Report for the review of the 2009 Guidelines 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 Members States

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ABSTRACT

In 2019, almost 18 million EU citizens were estimated to reside in an EU Member State other than their own, illustrating the **overall success of the exercise of free movement of persons**. As one of the fundamental freedoms of the internal market, its correct implementation is of the utmost importance.

The **2009 Guidelines** on 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, provide important clarifications on how to correctly apply Directive 2004/38/EC, in particular in view of the specific transposition problems identified in the 2008 report on the application of the Directive. The European Commission announced the review of the 2009 Guidelines in the context of its 2020 EU Citizenship Report to provide updated guidance to all interested parties, in particular EU citizens, and to support the work of national authorities dealing with citizens' rights as well as courts and legal practitioners.

This Report presents suggestions for review of the 2009 Guidelines detailing, where relevant, **potential options** aimed at addressing the main legal and administrative difficulties that EU citizens and their family members have faced with regard to the implementation of Directive 2004/38/EC in their contact with the national administrations in the reference period running from January 2015 until April 2020. The suggestions for review are based on the CJEU case-law delivered since 2009 and on links that can be established with other guidance documents that have been adopted by the Commission since 2009 on specific aspects of relevance to the Directive.

1. EXECUTIVE SUMMARY

Project context

In 2019, almost 18 million EU citizens were estimated to reside in an EU Member State other than their own, illustrating the **overall success of the exercise of free movement of persons**.[1] As one of the fundamental freedoms of the internal market, its correct implementation is of the utmost importance.

The **2009 Guidelines** on better transposition and application of Directive 2004/38/EC (2009 Guidelines) provide important clarifications on how to correctly apply Directive 2004/38/EC, in particular in view of the specific transposition problems identified in the 2008 report on the application of the Directive.[2] The European Commission announced the review of the 2009 Guidelines in the context of its 2020 EU Citizenship Report to provide updated guidance to all interested parties, in particular EU citizens, and to support the work of national authorities dealing with citizens' rights as well as courts and legal practitioners.

This **Overall Report** (Deliverable E)[3] presents suggestions for review of the 2009 Guidelines detailing, where relevant, **potential options** aimed at further eliminating the main legal or administrative obstacles faced by EU citizens and their family members in the exercise of their rights. In particular, it:

- Identifies and explains in detail how the CJEU case-law since 2009 has addressed some of the main legal and administrative difficulties that citizens have faced during the last five years with regard to the implementation of Directive 2004/38/EC in their contact with national administrations;
- Identifies any inconsistency between the 2009 Guidelines and the CJEU case-law including instances where the text of the 2009 Guidelines seems to be incomplete or inaccurate;
- Indicates which new topics could be included in the reviewed Guidelines.

Horizontal considerations

In addition to the specific options put forward with respect to the different requirements of the Directive, a number of **horizontal considerations** may be taken into account when revising the 2009 Guidelines:

- As mentioned in the 2020 EU Citizenship Report, revisions should further improve legal certainty for EU citizens and their family members who exercise their right to move and reside freely in another EU Member State, and support Member State authorities in the correct and uniform application of the Directive. They should therefore be drafted in language that ensures clarity and ease of reference both for citizens and national authorities.
- Consideration could be given to other issues that might not have an evidence-base in the research under this study or within its reference period but might nevertheless benefit from further clarification. This could be the case, for example, as already announced in the 2020 EU

[1] Eurostat, number of mobile EU citizens, migr_pop1ctz.

[2] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final, 10 December 2008.

[3] The suggestions for revisions of the 2009 Guidelines build on two main areas of research: a detailed analysis of CJEU case-law in relation to the right of free movement since 2009 (Deliverables A and B); the mapping and analysis of the most important and urgent difficulties (main difficulties) faced by EU citizens and their family members during the last five years in their contact with the national administrations related to the implementation of Directive 2004/38/EC, based on desk research, stakeholder interviews and a final validation by a Board of distinguished academic experts (Deliverables C and D).

Citizenship Report, with respect to restrictions to free movement on the basis of public health in light of the COVID-19 pandemic.

