exclusively the possibility to restrict, where justified, the exercise of a right derived directly from the Treaty<sup>303</sup>.

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<sup>298</sup> The possibility for non-EU family members to hold multiple residence statuses whenever this is not explicitly excluded follows from a combined reading of the different EU legal acts on legal migration and free movement.

<sup>299</sup> See recital 18 and Article 2(1) of Directive 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC (OJ L 382, 28.10.2021, p. 1).

<sup>300</sup> See Article 3 of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16, 23.1.2004, p. 44).

<sup>301</sup> COM(1999)372 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A51999DC0372>. The content of the 1999 Communication (Section 3) is still generally valid, even if it refers to Directive 64/221 (Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (OJ 56, 4.4.1964, p. 850)) which was repealed by Directive 2004/38/EC.

<sup>302</sup> 139/85, *Kempf*, ECLI:EU:C:1986:223, paragraph 13 and C-33/07, *Jipa*, ECLI:EU:C:2008:396, paragraph 23.

<sup>303</sup> 321/87, *Commission v Belgium*, ECLI:EU:C:1989:176, paragraph 10.



## 13.1 Restrictions on the right to move and reside freely on grounds of public policy and public security

### 13.1.1 Public policy and public security

Member States may restrict the freedom of movement of EU citizens on grounds of public policy or public security. Chapter VI of Directive 2004/38/EC applies to any action taken on grounds of public policy or public security which affects the right of persons coming under Directive 2004/38/EC to enter and reside freely in the host Member State under the same conditions as the nationals of that Member State<sup>304</sup>.

Member States retain the freedom to determine the requirements of public policy and public security in accordance with their needs, which can vary from one Member State to another and from one period to another. However, when they do so in the context of the application of Directive 2004/38/EC, they must interpret those requirements strictly<sup>305</sup>.

It is crucial that Member States define clearly the protected interests of society, and make a clear distinction between public policy and public security. The latter cannot be extended to measures that should be covered by the former<sup>306</sup>.

**Public security** is generally interpreted to cover both internal and external security<sup>307</sup> along the lines of preserving the integrity of the territory of a Member State and its institutions. **Public policy** is generally interpreted along the lines of preventing disturbance of social order<sup>308</sup>.

EU citizens may be expelled only for conduct punished by the law of the host Member State or with regard to which other genuine and effective measures intended to combat such conduct were taken, as confirmed by the case law<sup>309</sup> of the Court.

In any case, failure to comply with the registration requirement is not of such a nature as to constitute in itself conduct threatening public policy and public security and cannot therefore by itself justify the expulsion of the person<sup>310</sup>.

Article 27 of Directive 2004/38/EC may be relied upon by an EU citizen against his or her Member State of origin when that Member State imposes restrictions on his or her right to exit its territory<sup>311</sup>.

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<sup>304</sup> 36/75, *Rutili*, ECLI:EU:C:1975:137, paragraphs 8-21 and 30/77, *Bouchereau*, ECLI:EU:C:1977:172, paragraphs 6-24.

<sup>305</sup> 36/75, *Rutili*, ECLI:EU:C:1975:137, paragraph 27, 30/77, *Bouchereau*, ECLI:EU:C:1977:172, paragraph 33, C-33/07, *Jipa*, ECLI:EU:C:2008:396, paragraph 23 and C-331/16 and C-366/16, *K and H*, ECLI:EU:C:2018:296, paragraph 40 and case law cited.

<sup>306</sup> But note C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraph 50, in Section 13.1.3 - *Proportionality assessment*.

<sup>307</sup> C-423/98, *Albore*, ECLI:EU:C:2000:401, paragraphs 18 et seq. and C-285/98, *Kreil*, ECLI:EU:C:2000:2, paragraph 15.

<sup>308</sup> Note C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraphs 43-47.

<sup>309</sup> 115/81 and 116/81, *Adoui and Cornuaille*, ECLI:EU:C:1982:183, paragraphs 5-9 and C-268/99, *Jany*, ECLI:EU:C:2001:616, paragraph 61.

<sup>310</sup> 48/75, *Royer*, ECLI:EU:C:1976:57, paragraph 51.

<sup>311</sup> C-430/10, *Gaydarov*, ECLI:EU:C:2011:749 and C-434/10, *Aladzhov*, ECLI:EU:C:2011:750.

### 13.1.2 Personal conduct and threat

Restrictive measures may be taken only on a case-by-case basis where the personal conduct of an individual represents a **genuine, present and sufficiently serious threat** affecting one of the fundamental interests of the society of the host Member State<sup>312</sup>. Restrictive measures cannot be based solely on considerations pertaining to the protection of public policy or public security advanced by another Member State<sup>313</sup>. That does not however rule out the possibility of such reasons being taken into account in the assessment made by the competent national authorities for the purpose of adopting the measure restricting freedom of movement<sup>314</sup>.

A decision refusing a right to reside in or enter a Member State under rules other than the free movement *acquis* (e.g. refusal of refugee status) cannot automatically lead to the conclusion that the presence of the person represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the host Member State. However, the separate assessment of the genuine, present and sufficiently serious threat that needs to be carried out under Directive 2004/38/EC may take into account the findings of fact made in the preceding decision and the factors on which that decision was based<sup>315</sup>.

EU law precludes the adoption of restrictive measures on **general preventive grounds**<sup>316</sup>. Restrictive measures must be based on an actual threat and cannot be justified merely by a general risk<sup>317</sup>. Restrictive measures following a criminal conviction cannot be automatic and must take into account the personal conduct of the offender and the threat that it represents for the requirements of public policy<sup>318</sup>.

In addition, ‘the legislation of the Member States should not include any provision which establishes a *systematic and automatic link* between a criminal conviction and subsequent expulsion. Neither should the competent national authorities automatically take any such decision. An “automatic” system means any national provision the wording of which leaves the national authorities or the national court no margin for appreciation or for taking into consideration any individual circumstances<sup>319</sup>. However, nothing should prevent the Member States from linking a criminal conviction with an examination of the circumstances in order to ascertain whether there are reasons to take measures on grounds of public order or public security. The national court may order a criminal conviction and an expulsion on the same occasion or the court or the administrative authorities may order an expulsion at a later stage either while the person is still in prison or upon release from prison’<sup>320</sup>.

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<sup>312</sup> All criteria are cumulative.

<sup>313</sup> C-33/07, *Jipa*, ECLI:EU:C:2008:396, paragraph 25 and C-503/03, *Commission v Spain*, ECLI:EU:C:2006:74, paragraph 62.

<sup>314</sup> C-33/07, *Jipa*, ECLI:EU:C:2008:396, paragraph 25.

<sup>315</sup> C-331/16 and C-366/16, *K and H*, ECLI:EU:C:2018:296, paragraphs 51-54.

<sup>316</sup> 67/74, *Bonsignore*, ECLI:EU:C:1975:34, paragraphs 5-7.

<sup>317</sup> General prevention in specific circumstances, such as sport events, is covered in the 1999 Communication (see Section 3.3).

<sup>318</sup> C-348/96, *Calfa*, ECLI:EU:C:1999:6, paragraphs 17-27 and 67/74, *Bonsignore*, ECLI:EU:C:1975:34, paragraphs 5-7.

<sup>319</sup> Automatic links in this sense have sometimes been introduced in cases where the individual commits severe crimes and receives a certain minimum sentence (see Case C-348/96 *Donatella Calfa*).

<sup>320</sup> See Section 3.3.2 of the 1999 Communication.

Grounds extraneous to the **personal conduct** of an individual cannot be invoked. Automatic expulsions are not allowed under Directive 2004/38/EC <sup>321</sup>.

Individuals can have their rights restricted only if their personal conduct represents a **threat**, i.e. indicates the likelihood of a serious prejudice to the requirements of public policy or public security.

A **previous criminal conviction** can be taken into account, but 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 <sup>322</sup>. The authorities must base their decision on an assessment of the future conduct of the individual concerned. The kind and number of previous convictions must form a significant element in this assessment and particular regard must be had to the seriousness and frequency of the crimes committed. While the danger of reoffending is of considerable importance, a remote possibility of new offences is not sufficient <sup>323</sup>.

**Examples:**

*A. and I. have finished serving their two-year sentence for robbery. The authorities assess if the personal conduct of the two friends represents a threat, i.e. if it involves the likelihood of a new and serious prejudice to public policy:*

*-This was A.'s first conviction. She behaved well in prison. Since she left prison, she has found a job. The authorities find nothing in her behaviour that represents a genuine, present and sufficiently serious threat.*

*-As for I., this was already his fourth conviction. The seriousness of his crimes has grown over time. His behaviour in prison was far from exemplary and his two requests to be released on parole were refused. In less than 2 weeks, he is caught planning another robbery. The authorities conclude that I.'s conduct is a threat to public policy.*

The threat must be **present**. Past conduct may be taken into account where there is a likelihood of reoffending <sup>324</sup>. In general, the finding of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society 'implies the existence in the individual concerned of a propensity to repeat the conduct constituting such a threat in the future' <sup>325</sup>. A threat that is only presumed is not **genuine**.

However, 'it is also possible that past conduct alone may constitute such a threat to the requirements of public policy' <sup>326</sup>. In that regard, the conduct of a person that shows the persistence of a disposition hostile to the EU fundamental values, such as human dignity and human rights, as revealed by past crimes or acts, is capable of constituting a genuine, present

<sup>321</sup> C-408/03, *Commission v Belgium*, ECLI:EU:C:2006:192, paragraphs 68-72.

<sup>322</sup> C-482/01 and 493/01, *Orfanopoulos and Oliveri*, ECLI:EU:C:2004:262, paragraphs 82 and 100 and C-50/06, *Commission v Netherlands*, ECLI:EU:C:2007:325, paragraphs 42-45.

<sup>323</sup> For example, the danger of re-offending may be considered greater in the case of drug dependency if there is a risk of further criminal offences committed to fund the dependency: Opinion of Advocate General Stix-Hackl, C-482/01 and C-493/01, *Orfanopoulos and Oliveri*, ECLI:EU:C:2003:455.

<sup>324</sup> 30/77, *Bouchereau*, ECLI:EU:C:1977:172, paragraphs 25-30.

<sup>325</sup> C-331/16 and C-366/16, *K and H*, ECLI:EU:C:2018:296, paragraph 56.

<sup>326</sup> C-331/16 and C-366/16, *K and H*, ECLI:EU:C:2018:296, paragraph 56.

and sufficiently serious threat affecting one of the fundamental interests of society, even if the past crimes or acts of the person are not likely to take place again outside their specific historical and social context<sup>327</sup>.

Suspension of sentence constitutes an important factor in the assessment of the threat as it suggests that the individual concerned no longer represents a real danger.

The threat must exist at the moment when the restrictive measure is adopted by the national authorities or reviewed by the courts<sup>328</sup>.

The fact that a person is imprisoned when an expulsion decision is adopted, without the prospect of being released in the near future, does not exclude that his or her conduct may represent a present and genuine threat for a fundamental interest of the society of the host Member State. Member States can adopt an expulsion order concerning an imprisoned person<sup>329</sup>.

Present **membership of an organisation** may be taken into account where the individual concerned participates in the activities of the organisation and identifies with its aims or designs<sup>330</sup>. Member States do not have to criminalise or to ban the activities of an organisation to be in a position to restrict the rights under Directive 2004/38/EC, as long as some administrative measures to counteract the activities of that organisation are in place. Past associations<sup>331</sup> cannot, in general, constitute present threat.

In certain circumstances, **persistent petty criminality** may represent a threat to public policy, despite the fact that any single crime/offence, taken individually, would be insufficient to represent a sufficiently serious threat as defined above. National authorities must show that the personal conduct of the individual concerned represents a threat to the requirements of public policy<sup>332</sup>. When assessing the existence of the threat to public policy in these cases, the authorities may in particular take into account the following **factors**:

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

The existence of multiple convictions is not enough, in itself.

The mere existence of a tax liability or of a debt of a legal person owned by the person without taking into account the personal conduct of that individual is not enough to constitute a threat<sup>333</sup>.

A restriction imposed by a Member State on an individual who has been the subject, in the past, of a decision excluding them from refugee status on the ground that there are serious reasons to believe that the person committed a war crime or a crime against humanity or was guilty of acts

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<sup>327</sup> C-331/16 and C-366/16, *K and H*, ECLI:EU:C:2018:296, paragraph 60.

<sup>328</sup> C-482/01 and C-493/01, *Orfanopoulos and Oliveri*, ECLI:EU:C:2004:262, paragraph 82.

<sup>329</sup> C-193/16, *E*, ECLI:EU:C:2017:542, paragraphs 23-27.

<sup>330</sup> 41/74, *van Duyn*, ECLI:EU:C:1974:133, paragraph 17 et seq.

<sup>331</sup> 41/74, *van Duyn*, ECLI:EU:C:1974:133, paragraph 17 et seq.

<sup>332</sup> C-349/06, *Polat*, ECLI:EU:C:2007:581, paragraph 35.

<sup>333</sup> C-434/10, *Aladzhov*, ECLI:EU:C:2011:750, paragraph 43 and C-249/11, *Byankov*, ECLI:EU:C:2012:608, paragraphs 37-42.

contrary to the purposes and principles of the United Nations may fall within the scope of the concept of public policy or public security, within the meaning of Directive 2004/38/EC<sup>334</sup>.

### 13.1.3 Proportionality assessment

Once the authorities have established that the personal conduct of the individual represents a threat that is serious enough to warrant a restrictive measure, they must carry out a **proportionality assessment** to decide whether the person concerned can be denied entry or removed on grounds of public policy or public security.

The proportionality assessment is meant to determine whether the restrictive measure is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it<sup>335</sup>.

National authorities must carry out an analysis of the characteristics of the general restrictive measure at stake and, on that basis, assess its intrinsic proportionality. For that purpose, the following factors can be taken into account<sup>336</sup>:

- Is the restrictive measure appropriate to ensure the achievement of the objective it pursues and is the measure necessary for that purpose (e.g. is a ban on exit appropriate to secure a debt)?
- Are there other measures available that would have been equally effective to obtain the objective without necessarily restricting the person's freedom of movement (e.g. possibilities offered by national law to secure a debt)?
- What are the modalities of application of the measure:
  - Is the measure coupled with exceptions?
  - Is the measure coupled with a temporal limitation?
  - Is the measure coupled with a possibility of regular review of the factual and legal circumstances underpinning it?

Furthermore, the competent authorities of the host Member State must 'weigh the protection of the fundamental interest of society at issue, on the one hand, against the interests of the person concerned in the exercise of his right to freedom of movement and residence as a Union citizen and in his right to respect for private and family life, on the other'<sup>337</sup>.

National authorities must identify the protected interests of society at issue. It is in the light of these interests that they must carry out an analysis of the characteristics of the threat. The following **factors** could be taken into account:

- degree of social danger resulting from the presence of the person concerned on the territory of that Member State;

<sup>334</sup> C-331/16 and C-366/16, *K and H*, ECLI:EU:C:2018:296, paragraphs 43-47.

<sup>335</sup> C-430/10, *Gaydarov*, ECLI:EU:C:2011:749, paragraph 40, and C-331/16 and C-366/16, *K and H*, ECLI:EU:C:2018:296, paragraph 61.

<sup>336</sup> C-434/10, *Aladzhov*, ECLI:EU:C:2011:750, paragraph 47 and C-249/11, *Byankov*, ECLI:EU:C:2012:608, paragraphs 44-47.

<sup>337</sup> See in particular, case C-331/16 and 366/16, *K. & H.F.*, ECLI:EU:C:2018:296, paragraph 67. See also case C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraph 50.

- nature and gravity of the offending activities, their frequency, cumulative danger and damage caused;
- the degree of involvement in the criminal activity;
- whether there are mitigating circumstances;
- the possible penalties and the sentences imposed and enforced;
- time elapsed since acts committed;
- the risk of reoffending;
- and the subsequent behaviour of the person concerned (*NB: also good behaviour in prison and possible release on parole could be taken into account*).

In addition, national authorities need to take into account the risk of compromising the social rehabilitation of the EU citizen in the host Member State in which he has become genuinely integrated, as this represents a general interest for the European Union<sup>338</sup>.

Due regard should be paid to fundamental rights and, in particular, to the right to private and family life as contained in Article 7 of the Charter of Fundamental Rights and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>339</sup>.

The personal and family situation of the individual concerned must be assessed carefully with a view to establishing whether the envisaged measure is appropriate and does not go beyond what is strictly necessary to achieve the objective pursued, and whether there are less stringent measures to achieve that objective. The following **factors**, outlined in an indicative list in Article 28(1), should be taken into account<sup>340</sup>:

- impact of expulsion on the economic, personal and family life of the individual (*including on other family members who would have the right to remain in the host Member State*);
- where applicable, consideration of the best interest of the child for whom the measure might have significant consequences<sup>341</sup>;
- the seriousness of the difficulties which the spouse/partner and any of their children risk facing in the country of origin of the person concerned;
- strength of ties (*relatives, visits, language skills*) – or lack of ties – with the country of origin and with the host Member State (*for example, the person concerned was born in the host Member State or lived there from an early age*);

<sup>338</sup> C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraph 50.

<sup>339</sup> C-331/16 and 366/16, *K. & H.F.*, ECLI:EU:C:2018:296, paragraph 63 and C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraph 52 and case law cited.

<sup>340</sup> In relation to the fundamental rights, see the case law of the European Court of Human Rights in cases *Berrehab v. The Netherlands*, Application no. 10730/84, judgment of 21 June 1988; *Moustaquim v. Belgium*, Application no. 12313/86, judgment of 18 February 1991; *Beldjoudi v. France*, Application no. 12083/86, judgment of 26 March 1992; *Boujlifa v. France*, Application no. 25404/94, judgment of 21 October 1997; *El Boujaïdi v. France*, Application no. 25613/94, judgment of 26 September 1997 and *Dalia v. France*, Application no. 26102/95, judgment of 19 February 1988.

<sup>341</sup> C-112/20, *M.A.*, ECLI:EU:C:2021:197, paragraph 36.

- length of residence in the host Member State (*the situation of a tourist is different from the situation of someone who has lived for many years in the host Member State*) and, when appropriate, the legality of the individual's residence in the host Member State;
- age and state of health.

#### Increased protection against expulsion (Articles 28(2) and 28(3) of Directive 2004/38/EC)

Directive 2004/38/EC establishes a system of protection against expulsion measures which is based on the degree of integration of the persons concerned in the host Member State.

Accordingly, Directive 2004/38/EC lays down three levels of protection against expulsion: 1) a basic one, for all beneficiaries of the Directive; 2) an intermediate level of protection, which is available when the person concerned has a right of permanent residence; and 3) an enhanced level of protection, which applies where the EU citizen concerned has resided in the host Member State for the previous 10 years.

#### Intermediate level of protection for persons who have a right of permanent residence (Article 28(2)):

EU citizens and their family members who are permanent residents (see Section 9 - *Permanent residence (Articles 16 to 21 of Directive 2004/38/EC)*) in the host Member State can be expelled only on serious grounds of public policy or public security. As an example, dealing in narcotics as part of an organised group is covered by this concept<sup>342</sup>.

In addition, any crimes that may justify the expulsion of a person who has resided for the previous 10 years in the host Member State (category below) will also justify the expulsion of a permanent resident.

A period of imprisonment in the host Member State after the right of permanent residence has been acquired does not affect the right of permanent residence<sup>343</sup>.

By contrast, periods of imprisonment in the host Member State before the acquisition of permanent residence cannot be taken into consideration for the purpose of permanent residence. Furthermore, they 'interrupt' the continuity of the legal residence. As a result, after prison, a person must accumulate a new period of 5 continuous years of residence in order to obtain a right of permanent residence (see Section 9 - *Permanent residence (Articles 16 to 21 of Directive 2004/38/EC)*)<sup>344</sup>.

#### Enhanced level of protection for EU citizens who resided in the host Member State for the previous 10 years or who are minors (Article 28(3)):

EU citizens who have resided in the host Member State for the previous 10 years and EU children can be expelled only on imperative grounds of public security (not public policy). There must be a clear distinction between normal, 'serious' and 'imperative' grounds on which the expulsion can be taken.

Criminal offences such as those referred to in the second subparagraph of Article 83(1) TFEU (i.e. terrorism, trafficking in human beings and sexual exploitation, illicit drug trafficking, illicit

<sup>342</sup> C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraph 56.

<sup>343</sup> C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708.