- When introducing references to other guidance documents of relevance to the Directive, different options can be considered such as, summarising or reproducing the information of the other guidance documents or using cross-references. Careful consideration should be given to which approach is most effective.

Potential options for review of the 2009 Guidelines

I. Potential options where no main difficulties were identified

With respect to the Directive's requirements **where no main difficulties were identified**, suggestions for review are **limited to taking into account CJEU case-law since 2009** on specific aspects of relevance to the Directive. These include:

- The right of residence of up to three months (Article 6 of the Directive) – a reference to *G.M.A.* could be added to Section 2.3 of the 2009 Guidelines.
- The retention of the right of residence by family members in the event of death or departure of the Union citizen and in the event of divorce, annulment of marriage or termination of registered partnership (Articles 12 and 13 of the Directive) – references could be added to *Czop and Punakova*, *Ibrahim and Teixeira*, *Haji Ahmed* and *Kudip Singh and Others*, where the CJEU clarified the relationship between Directive 2004/38/EC and Regulation (EU) 492/2011; the non-applicability of Article 13 to durable partnerships; the timing requirements in case of divorce and departure of the EU citizen.
- The verification of rights and checks (Article 26 of the Directive) - a reference to *Commission v United Kingdom* could be made in a new Section of the 2009 Guidelines.
- Exclusion orders and expulsions orders (Articles 32 and 33 of the Directive) – references to *Byankov*, *Petrea*, *E* and *OBFG and Others* could be added in Section 3 of the 2009 Guidelines.

II. Potential options where main difficulties were identified

With respect to the Directive's requirements **where main difficulties were identified**, potential options for review of the 2009 Guidelines are set out below and divided on the basis of whether a **new Section** would need to be added to the 2009 Guidelines or whether addressing these difficulties would rather require **revisions to existing Sections** of the 2009 Guidelines.

A. New Sections

Main difficulties were identified for **topics for which no guidance is currently included in the 2009 Guidelines**. While some topics can be covered under existing sections, for others, it is suggested to introduce new sections in the revised Guidelines in order to provide clarifications through references to CJEU case-law and by establishing links with other guidance documents adopted since 2009 which could address the main difficulties identified.

(i) Right of exit (Article 4)

Difficulties for EU citizens and non-EU family members who hold a residence card in exercising their right of exit were identified as a main difficulty and the absence of guidance on the interpretation of Article 4 of the Directive, may be seen as a gap in the 2009 Guidelines.

It is therefore suggested that the right of exit could be added as a new topic wherein clarifications could be provided in line with the CJEU rulings in *Gaydarov*, *Aldzhov* and *Byankov*.

(ii) Retention of the right of residence by jobseekers (Article 14(4)(b))

Issues related to jobseekers retaining a right of residence under Article 14(4)(b) of the Directive were identified as a main difficulty.

Potential options include:

- Clarifying the conditions for the retention of the right of residence by jobseekers, including explanations related to how much time Member States should allow jobseekers to reside in their territory and explanations related to the interpretation of the existence of evidence that the jobseeker is seeking employment and has a genuine chance of being engaged with reference to *G.M.A.*, the 2010 Communication on free movement of workers[4] and the 2013 Commission Communication on free movement of EU citizens and their families.[5]
- Adding explanations relating to the circumstances in which jobseekers can rely on the principle of equal treatment and entitlement to social assistance in the host Member State, in line with *Alimanovic* and *Vatsouras and Koupatantze*.

(iii) Right of permanent residence (Articles 16 to 21)

Article 16 of the Directive ensures that EU citizens who have legally resided for a continuous period of five years in the host Member State have the right of permanent residence there. The provisions related to the right of permanent residence are not addressed by the 2009 Guidelines but have been interpreted on several occasions by the CJEU. The imposition of excessive requirements in connection with permanent residence documentation was identified as a main difficulty both in respect of EU citizens and their non-EU family members alongside difficulties with the calculation of continuous periods of residence, excessive delays and the validity period of the permanent residence card.