<sup>344</sup> C-378/12, *Onuekwere*, ECLI:EU:C:2014:13, paragraphs 27 and 32.

arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime) constitute a particularly serious threat to one of the fundamental interests of society, which might pose a direct threat to the calm and physical security of the population. They are thus covered by the concept of ‘imperative grounds of public security’, capable of justifying an expulsion measure against beneficiaries of the enhanced protection provided for in Article 28(3), ‘as long as the manner in which such offences were committed discloses particularly serious characteristics’<sup>345</sup>.

To benefit from the enhanced protection against expulsion on the basis of the previous 10 years of residence, the ten-year period of residence ‘must, in principle be continuous’ and ‘must be calculated by counting back from the date of the decision ordering that person’s expulsion’<sup>346</sup>.

The enhanced protection against expulsion on the basis of 10 years of residence can only be claimed by an EU citizen who has a right of permanent residence<sup>347</sup>.

Periods of imprisonment interrupt, **in principle**, the continuity of residence needed to acquire the enhanced protection provided for in Article 28(3). However, such periods of imprisonment cannot be regarded as **automatically** breaking the integrative links with the host Member State. National authorities need to determine such links<sup>348</sup>. For that purpose, they must carry out ‘an overall assessment of the situation of that person at the precise time when the question of expulsion arises. In the context of that overall assessment, periods of imprisonment must be taken into consideration together with all the relevant factors in each individual case, including, as the case may be, the circumstance that the person concerned resided in the host Member State for the 10 years preceding his imprisonment’<sup>349</sup>.

In order to determine if absences from the host Member State during the ten-year residence period prevent an EU citizen from enjoying enhanced protection, national authorities need to carry out an overall assessment of the person’s situation when the question of expulsion arises, to ascertain whether the absences at stake involve the transfer to another country of the centre of the personal, family or occupational interests of the person concerned. All the relevant factors need to be taken into consideration in each individual case, in particular the duration of each period of absence, their cumulative duration and frequency, and the reasons for the absences<sup>350</sup>.

#### 13.1.4 Preventive measures

As EU law does not contain rules on the enforcement of decisions to expel EU citizens and their family members, it is for the Member States to lay down national rules on this matter.

Relevant national legislation may use as a basis the provisions of the Return Directive<sup>351</sup> for the adoption – in relation to mobile EU citizens and their family members who are subject to

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<sup>345</sup> C-348/09, *I*, ECLI:EU:C:2012:300, paragraph 33.

<sup>346</sup> C-400/12, *M.G.*, ECLI:EU:C:2014:9, paragraphs 27 and 24 and C-316/16 and C-424/16, *B and Vomero*, ECLI:EU:C:2018:256, paragraphs 65 and 66.

<sup>347</sup> C-316/16 and C-424/16, *B and Vomero*, ECLI:EU:C:2018:256, paragraph 49.

<sup>348</sup> C-316/16 and C-424/16, *B and Vomero*, ECLI:EU:C:2018:256, paragraph 70.

<sup>349</sup> C-316/16 and C-424/16, *B and Vomero*, ECLI:EU:C:2018:256, paragraph 70. For further information on the factors to be used in that assessment, see also paragraphs 72-75.

<sup>350</sup> C-145/09, *Tsakouridis*, ECLI:EU:C:2010:708, paragraphs 32 and 33.

<sup>351</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).



an expulsion decision for reasons of public policy or public security – of measures to prevent their absconding during the period of voluntary departure and measures for their detention in the event of non-compliance with an expulsion order.

However, as the national provisions laying down such preventive measures restrict the exercise of the right of freedom of movement for mobile EU citizens and their family members, **they need to comply with the following conditions and may need to be adapted accordingly:**

- They must comply with the **provisions of Directive 2004/38/EC** on restrictions of the right to free movement for reasons of public policy or public security (in particular Article 27);
- They must **pursue a legitimate objective, be based on objective considerations and be proportionate**; and
- They must **not be less favourable than the national provisions transposing the Return Directive that apply to non-EU citizens** <sup>352</sup>.

As regards specifically the detention measures applicable to mobile EU citizens and their family members who have not complied with an expulsion decision for reasons of public policy or public security, **when assessing the proportionality of the maximum period of detention applicable to them**, special consideration should be paid to the fact that mobile EU citizens and their family members are not in a situation comparable to that of non-EU citizens, in particular considering the facilitations that exist for organising an expulsion between Member States <sup>353</sup>.

### **13.2 Restrictions of the right to move and reside freely on grounds of public health**

As stipulated in Article 27(1), Member States may restrict the freedom of movement of EU citizens on grounds of public health. However, under Article 29(1), the only diseases justifying measures restricting freedom of movement are **diseases with epidemic potential** that are classified as such by the relevant instruments of the World Health Organization (WHO), as well as other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State.

Currently, the relevant WHO instruments are the International Health Regulations (2005) <sup>354</sup>. They stipulate that the WHO's Director-General is to determine whether an event constitutes a public health emergency of international concern, and when any such emergency has ended. For example, on 30 January 2020, the WHO declared a public health emergency of international concern over the global outbreak of severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), which causes coronavirus disease 2019 (COVID-19) <sup>355</sup>.

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<sup>352</sup> C-718/19, *Ordre des barreaux francophones and germanophone and Others*, ECLI:EU:C:2021:505, paragraphs 44, 47-51, 57, 60 and 73.

<sup>353</sup> C-718/19, *Ordre des barreaux francophones and germanophone and Others*, ECLI:EU:C:2021:505, paragraphs 64-73.

<sup>354</sup> <https://www.who.int/health-topics/international-health-regulations>

<sup>355</sup> [https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news/item/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))

In addition, in accordance with the Regulation (EU) 2022/2371 on serious cross-border threats to health, a situation of public health emergency can be recognised and declared at Union level<sup>356</sup>.

Paragraphs 2 and 3 of Article 29 contain specific rules on EU citizens and family members who already reside in the host Member State. According to paragraph 2, EU citizens and their family members who have resided in the Member State for more than 3 months can no longer be expelled on grounds of public health by the Member State of residence. This also **precludes host Member States refusing re-entry** to EU citizens and their family members having resided in their territory for more than 3 months, as the prohibition in Article 29(2) would otherwise be circumvented. Considerations of proportionality and administrative efficiency should typically lead Member States to permit re-entry regardless of the length of prior residence<sup>357</sup>.

Under paragraph 3 of Article 29, EU citizens and their family members who have resided in the host Member State for less than 3 months may, where there are serious indications that it is necessary, be required to undergo a medical examination to certify that they are not suffering from any of the conditions referred to in Article 29(1). Such examinations, aimed at determining whether the right of residence should be refused on public health grounds, must be free of charge and may not be required as a matter of routine, as doing so would undermine the exhaustive character of the list of documentation to be provided by EU citizens and their family members in Articles 8 and 10.

The provisions in Article 29(2) and (3) on individual measures which can be addressed to persons already residing in a Member State must be distinguished from exceptional **general public health measures** provided for in national law that limit the exercise of the right to move freely within the EU, such as those taken during the COVID-19 pandemic<sup>358</sup>. In this context, restrictions on freedom of movement can also take different forms, depending on the disease concerned, for example requirements for EU citizens and their family members to provide proof of medical examinations, to undergo post-arrival quarantine, or to submit passenger locator forms or similar documentation prior to or following travelling<sup>359</sup>.

Any such restrictions must be limited to diseases falling within the scope of Article 29(1) – such as diseases for which the WHO has declared a public health emergency of international concern – and be applied in accordance with the general principles of EU law, in particular **proportionality** and **non-discrimination**. Any measures taken therefore need to be strictly limited in scope and time<sup>360</sup>, and must not extend beyond what is strictly necessary to safeguard public health<sup>361</sup>. This may require, for example, specific exemptions for essential travellers,

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<sup>356</sup> Article 23 of Regulation (EU) 2022/2371 of the European Parliament and of the Council of 23 November 2022 on serious cross-border threats to health and repealing Decision No 1082/2013/EU (OJ L 314, 6.12.2022, p. 26).

<sup>357</sup> See, for example, point 21 of the Guidelines for border management measures to protect health and ensure the availability of goods and essential services (OJ C 861, 16.3.2020, p. 1) and point 5 of Council Recommendation (EU) 2020/1475 of 13 October 2020 on a coordinated approach to the restriction of free movement in response to the COVID-19 pandemic (OJ L 337, 14.10.2020, p. 3).

<sup>358</sup> See, for example, Opinion of Advocate General Emiliou, C-128/22, *NORDIC INFO*, ECLI:EU:C:2023:645.

<sup>359</sup> See also Article 11 of Regulation (EU) 2021/953 of the European Parliament and of the Council of 14 June 2021 on a framework for the issuance, verification and acceptance of interoperable COVID-19 vaccination, test and recovery certificates (EU Digital COVID Certificate) to facilitate free movement during the COVID-19 pandemic (OJ L 211, 15.6.2021, p. 1).

<sup>360</sup> Regulation (EU) 2021/953, for example, is limited both in scope and in time to the COVID-19 pandemic.

<sup>361</sup> Recital 6 of Regulation (EU) 2021/953. See also C-406/04, *De Cuyper*, ECLI:EU:C:2006:491, paragraph 42.

including workers or self-employed persons in critical occupations<sup>362</sup> or transit passengers, and cross-border regions<sup>363</sup>. The proportionality of public health measures limiting the exercise of the right to move freely within the EU may also depend on whether the Member State concerned introduces **comparable public health measures at domestic level**. Finally, Member States should provide clear, comprehensive and timely information about any such general public health measures.

In assessing whether such measures are necessary, Member States also need to examine whether the public health objective pursued could not be achieved by **alternatives that interfere less** with the right to free movement<sup>364</sup>. In this context, the measures and possible alternatives that can be taken will necessarily depend on the nature of the specific public health threat. During the COVID-19 pandemic, for example, travel-related test or quarantine requirements were typically measures available that caused less interference than a blanket ban on entry or exit<sup>365</sup>. The proportionality of the measures taken, as well as the possible emergence of less restrictive measures, for example as a result of new scientific developments, must be regularly re-assessed. Nevertheless, Member States may refuse entry to non-resident EU citizens and their family members on grounds of public health as a last resort. Overall, any measures limiting the exercise of the right to move freely within the EU on public health grounds must be lifted as soon as possible<sup>366</sup>.

Notably during a pandemic, Member States may put in place restrictions to free movement as a result of the same disease falling within the scope of Article 29(1). In such a situation, **coordinated efforts at EU level** may become necessary to avoid, in the absence of coordination, unilateral measures creating additional practical obstacles to free movement, even if these measures are, assessed individually, in line with EU law. These efforts may include legally binding instruments<sup>367</sup> or non-binding acts such as recommendations<sup>368</sup>.

In summary:

<b>The only diseases justifying measures that restrict freedom of movement:</b>	
<ul style="list-style-type: none"> <li>a) diseases with epidemic potential, as defined by the relevant WHO instruments;</li> <li>b) other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State</li> </ul>	
<b>EU citizens and family members</b>	<ul style="list-style-type: none"> <li>• cannot be expelled on grounds of public health by the Member State of residence</li> </ul>

<sup>362</sup> See, for example, Commission Guidelines concerning the exercise of the free movement of workers during COVID-19 outbreak (OJ C 102I, 30.3.2020, p. 12).

<sup>363</sup> See, for example, points 19 and 19b of Council Recommendation (EU) 2020/1475.

<sup>364</sup> See, for example, C-406/04, *De Cuyper*, ECLI:EU:C:2006:491, paragraph 44.

<sup>365</sup> See point 17 of Council Recommendation (EU) 2020/1475 and point 11 of Council Recommendation (EU) 2022/107 of 25 January 2022 on a coordinated approach to facilitate safe free movement during the COVID-19 pandemic and replacing Recommendation (EU) 2020/1475 (OJ L 18, 27.1.2022, p. 110). Based on Regulation (EU) 2021/953, where Member States were requiring proof of a negative test, of vaccination or of recovery, they were obliged to accept, under the same conditions, certificates conforming with that Regulation.

<sup>366</sup> See point 2 of Council Recommendation (EU) 2022/107.

<sup>367</sup> For example Regulation (EU) 2021/953 and the legal acts adopted on its basis.

<sup>368</sup> For example Council Recommendation (EU) 2020/1475 and Council Recommendation (EU) 2022/107.

<b>having resided for more than 3 months</b>	<ul style="list-style-type: none"> <li>cannot be refused re-entry by the Member State of residence</li> </ul>
<b>EU citizens and family members having resided for less than 3 months</b>	<ul style="list-style-type: none"> <li>may, where there are serious indications that it is necessary, be required to undergo a medical examination to certify that they are not suffering from the disease concerned</li> <li>such examinations must be free of charge and may not be required as a matter of routine</li> <li>should typically not be refused re-entry by the Member State of residence</li> </ul>
<b>EU citizens and family members not yet residing</b>	<ul style="list-style-type: none"> <li>restrictions must be applied in accordance with the general principles of EU law, in particular proportionality and non-discrimination</li> <li>measures taken need to be strictly limited in scope and time, and must not extend beyond what is strictly necessary to safeguard public health</li> <li>Member States need to examine whether the public health objective pursued could not be achieved by alternatives that interfere less with the right to free movement</li> <li>refusal of entry possible as last resort</li> </ul>

#### **14 Restrictions on grounds other than public policy, public security or public health (Article 15 of Directive 2004/38/EC)**

Article 15 covers expulsion decisions made on grounds unrelated to any danger to public policy, public safety or public health<sup>369</sup>. Article 15 thus allows the host Member State to expel from its territory EU citizens or their family members who, in the past, had a right of residence of up to 3 months (by virtue of Article 6) or longer than 3 months (by virtue of Article 7) but who no longer satisfy the requirements for a right of residence<sup>370</sup>. This could concern for example:

- a family member who, further to the departure of the EU citizen from the host Member State, no longer enjoys a right of residence under Directive 2004/38/EC;
- a person who is no longer a family member of the EU citizen and does not meet the conditions to retain a right of residence under Directive 2004/38/EC;
- an economically non-active EU citizen who has become an unreasonable burden to the social assistance scheme of the host Member State.

<sup>369</sup> C-94/18, *Chenchooliah*, ECLI:EU:C:2019:693, paragraph 73.

<sup>370</sup> C-94/18, *Chenchooliah*, ECLI:EU:C:2019:693, paragraph 74 and C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraph 66.

In such a case, the relevant safeguards laid down in Articles 30 and 31 of Directive 2004/38/EC are applicable by analogy when such an expulsion decision is adopted and it is not possible, under any circumstances, for such a decision to impose a ban on entry into the territory<sup>371</sup>.

An expulsion decision taken under Article 15(1) of Directive 2004/38/EC where the EU citizen no longer enjoys a right of residence under Article 7 of Directive 2004/38/EC cannot be regarded as having fully been complied with merely because the person concerned has physically left the host Member State. The EU citizen needs to have genuinely and effectively terminated his or her residence there under Article 7<sup>372</sup>.

Only once these EU citizens have genuinely and effectively terminated that residence, can they again exercise their right of residence under Article 6 of Directive 2004/38/EC in the same host Member State, as their new residence cannot be regarded as constituting in fact a continuation of their preceding residence in that territory<sup>373</sup>.

Under such circumstances, to determine, through an overall assessment of all the circumstances, whether the EU citizen and the family members have genuinely and effectively terminated their residence in the territory of a Member State, the competent national authorities need to take into account the following factors<sup>374</sup>:

- a) The length of residence outside the territory of the Member State. The longer the person concerned is absent from the host Member State, the more that absence attests to the genuine and effective nature of the end of that person's residence. By contrast, a brief absence of a few days or hours is rather an indication that the residence has not been terminated.
- b) Factors evidencing a break in the links between the person concerned and the Member State (e.g. a request for removal from a population register, the termination of a lease contract or a contract for the provision of public services (such as water or electricity), moving house or flat, de-registration from a job placement service or the termination of other relationships which presuppose some integration in that Member State).

The relevance of these factors, which may vary according to the circumstances, must be assessed by the authorities in the light of all the specific circumstances characterising the particular situation of the person concerned (account should be taken of the extent to which the person is integrated in the host Member State, the length of his or her residence in the territory of that Member State immediately before the expulsion decision taken against him or her, and his or her family and economic situation).

- c) The characteristics of the residence of the person concerned outside the territory of the Member State during the period of absence from that Member State, with a view to ascertaining whether the person moved the centre of his or her personal, occupational or family interests to another country during that period.

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<sup>371</sup> C-94/18, *Chenchooliah*, ECLI:EU:C:2019:693, paragraphs 86-88 and C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraphs 67 and 68.

<sup>372</sup> C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraph 81.

<sup>373</sup> C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraph 81.

<sup>374</sup> C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraphs 90-93.

In the event of failure to comply with such an expulsion decision, the Member State is not obliged to adopt a new decision but may rely on the initial one in order to oblige the person concerned to leave its territory<sup>375</sup>.

However, a material change in circumstances enabling the EU citizen to satisfy the conditions of the right of residence for more than 3 months under Article 7 (e.g. the EU citizen becomes a worker), would deprive the expulsion decision of any effect and would require, despite the failure to comply with that decision, that the residence on the territory of the Member State be regarded as legal<sup>376</sup>.

Finally, an expulsion decision taken under Article 15(1) of Directive 2004/38/EC does not preclude the exercise of the right of entry enshrined under Article 5 of Directive 2004/38/EC, when the EU citizen travels to the territory of the Member State ‘on an *ad hoc* basis for purposes other than to reside there’. Thus, the expulsion decision cannot be enforced against the person concerned as long as his or her presence in the host Member State is justified under Article 5 of Directive 2004/38/EC<sup>377</sup>.

## **15 Procedural safeguards (Articles 30 to 33 of Directive 2004/38/EC)**

The procedural safeguards of Directive 2004/38/EC must be interpreted in a manner which complies with the requirements flowing from Article 47 of the Charter of Fundamental Rights on the right to an effective remedy<sup>378</sup>.

The procedural safeguards of Chapter VI of Directive 2004/38/EC apply to all situations in which rights of entry and residence under Directive 2004/38/EC are restricted or denied (including visa refusals, denials of entry, refusal of residence card applications, refusal of residence certificate, withdrawal of residence cards...) and whatever the grounds on which the measure is based, i.e.:

- abuse and fraud (Article 35 of Directive 2004/38/EC);
- measures taken on grounds of public policy, public security or public health;
- measures taken on all other grounds (Article 15 of Directive 2004/38/EC) which include when a visa, residence card application or a registration is refused because the applicant does not meet the conditions attached to the right of residence or decisions taken on the ground that the person concerned no longer meets the conditions attached to the right of residence (such as when an economically non-active EU citizen becomes an unreasonable burden to the social assistance scheme of the host Member State)<sup>379</sup>.

With the exception of general public health measures provided for in national law that limit the exercise of the right to move freely within the EU which do not need to analyse the specific situation of each individual (such as those taken during the COVID-19 pandemic: see Section 13.2 - *Restrictions of the right to move and reside freely on grounds of public health*), the person concerned must always be notified in writing of any restrictive measure. The decision must

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<sup>375</sup> C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraph 94.

<sup>376</sup> C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraph 95.

<sup>377</sup> C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraphs 102 and 103.

<sup>378</sup> C-300/11, ZZ, ECLI:EU:C:2013:363, paragraph 50.

<sup>379</sup> See C-94/18, *Chenchooliah*, ECLI:EU:C:2019:693, paragraphs 80-89, clarifying which provisions may be pertinent in case of expulsion after the derived right of residence has ceased.

specify the court or administrative authority with which the person concerned may lodge an appeal and the time limit for the appeal.

Decisions must be fully reasoned and list all the specific factual and legal grounds on which they are taken so that the person concerned may take effective steps to ensure his or her defence<sup>380</sup> and national courts may review the case in accordance with the right to an effective remedy, which is a fundamental right under Article 47 of the Charter of Fundamental Rights<sup>381</sup>. In this respect, forms may be used to notify the decisions but must always allow for a full justification of the grounds on which the decision was taken (*just indicating one or more of several options by ticking a box is not acceptable*).

The redress procedures must permit a review of the legality of the decisions restricting free movement as regards matters of both fact and law and ensure that the decision in question is not disproportionate<sup>382</sup>.

While the time limits within which judicial appeals proceedings should be conducted are not specified in Directive 2004/38/EC, Article 47 of the Charter of Fundamental Rights requires a fair and public hearing ‘within a reasonable time’.

Following the judicial annulment of a decision refusing to issue a residence card for a family member of an EU citizen, the competent national authority is required to adopt a new decision within a reasonable period of time, which cannot, in any case, exceed the period referred to in Article 10(1) of Directive 2004/38/EC (6 months from the date on which the application is submitted)<sup>383</sup>. As observed by the Court, ‘the automatic opening of a new period of six months, following the judicial annulment of a decision refusing to issue a residence card, appears disproportionate in the light of the ultimate purpose of the administrative procedure referred to in Article 10(1) of Directive 2004/38 and the objectives of that directive’<sup>384</sup>.

While Article 30 of Directive 2004/38/EC requires Member States to take every appropriate measure with a view to ensuring that the person concerned understands the content and implications of a decision adopted under Article 27, it does not require that decision to be notified to them in a language which they understand or which it is reasonable to presume they understand, if the person did not make a request to that effect<sup>385</sup>.

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<sup>380</sup> 36/75, *Rutili*, ECLI:EU:C:1975:137, paragraphs 37-39.

<sup>381</sup> However, see case C-300/11, *ZZ*, ECLI:EU:C:2013:363, paragraph 49, where the Court held that ‘It is only by way of derogation that Article 30(2) of Directive 2004/38 permits the Member States to limit the information sent to the person concerned in the interests of State security’. The Court further considered that as a derogation, this provision must be interpreted strictly, but without depriving it of its effectiveness. The Court provided clarifications on the extent that Articles 30(2) and 31 of Directive 2004/38/EC permit the grounds of a decision taken under Article 27 of the Directive not to be disclosed precisely and in full. The Court concluded (paragraph 69) that Articles 30(2) and 31 of Directive 2004/38/EC read in the light of Article 47 of the Charter of Fundamental Rights, require ‘the national court with jurisdiction to ensure that failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision taken under Article 27 of that directive is based and to disclose the related evidence to him is limited to that which is strictly necessary, and that he is informed, in any event, of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence’.

<sup>382</sup> C-94/18, *Chenchooliah*, ECLI:EU:C:2019:693, paragraph 85. See also C-89/17, *Banger*, ECLI:EU:C:2018:570, paragraph 48 and C-430/10, *Gaydarov*, ECLI:EU:C:2011:749, paragraph 41.

<sup>383</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 69.

<sup>384</sup> C-246/17, *Diallo*, ECLI:EU:C:2018:499, paragraph 68.

<sup>385</sup> C-184/16, *Petrea*, ECLI:EU:C:2017:684, paragraph 72.

Under Article 30(3), the time allowed to leave the territory must be at least 1 month, save in duly substantiated cases of **urgency**. The justification of an urgent removal must be genuine and proportionate<sup>386</sup>. In assessing the need to reduce this time in cases of urgency, the authorities must take into account the impact of an immediate or urgent removal on the personal and family life of the person concerned (*e.g. need to give notice at work, terminate a lease, need to arrange for personal belongings to be sent to the place of new residence, the education of children, etc.*). Adopting an expulsion measure on imperative or serious grounds does not necessarily mean that there is urgency. The assessment of urgency must be clearly and separately substantiated.

Re-entry bans<sup>387</sup> can be imposed together with an expulsion order based on grounds of public policy or public security only in cases where it is shown that the individual concerned is likely to remain a serious and genuine threat to one of the fundamental interests of society in the future. They cannot automatically follow a criminal conviction<sup>388</sup>. Persons who are subject to a re-entry ban may apply for it to be lifted after a reasonable period<sup>389</sup>.

While expulsion decisions and re-entry bans can be adopted concomitantly, the two decisions and their justifications should be clearly distinguished. However, in practice, any expulsion decision may trigger an assessment as to whether a re-entry ban is warranted.

In cases where the right of free movement is abused or obtained fraudulently, it will depend on the seriousness of the offence whether the persons can be considered as a serious threat to public order, which can justify in some cases a re-entry ban.

While social security fraud may also be subject to penalties – criminal or administrative – within the Member States’ legal systems, it does not in itself amount to abuse or fraud to free movement within the meaning of Article 35 of Directive 2004/38/EC. However, when a legally resident mobile EU citizen fraudulently obtains a benefit on false declarations, expulsion and imposition of a re-entry ban is possible under the general rules of Directive 2004/38/EC if the EU citizen can be considered to be a serious threat to public order, in conformity with the above-mentioned principle of proportionality.

For an expulsion order taken on all other grounds (Article 15 of Directive 2004/38/EC), it is not possible, under any circumstances, for such a decision to impose a re-entry ban into the territory<sup>390</sup>.

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<sup>386</sup> Opinion of Advocate General Stix-Hackl, C-441/02, *Commission v Germany*, ECLI:EU:C:2005:337.

<sup>387</sup> The term ‘re-entry ban’ refers to ‘exclusion orders’ under Article 32 of Directive 2004/38/EC.

<sup>388</sup> C-348/96, *Calfa*, ECLI:EU:C:1999:6, paragraphs 27 and 28.

<sup>389</sup> Article 32(1) of Directive 2004/38/EC and 115/81 and 116/81, *Adoui and Cornuaille*, ECLI:EU:C:1982:183, paragraph 12.

<sup>390</sup> C-94/18, *Chenchooliah*, ECLI:EU:C:2019:693, paragraph 89 and C-719/19, *Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506, paragraphs 67 and 68.



## **16 Fraud and abuse (Article 35 of Directive 2004/38/EC)**

### **16.1 General considerations**

**EU law cannot be relied upon in case of abuse**<sup>391</sup>. Article 35 allows Member States to take effective and necessary measures to fight against abuse and fraud in areas falling within the material scope of EU law on free movement of persons by refusing, terminating or withdrawing any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure must be proportionate and subject to the procedural safeguards provided for in the Directive<sup>392</sup>.

**EU law promotes the mobility of EU citizens and protects those who have made use of it**<sup>393</sup>. There is no abuse where EU citizens and their family members obtain a right of residence under EU law in a Member State other than that of the EU citizen's nationality as they are benefiting from an advantage inherent in the exercise of the right of free movement protected by the Treaty<sup>394</sup>, regardless of the purpose of their move to that Member State<sup>395</sup>.

Strange or unusual conduct in itself does not represent abuse or fraud.

Detailed guidance – including operational guidance – on how to tackle abuse and fraud and applicable burden of proof is given in the Handbook on marriages of convenience<sup>396</sup>. In the context of visa applications, Section 5 of Part III of the Visa Handbook provides operational instructions that derive directly from Article 35 of Directive 2004/38/EC and are relevant for all EU Member States.

### **16.2 Fraud**

For the purposes of Directive 2004/38/EC, **fraud** may be defined as the conduct of a person who seeks to break the law by presenting fraudulent documentation alleging that the formal conditions have been duly met or which is issued on the basis of false representation of a material fact concerning the conditions attached to the right of residence. For instance, submitting a forged marriage certificate with a view to obtaining a right of entry and residence under Directive 2004/38/EC would be a case of fraud and not of abuse, since no marriage was actually contracted.

Persons who have been issued with a residence document only as a result of fraudulent conduct in respect of which they have been convicted, may have their rights under the Directive refused,

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<sup>391</sup> 33/74 *van Binsbergen*, ECLI:EU:C:1974:131 paragraph 13, C-370/90, *Singh*, ECLI:EU:C:1992:296, paragraph 24 and C-212/97, *Centros*, ECLI:EU:C:1999:126 paragraphs 24 and 25.

<sup>392</sup> C-127/08, *Metock*, ECLI:EU:C:2008:449, paragraphs 74 and 75.

<sup>393</sup> C-370/90 *Singh*, ECLI:EU:C:1992:296; C-291/05, *Eind*, ECLI:EU:C:2007:771 and C-60/00, *Carpenter*, ECLI:EU:C:2002:434.

<sup>394</sup> C-212/97, *Centros*, ECLI:EU:C:1999:126, paragraph 27 and C-147/03 *Commission v Austria*, ECLI:EU:C:2005:427, paragraphs 67 and 68.

<sup>395</sup> C-109/01, *Akrich*, ECLI:EU:C:2003:491, paragraph 55 and C-1/05, *Jia*, ECLI:EU:C:2007:1, paragraph 31.

<sup>396</sup> See Commission Staff Working Document SWD(2014) 284 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014SC0284%20&from=IT> and COM(2014) 604 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014DC0604&rid=1>

terminated or withdrawn<sup>397</sup> (see Section 16.6 - *Measures and sanctions against abuse and fraud*).

### 16.3 Abuse

For the purposes of Directive 2004/38/EC, **abuse** may be defined as an artificial conduct entered into **solely** with the purpose of obtaining the right of free movement and residence under EU law which, albeit formally observing of the conditions laid down by EU rules, does not comply with the purpose of those rules<sup>398</sup>.

When interpreting the notion of abuse in the context of Directive 2004/38/EC, due attention must be given to the status of the EU citizen. In accordance with the principle of supremacy of EU law, the assessment of whether EU law was abused must be carried out in the framework of EU law, and not with regard to national migration laws. Directive 2004/38/EC does not prevent Member States from **investigating individual cases** where there is a **well-founded suspicion of abuse**. However, EU law prohibits systematic checks<sup>399</sup>. Member States may rely on previous analyses and experience showing a clear correlation between proven cases of abuse and certain characteristics of such cases.

### 16.4 Marriages of convenience

The notion of marriage of convenience for the purposes of the EU free movement rules refers to a marriage contracted for the sole purpose of conferring a right of free movement and residence under EU law on free movement of EU citizens to a spouse who would otherwise not have such a right<sup>400</sup>. The quality of the relationship is immaterial to the application of Article 35.

In principle, abuse can also take the form of other relationships of convenience but all the guidance pertaining to marriages of convenience can be applied *mutatis mutandis*. Examples of such relationships of convenience include (registered) partnership of convenience, fake adoption or where an EU citizen declares to be a father of a non-EU child to convey nationality and a right of residence on the child and his or her mother, knowing that he is not the father and not willing to assume parental responsibilities; dependency of convenience.

Ongoing investigation of suspected cases of marriages of convenience cannot justify derogation from the rights of non-EU family members under Directive 2004/38/EC, such as the prohibition of the right to work, seizure of passport or delay of the issue of a residence card within 6 months from the date of application. These rights can be withdrawn at any time as a result of subsequent investigations.

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<sup>397</sup> C-285/95, *Kol*, ECLI:EU:C:1997:280, paragraph 29 and C-63/99, *Gloszczuk*, ECLI:EU:C:2001:488, paragraph 75.

<sup>398</sup> C-110/99, *Emsland-Stärke*, ECLI:EU:C:2000:695, paragraphs 52 et seq. and C-212/97, *Centros*, ECLI:EU:C:1999:126, paragraph 25.

<sup>399</sup> The prohibition includes not only checks on all migrants, but also checks on whole classes of migrants (e.g. those of a given ethnic origin).

<sup>400</sup> See Recital 28.

## 16.5 Abuse by returning nationals

See Section 18 - *Right of residence of the family members of returning nationals*.

## 16.6 Measures and sanctions against abuse and fraud

Measures adopted by the national authorities on the basis of Article 35 of Directive 2004/38/EC must be based on an individual examination of the particular case. This means that measures pursuing an objective of general prevention in respect of widespread cases of abuse of rights or fraud cannot lead to leaving the provisions of Directive 2004/38/EC unapplied<sup>401</sup>.

Article 35 entitles Member States to adopt the **necessary measures** in cases of abuse of rights or fraud. These measures **can be taken at any point of time** and may entail:

- the refusal to confer rights under EU law on free movement (*e.g. to issue an entry visa or a residence card*);
- the termination or withdrawal of rights under EU law on free movement (*e.g. the decision to terminate validity of a residence card and to expel the person concerned who acquired rights by abuse or fraud*).

EU law does not at present provide for any specific sanctions Member States may take in the framework of fight against abuse or fraud. Member States may lay down sanctions under civil (*e.g. cancelling the effects of a proven marriage of convenience on the right of residence*), administrative or criminal law (*fine or imprisonment*), provided these sanctions are effective, non-discriminatory and proportionate.

## **17 Publicity/dissemination of information (Article 34 of Directive 2004/38/EC)**

Article 34 of Directive 2004/38/EC requires Member States to disseminate information concerning the rights and obligations of EU citizens and their family members on the subjects covered by Directive 2004/38/EC. This includes, in particular, conducting awareness-raising campaigns through national and local media and other means of communication.

Ensuring that correct information is available for EU citizens and their family members is of the highest importance to enable the effective exercise of rights.

### ***Examples of best practice:***

*-Providing information through a single website, avoiding fragmentation and duplication of sources which might contradict each other or create confusion. If all relevant information is offered through a single channel, it is easier for citizens to find comprehensive information, and for national authorities to ensure that the available information is consistent and up to date.*

*-Creating FAQs and keeping them updated.*

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<sup>401</sup> C-202/13, *Sean McCarthy and Others*, ECLI:EU:C:2014:2450, paragraphs 52-58.

Ensuring information is available is also an obligation under Regulation (EU) 2018/1724<sup>402</sup> establishing a single digital gateway (called ‘Your Europe’), which requires Member States as well as the Commission to ensure that citizens and businesses have easy, online access to information on rights, obligations and rules, applying in areas listed in Annex I to the Regulation. These areas include:

- documents required of EU citizens, their family members who are not EU citizens, minors travelling alone and non-EU citizens when travelling across borders within the EU (ID card, visa, passport);
- residence in another Member State, covering information on moving temporarily or permanently to another Member State and on requirements for residence documents for EU citizens and their family members.

On the **Your Europe** website<sup>403</sup>, EU citizens and their family members can find information about their rights under Directive 2004/38/EC and seek specific advice from EU assistance services, such as SOLVIT.

SOLVIT<sup>404</sup> is an EU-wide network of national administrations that aims to resolve cross-border problems related to the EU’s single market, including Directive 2004/38/EC. The network enables Member States to work together – without recourse to legal proceedings and free of charge – and find solutions to problems caused by breaches of EU law by public authorities.

Where SOLVIT identifies recurrent problems as regards the correct application of Directive 2004/38/EC it reports them to the Commission so that the root of the problem can be addressed. SOLVIT centres thus work hand in hand with their own national authorities to resolve individual problems and contribute to the correct application of Directive 2004/38/EC.

## **18 Right of residence of the family members of returning nationals**

The Court has interpreted rights that EU law confers on EU citizens exercising their right to move and reside freely in a Member State other than the one of which they are nationals as also extending to those EU citizens who return to their Member State of nationality after having exercised their free movement right by residing in another Member State<sup>405</sup>.

As a result, the family members of returning EU citizens may be granted a derived right of residence in the Member State of nationality of the EU citizen, on the basis of the rules on free movement of persons. In such cases, Directive 2004/38/EC applies by analogy<sup>406</sup>.

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<sup>402</sup> Regulation (EU) 2018/1724 of the European Parliament and of the Council of 2 October 2018 establishing a single digital gateway to provide access to information, to procedures and to assistance and problem-solving services and amending Regulation (EU) No 1024/2012 (OJ L 295, 21.11.2018, p. 1-38).

<sup>403</sup> <https://europa.eu/youreurope/>

<sup>404</sup> [https://ec.europa.eu/solvit/index\\_en.htm](https://ec.europa.eu/solvit/index_en.htm)

<sup>405</sup> See for example, C-370/90, *Singh*, ECLI:EU:C:1992:296; C-224/98, *D’Hoop*, ECLI:EU:C:2002:432; C-109/01, *Akrich*, ECLI:EU:C:2003:491; C-291/05, *Eind*, ECLI:EU:C:2007:771; C-456/12, *O. & B.*, ECLI:EU:C:2014:135; C-89/17, *Banger*, ECLI:EU:C:2018:570, C-230/17, *Deha Altiner and Ravn*, ECLI:EU:C:2018:497 or C-673/16, *Coman*, ECLI:EU:C:2018:385.

<sup>406</sup> C-673/16, *Coman*, ECLI:EU:C:2018:385, paragraph 25 and case law cited.

However, as developed by the case law, this possibility is subject to the following conditions being met:

**a) Regarding the residence in the host Member State from which the EU citizen returns**

- **The EU citizen must have genuinely settled in that Member State in conformity with the conditions set out in Article 7(1) or Article 16(1) of Directive 2004/38/EC**

In essence, the EU citizen and the family member meet this condition where, during the residence in the host Member State, the EU citizen:

- was a worker or was self-employed;
- had sufficient resources and sickness insurance (including students, as per Article 7(1)(c));
- was a family member of some other EU citizen who meets these conditions; or
- had already acquired the right of permanent residence (that is no longer subject to any conditions).

Cumulated short periods of residence, such as multiple stays during weekends or holidays, fall within the scope of Article 6 of Directive 2004/38/EC and do not satisfy those conditions<sup>407</sup>.

As confirmed by the Court, residence in the host Member State pursuant to and in conformity with the conditions set out above is, in principle, ‘evidence of settling there and therefore of the Union citizen’s genuine residence in the host Member State and goes hand in hand with creating and strengthening family life in that Member State’<sup>408</sup>.

What is relevant in this regard is that the underlying conditions were met in the host Member State, irrespective of being in possession of a residence document or not<sup>409</sup>.

It cannot be inferred that the residence in the host Member State is not genuine and effective only because an EU citizen maintains some ties to the Member State of nationality, all the more if that EU citizen’s status in the host Member State is unstable (e.g. a work contract of limited duration).

- **The EU citizen must have created or strengthened his or her family life in that Member State with the family member concerned**

The family member of the EU citizen must also have resided in the host Member State pursuant to and in accordance with Article 7 or Article 16, as applicable, of Directive 2004/38<sup>410</sup>.

***Examples:***

***Example 1***

*J. returns home from another Member State with S., his non-EU spouse, after having resided as a worker in the other Member State, together with S., for a year and a half.*

<sup>407</sup> C-456/12, *O. & B*, ECLI:EU:C:2014:135, paragraph 59.

<sup>408</sup> C-456/12, *O. & B*, ECLI:EU:C:2014:135, paragraph 53.

<sup>409</sup> C-456/12, *O. & B*, ECLI:EU:C:2014:135, paragraph 60.

<sup>410</sup> C-456/12, *O. & B*, ECLI:EU:C:2014:135, paragraph 56.

*As a returning national, J. can rely on EU law for his spouse S. to derive a right of residence in his Member State of nationality. Under Article 10 of Directive 2004/38/EC - which applies by analogy - his non-EU spouse S. can apply for a residence card, which should be issued within a six-month delay.*

*It is irrelevant that S. had, before their move to the other Member State, unsuccessfully attempted twice to acquire residence in J.'s Member State.*

**Example 2**

*J. returns to his Member State of nationality from another Member State with S., his non-EU spouse. J. continued to work in his Member State of nationality during his alleged residence in another Member State.*

*The authorities contact the authorities of the host Member State and find out that J. returned home already after 3 weeks. The couple stayed in a tourist hotel and paid for the 3 weeks of accommodation in advance.*

*Taking all of this into account, S. does not benefit from the provisions of Directive 2004/38/EC by analogy.*

**b) Regarding the residence in the Member State of nationality of the EU citizen:**

As returnees are nationals of one Member State who resided in another Member State and now reside in the Member State of which they are nationals, their situation comes within the scope of Article 21 TFEU, under which they enjoy the right to lead a normal family life in their Member State of nationality, together with their family members.

The Court considered that EU law does not preclude a Member State from refusing to grant a residence right to the family member of an EU citizen who has returned home after residing in another Member State when the family member has not entered the Member State of nationality or has not applied for the residence document as a 'natural consequence' of the return of the EU citizen to the Member State of nationality. In this case, however, other relevant factors must also be taken into account in the overall assessment, to show that the family life which was created and strengthened in the host Member State has not ended in spite of the time which elapsed between the return of the EU citizen to that Member State and the entry of the family member to the same Member State<sup>411</sup>.

**Example:**

*J. is a national of Member State A. After a period of residence in Member State B with his non-EU spouse T., J. returns to Member State A. T. does not accompany him and remains in Member State B to finish her University studies. T. later seeks to join J. in Member State A. In determining whether T. has a derived right of residence in Member State A, the fact that a significant period of time has passed since J.'s return to Member State A can be taken into account, but in addition, it must be assessed whether their family life has continued.*

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<sup>411</sup> C-230/17, *Deha Altiner and Ravn*, ECLI:EU:C:2018:497, paragraphs 31-35.

The Court has confirmed that its returnees case law applies to ‘extended family members’ of Article 3(2), who are thus entitled to have their right of entry and residence facilitated when they return <sup>412</sup>.

Lastly, it has been clarified that, for marriages concluded in the EU, same-sex spouses are covered by this case law and they can thus return to the Member State of nationality of the EU citizen, irrespective of whether such Member State authorises or not marriage between persons of the same-sex <sup>413</sup>. The Court explained that this decision does not require the Member State of nationality to provide for same-sex marriage in its national legislation but that it must recognise marriages concluded in another Member State for the exercise of the family member’s right of entry and residence and all the rights derived from EU law <sup>414</sup>.

**c) there was no abuse:**

For a conduct to be abusive, there has to be <sup>415</sup>:

- *a combination of objective circumstances which indicate that the purpose of EU rules was not achieved, despite the fact that the conditions laid down by these rules were formally fulfilled;*
- *a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it.*

Apart from marriages of convenience, the Court has not yet had the opportunity to clarify which other forms of abuse could be covered under this concept <sup>416</sup>.

The Court has consistently held that the motives of an EU citizen for exercising his or her right to free movement – be it as an economically active or non-active EU citizen – are irrelevant, provided that the person fulfils the residence conditions of EU free movement law <sup>417</sup>. It follows that where EU citizens are unable to be joined by their family members in their Member State of origin because of the application of national immigration rules preventing it, it is not abusive to exercise their right to free movement in another Member State with the sole purpose of relying, upon return to their Member State of nationality, on their rights as returning nationals under EU law <sup>418</sup>. This presupposes, however, that the persons in question meet the conditions for applying the returnees rules.

In the event of refusals, it is therefore important for national authorities to distinguish in their decisions those cases where the conditions are not fulfilled from those where abuse existed.

Abuse by returning nationals can by definition materialise only in the Member State of nationality of the returning EU citizen.

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<sup>412</sup> C-89/17, *Banger*, ECLI:EU:C:2018:570.

<sup>413</sup> C-673/16, *Coman*, ECLI:EU:C:2018:385, paragraph 51.

<sup>414</sup> C-673/16, *Coman*, ECLI:EU:C:2018:385, paragraph 45.

<sup>415</sup> C-202/13, *McCarthy*, ECLI:EU:C:2014:2450 paragraph 54 and case law cited.

<sup>416</sup> C-109/01, *Akrich*, ECLI:EU:C:2003:491, paragraph 57.

<sup>417</sup> C-109/01, *Akrich*, ECLI:EU:C:2003:491, paragraphs 55 and 56; C-294/06, *Payir and Others*, ECLI:EU:C:2008:36, paragraph 46; 53/81, *Levin*, ECLI:EU:C:1982:105, paragraph 21; Opinion of Advocate General Geelhoed, C-209/03, *Bidar*, ECLI:EU:C:2004:715, paragraph 19; C-46/12, *L.N.*, ECLI:EU:C:2013:97, paragraphs 46 and 47; C-212/97, *Centros*, ECLI:EU:C:1999:126, paragraph 27.

<sup>418</sup> C-109/01, *Akrich*, ECLI:EU:C:2003:491, paragraphs 55 and 56.

## 19 Ruiz Zambrano case law

Directive 2004/38/EC applies to EU citizens who move to or reside in a Member State other than that of which they are nationals, and to their family members who accompany or join them in that Member State.

EU citizens who have never exercised the right of free movement and have always resided in a Member State of which they are nationals, are not covered by Directive 2004/38/EC<sup>419</sup>. They are therefore considered to be ‘static’ EU citizens. Their family members are not covered either, given that the rights conferred on them are not autonomous rights, but are derived rights, acquired through their status as members of a mobile EU citizen’s family<sup>420</sup>.

On this basis, Directive 2004/38/EC does not apply to non-EU family members of ‘static’ EU citizens and, consequently, they cannot acquire a derived right of residence on the basis of Directive 2004/38/EC.

However, where the conditions of Directive 2004/38/EC are not fulfilled, the Court has recognised that those non-EU citizens could acquire a right of residence derived from the ‘static’ EU citizen in very specific situations. The Court has recognised this right on the basis of Article 20 TFEU, which has established a citizenship of the EU. The Court considers the EU citizenship as the fundamental status of nationals of the Member States<sup>421</sup>.

The Court recognised this right for the first time in the *Ruiz Zambrano* case<sup>422</sup>, with respect to a non-EU citizen parent of EU minor children.

The Court considered that a Member State must grant a right of residence to a non-EU citizen with dependent minor EU children who have never exercised their right of free movement when the refusal to grant such a right would compel those children to leave the territory of the EU in order to accompany their parents<sup>423</sup>. This situation would deprive those EU citizens of the genuine enjoyment of the substance of their rights as EU citizens established under Article 20 TFEU<sup>424</sup>.

Directive 2004/38/EC does not apply by analogy to such situations. In particular, this means that Member States cannot issue residence cards provided for by Articles 10 and 20 of Directive 2004/38/EC to the beneficiaries of the *Ruiz Zambrano* case law. Instead, they are issued with residence permits under Regulation (EC) No 1030/2002. Where the residence permit is issued by a Member State which is part of the Schengen area<sup>425</sup>, residence permits issued under Regulation (EC) No 1030/2002 have visa-exempting effects towards the Member States which are part of the Schengen area.

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<sup>419</sup> See, for instance, C-256/11, *Dereci and Others*, ECLI:EU:C:2011:734, paragraph 54.

<sup>420</sup> See C-256/11, *Dereci and Others*, ECLI:EU:C:2011:734, paragraph 56.

<sup>421</sup> C-184/99, *Grzelczyk*, ECLI:EU:C:2001:458, paragraph 31; C-413/99, *Baumbast and R*, ECLI:EU:C:2002:493, paragraph 82.

<sup>422</sup> C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124.

<sup>423</sup> C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124, paragraph 44.

<sup>424</sup> C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124, paragraph 42.

<sup>425</sup> All Member States, except Bulgaria, Ireland, Cyprus and Romania.



The residence permits issued to beneficiaries of the *Ruiz Zambrano* case law, must grant them the right to work <sup>426</sup>.

### 19.1 Genuine enjoyment of the substance of the rights as EU citizens

The Court recognises a right of residence for non-EU citizens who are family members of EU citizens on the basis of Article 20 TFEU when the refusal to grant such a right would deny those EU citizens the genuine enjoyment of the substance of the rights conferred by EU citizenship.

This would apply in the following situations:

- when the EU citizen has to leave not only the territory of the Member State of which he or she is a national, but also the territory of the EU as a whole, in order to accompany a non-EU family member <sup>427</sup>;
- when the effectiveness of EU citizenship would be undermined. In this context, the effectiveness of EU citizenship obliges Member States to consider applications to grant a derived right of residence even when the non-EU citizen is subject to an entry ban <sup>428</sup>. In the same vein, Member States cannot automatically reject such applications on the sole ground that the EU citizen concerned does not have sufficient resources <sup>429</sup>.

However, a non-EU citizen who is a family member of an EU citizen will not be recognised a derived right of residence on the sole ground that it might appear desirable to that EU citizen, for economic reasons or in order to keep his family together in the EU, for the non-EU family member to be able to reside with the EU citizen in the EU <sup>430</sup>.

In addition, the Court considered that Article 20 TFEU does not preclude the non-EU parent of a minor EU child, who has the nationality of a Member State and who since birth has never resided in the EU, from benefiting from a derived right of residence flowing from Article 20 TFEU, provided that it is established that that child will enter and reside together with that parent in the Member State of which he or she has the nationality. Conversely, in a situation where the non-EU parent is to reside alone in the EU whilst that child is to remain in a non-EU country, a decision refusing that parent the right to reside in the EU would be without effect on the exercise by that child of his or her rights conferred by EU citizenship <sup>431</sup>.

Furthermore, Member States may still refuse to grant the derived right of residence on the basis of Article 20 TFEU for reasons of public policy and public security <sup>432</sup> (see Section 19.4 - *The possibility of limiting a derived right of residence based on Article 20 TFEU*).

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<sup>426</sup> C-34/09, *Ruiz Zambrano*, ECLI:EU:C:2011:124, paragraph 44.

<sup>427</sup> C-256/11, *Dereci and Others*, ECLI:EU:C:2011:734, paragraphs 65-67, C-356/11 and C-357/11, *O and Others*, ECLI:EU:C:2012:776, paragraph 56 and C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354, paragraph 69.

<sup>428</sup> C-82/16, *K.A.*, ECLI:EU:C:2018:308, paragraphs 56 and 57.

<sup>429</sup> C-836/18, *Subdelegación del Gobierno en Ciudad Real*, ECLI:EU:C:2020:119, paragraphs 48-53.

<sup>430</sup> See, for instance, C-256/11, *Dereci and Others*, ECLI:EU:C:2011:734, paragraph 68 and C-356/11 and C-357/11, *O and Others*, ECLI:EU:C:2012:776, paragraph 52.

<sup>431</sup> C-459/20, *Staatssecretaris van Justitie en Veiligheid*, EU:C:2023:499, paragraphs 33-38.

<sup>432</sup> C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675, paragraph 84; C-82/16, *K.A.*, ECLI:EU:C:2018:308, paragraph 92.

## 19.2 Relationship of dependency

A crucial element for determining whether a derived right of residence on the basis of Article 20 TFEU should be granted is the existence of a relationship of dependency between the non-EU citizen and the EU citizen family member. This relationship needs to be of such a nature that it would compel the EU citizen to accompany the non-EU citizen and to leave the territory of the EU as a whole<sup>433</sup>.

A relationship of dependency is more likely to be found **between EU children and their non-EU parents**. An adult is, in general, capable of living an independent existence apart from the members of his or her family. On this basis, a relationship of dependency between a non-EU citizen and an adult EU citizen justifying a derived right of residence under Article 20 TFEU would only take place in exceptional cases, where any form of separation of the EU citizen concerned from the non-EU member of his or her family would not be possible<sup>434</sup>.

Regarding the relationship of dependency, a factor of relevance is that the EU citizen is emotionally, legally, or financially dependent on the non-EU citizen. In this context, a blood relation is not necessary<sup>435</sup>. Furthermore, the existence of a family link with that non-EU citizen, whether natural or legal, is not sufficient to establish such a relationship of dependency<sup>436</sup>. The fact that the non-EU parent has sole parental responsibility for the minor child is a relevant factor, but it is not decisive<sup>437</sup>. A legal obligation on the spouses to live together does not constitute a relationship of dependency<sup>438</sup>.

There are a series of factors which may help to establish the existence of a relationship of dependency between an EU child and the non-EU parent. These factors include the age of the child, the child's physical and emotional development, the extent of the child's emotional ties both to the EU citizen parent and to the non-EU parent as well as the risks which separation from the non-EU parent entail for the child's equilibrium<sup>439</sup>. It is essential to take into account, in the child's best interests, of all of the circumstances of the case<sup>440</sup>.

As to the need to take into consideration the child's best interests, the Court has brought some clarifications on the extent of this obligation. When dealing with an application for residence pursuant to Article 20 TFEU, the competent authorities need to take into consideration the best interests of the child concerned only with a view to assessing whether there is a relationship of dependency or the consequences of a derogation from the derived right of residence provided for by that Article based on considerations of public security or public order. Those best interests 'could be relied on not in order to reject an application for a residence permit but, on the contrary, to preclude the adoption of a decision that compelled that child to leave the territory of the European Union'. Thus, the competent national authorities cannot determine whether the movement of that child to the Member State of which he or she is a national is in

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<sup>433</sup> C-256/11, *Dereci and Others*, ECLI:EU:C:2011:734, paragraphs 65 and 67, C-356/11 and C---357/11, *O and Others*, ECLI:EU:C:2012:776, paragraph 56 and C-133/15, *Chavez-Vilchez*, ECLI:EU:C:2017:354, paragraph 69.

<sup>434</sup> C-82/16, *K.A.*, ECLI:EU:C:2018:308, paragraph 76.

<sup>435</sup> C-356/11 and C-357/11, *O and Others*, ECLI:EU:C:2012:776, paragraphs 55 and 56.

<sup>436</sup> C-82/16, *K.A.*, ECLI:EU:C:2018:308, paragraph 76.

<sup>437</sup> C-459/20, *Staatssecretaris van Justitie en Veiligheid*, EU:C:2023:499, paragraph 60.

<sup>438</sup> C-836/18, *Subdelegación del Gobierno en Ciudad Real*, ECLI:EU:C:2020:119, paragraph 61.

<sup>439</sup> C-82/16, *K.A.*, ECLI:EU:C:2018:308, paragraph 76.

<sup>440</sup> C-451/19 and C-532/19, *Subdelegación del Gobierno en Toledo*, ECLI:EU:C:2022:354, paragraph 67.

the best interests of that child. As a result, they cannot reject an application for a derived right of residence introduced by a non-EU citizen, upon whom a minor EU child, who has never resided in the EU is dependent, on the ground that moving to the child's Member State of nationality is not in the real or plausible interests of that child<sup>441</sup>.

In any case, the relationship of dependency between an EU child and the non-EU family member might exist even when the other EU citizen parent is able and willing to assume sole responsibility for the primary care of the child and the non-EU citizen does not cohabit with the EU child<sup>442</sup>.

The Court has considered that there **is a rebuttable presumption of a relationship of dependency** with respect to an EU child who has not exercised his or her right of free movement in the following situation: where the non-EU parent lives on a stable basis with the other parent, who is an EU citizen, sharing the daily care of that child and the legal, emotional and financial responsibility for that child. The relationship of dependency may be presumed, irrespective of the fact that the other parent has an unconditional right to remain in the Member State of which he or she is a national<sup>443</sup>.

For the purposes of assessing whether a relationship of dependency exists, the competent authorities must take into account the situation as it appears to be at the time when they are called upon to make a decision (even national courts which are called upon to rule on an appeal against a decision of those authorities need to take into account factual matters arising after that decision)<sup>444</sup>. Hence, the fact that the non-EU parent has not previously assumed day-to-day care of the child concerned for a long period cannot be treated as being decisive, since that situation might have evolved and at the time when the national authorities handle the residence application or the courts deal with a related appeal, that parent in fact assumes responsibility for that care<sup>445</sup>.

In addition, the Court looked into the situation of a minor non-EU sibling of an EU citizen minor whose non-EU parent-carer is eligible for a right of residence under Article 20 TFEU. It concluded that **a relationship of dependency capable of justifying the grant of a derived right of residence to the non-EU minor child** of the non-EU spouse of an EU citizen who has never exercised his or her right of freedom of movement **exists** where (i) the marriage between that EU citizen and the non-EU spouse produced an EU child who has never exercised free movement rights, and (ii) that EU child would be forced to leave the territory of the EU as a whole if the non-EU minor child were forced to leave the territory of the Member State concerned.

Indeed, in such a situation, the non-EU parent-carer could be forced to accompany the non-EU minor sibling. This, in turn, could also force the other EU citizen child to leave that territory<sup>446</sup>.

#### **Examples:**

<sup>441</sup> C-459/20, *Staatssecretaris van Justitie en Veiligheid*, EU:C:2023:499, paragraphs 39-45.

<sup>442</sup> C-82/16, *K.A.*, ECLI:EU:C:2018:308, paragraphs 72 and 73 and C-459/20, *Staatssecretaris van Justitie en Veiligheid*, EU:C:2023:499, paragraphs 56-59.

<sup>443</sup> C-451/19 and C-532/19, *Subdelegación del Gobierno en Toledo*, ECLI:EU:C:2022:354, paragraph 69.

<sup>444</sup> C-459/20, *Staatssecretaris van Justitie en Veiligheid*, EU:C:2023:499, paragraph 52.

<sup>445</sup> C-459/20, *Staatssecretaris van Justitie en Veiligheid*, EU:C:2023:499, paragraph 53.

<sup>446</sup> C-451/19 and C-532/19, *Subdelegación del Gobierno en Toledo*, ECLI:EU:C:2022:354, paragraphs 83-86.

### **Example 1**

*M. is a non-EU citizen living in Member State A. She is a single mother and the sole carer of her minor daughter D., who is a national of Member State A and has never exercised her free movement rights. There is a relationship of dependency between D. and M. such that, if M. was denied a right of residence, D. would be compelled to leave the territory of the EU as a whole to accompany her mother M. In such a case, M. has a right to reside and work in Member State A under the Ruiz Zambrano case-law.*

### **Example 2**

*W. is a non-EU citizen who used to reside in Member State A under national law but, for reasons linked to national law, her legal residence expired. She marries H., a national of Member State A who has never exercised his free movement rights. They would like to remain in Member State A, because H. owns a house there and it would be cheaper for them. The mere fact that it might appear desirable to H., for economic reasons, for W. to be able to reside with him in the EU, is not sufficient in itself to support the view that H. will be forced to leave the EU as a whole if such a right was not granted. Therefore, there is no basis to grant W a derived right of residence in Member State A based on the Ruiz Zambrano case law. Moreover, since an adult is, in principle, able to lead a life independent of their family members, the identification of a relationship of dependency between two adult family members capable of giving rise to a derived right of residence under the Ruiz Zambrano case law is conceivable only in exceptional cases, where, having regard to all the relevant circumstances, there could be no form of separation of the individual concerned from the family member on whom he or she is dependent. This is irrespective of other rights W. might have under national law.*

### **Example 3**

*M. is a non-EU citizen. She is married to F., a national of Member State A who has never exercised his free movement rights. They live in Member State A. They have a minor daughter, D., who is also a national of Member State A and has never exercised her free movement rights.*

*-D. lives with both parents on a stable basis and, therefore, the care of D. and her legal, emotional and financial responsibility are shared on a daily basis by the two parents. In such a case, there is a rebuttable presumption that there is, between the non-EU mother M. and the daughter D., a relationship of dependency capable of justifying the grant of a derived residence right to M. in Member State A under the Ruiz Zambrano case law. This cannot be called into question by the fact that the father F., as a national of Member State A, has an unconditional right to remain in that Member State.*

*- The authorities recognise M. a derived right to reside, because the departure of M. would also, in practice, force D. to leave the EU as a whole, due to the relationship of dependency between D. and M.*

### 19.3 Stays based on Article 20 TFEU and the acquisition of permanent residence status

The Court examined<sup>447</sup> the possibility for a stay based on Article 20 TFEU to lead to the acquisition of a right of permanent residence under Directive 2003/109/EC concerning the status of non-EU citizens ('third-country nationals') who are long-term residents<sup>448</sup>.

The Court considered that 'the residence of a third-country national in the territory of a Member State under Article 20 TFEU cannot be regarded as constituting residence "solely on temporary grounds" within the meaning of Article 3(2)(e) of Directive 2003/109'.

The Court then explained that in order to benefit from a long-term residence status under Directive 2003/109/EC, a non-EU citizen residing in a Member State under Article 20 TFEU must comply with the conditions of Articles 4 (length of residence) and 5 (sufficient resources and sickness insurance, as well as proof of integration in the Member State, if required by the host Member State's national law) of that Directive<sup>449</sup>.

### 19.4 The possibility of limiting a derived right of residence based on Article 20 TFEU

Member States may rely on an exception on grounds of public policy or public security in order to limit the right of entry or residence based on Article 20 TFEU<sup>450</sup>.

However, in assessing the situation of the non-EU parent-carer, the competent authorities must take account of the right to respect for private and family life, as laid down in Article 7 of the Charter of Fundamental Rights, read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter of Fundamental Rights.

This assessment also needs to take place where the national authorities consider the adoption of a decision which bans the entry and stay of the non-EU parent-carer and whose effects have a "European" dimension. Indeed, that decision deprives the non-EU parent-carer of any right to reside in the territory of all of the Member States<sup>451</sup>.

Like in the context of Directive 2004/38/EC (see Section 13 - *Restrictions on the right to move and reside freely on grounds of public policy, public security or public health (Articles 27, 28 and 29 of Directive 2004/38/EC)*), as a justification for derogating from the right of residence of EU citizens or members of their families, the concepts of 'public policy' and 'public security' must be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions. '[T]he concept of "public policy" presupposes, in any event, the existence, in addition to the disturbance of the social order which any infringement of the law involves, of a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. As regards "public security", it is apparent from the Court's case-law that this concept covers both the internal security of a Member State

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<sup>447</sup> C-624/20, *E.K.*, ECLI:EU:C:2022:639.

<sup>448</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, (OJ L 16, 23.1.2004, p. 44).

<sup>449</sup> C-624/20, *E.K.*, ECLI:EU:C:2022:639, paragraph 49.

<sup>450</sup> C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675, paragraph 81; C-304/14, *CS*, ECLI:EU:C:2016:674, paragraph 36 and C-528/21, *M.D.*, ECLI:EU:C:2023:341, paragraphs 67 and 68.

<sup>451</sup> C-528/21, *M.D.*, ECLI:EU:C:2023:341, paragraphs 62-64.

and its external security and that, consequently, a threat to the functioning of institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security'<sup>452</sup>.

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<sup>452</sup> C-165/14, *Rendón Marín*, ECLI:EU:C:2016:675, paragraph 83 and case law cited.