Potential clarifications in a new section in the Guidelines could be to:

- Underline the declaratory nature of the document attesting permanent residence for EU citizens and clarifications on the conditions for permanent residence, with reference to the CJEU rulings in *Wolzenburg, Alarape and Tijani, Dias* and *Ogieriakhi*.
- Add clarifications on the calculation of the continuous periods of legal residence, in line with *Lassal, Dias, Ogieriakhi, Ziolkowski and Szeja, Czop and Punakova, Alarape and Tijani* and *Onuekwere*.
- Underline the impact of excessive delays as well as the importance of correctly issuing the permanent residence cards, including with respect to their validity period, taking into account the evidential value of these cards and the fact that they facilitate the exercise of free movement and residence rights for non-EU family members.

(iv) Equal treatment and related rights (Articles 23 and 24)

Article 23 confers the right to take up employment or self-employment to family members of an EU citizen, irrespective of their nationality, who have a right of residence or permanent residence in a Member State. Article 24 provides for the right of equal treatment with nationals of the host Member State to all EU citizens residing in the host Member State on the basis of the Directive and to their family members with a right of residence. The absence of guidance on Article 24 and the right to equal treatment in the 2009 Guidelines is considered to be an important gap, particularly in view of the fact that more than one fifth of the respondents to the public consultation on EU citizenship rights in 2020

[4] 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.

[5] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Free movement of EU citizens and their families: Five actions to make a difference', COM (2013) 837 final, 25 November 2013.

indicated having experienced some sort of discrimination when residing in another Member State. Difficulties were in particular identified in relation to access to social assistance and access to the healthcare system. These difficulties related to access to healthcare are primarily linked to the catch-22 situation identified in one Member State with respect to the personal number without which it is not possible for EU citizens and their family members to access a number of services, including healthcare. There is also currently no reference to the right to work under Article 23 in the 2009 Guidelines.

Potential options for review of the 2009 Guidelines therefore include:

- Adding information on the right to work of family members under Article 23, including a reference to *Reyes*.
- Clarifying the requirements in relation to access to social assistance, in particular through references to *Vatsouras and Koupatantze*, *Brey*, *Dano*, *Alimanovic and Garcia Nieto*.
- As regards social security benefits, clarifying the relationship between Article 24, Regulation (EC) 883/2004 on coordination of social security systems and Regulation (EC) 492/2011 on freedom of movement for workers.
- As regards access to healthcare systems, adding a reference to the pending judgment of the CJEU in *A*.

(v) General provisions concerning residence documents (Article 25)

Article 25 stating that the possession of a registration certificate or residence card may under no circumstances be made a precondition for the exercise of the right or the completion of an administrative formality, is not subject to further guidance in the 2009 Guidelines. The imposition of requirements making possession of residence documentation a pre-condition for the exercise of a right or completion of an administrative formality was identified as a main difficulty.

Options for review of the 2009 Guidelines could focus on emphasising the declaratory rather than constitutive nature of residence documents through references to recent CJEU case-law in *Dias*, *O. & B.*, *Diallo* and *Ryanair*.

(vi) Restrictions on grounds other than public policy, public security or public health (Article 15)

According to Article 15(1), the procedures provided for by Articles 30 and 31 are to apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health.

The 2009 Guidelines do not specifically address restrictions on grounds other than public policy, public security or public health. Still, difficulties were identified with respect to the imposition of restrictions on such other grounds, in particular relating to the expulsion of EU citizens on invalid or questionable grounds and the imposition of an entry ban even though this is not permitted under Article 15(3).

Revisions to the 2009 Guidelines aimed at Article 15 could be viewed in parallel with potential options for revisions related to Articles 30 and 31 as set out in the point (vi) of Part B below and could include:

- Adding cross-references to Article 15(1) to specify that the same approach is to be followed to the extent that Articles 30 and 31 can in fact be applied by analogy. To this effect, reference could be made to *Chenchooliah* and to the right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the European Union.
- Specifying in line with *Chenchooliah* that the scope of Article 15 covers expulsion decisions where the non-EU family member of an EU citizen who enjoyed a temporary right of residence under the Directive in the past, no longer enjoys such right.

(vii) Publicity/dissemination of information (Article 34)

The lack of information or provision of incorrect or confusing information by authorities in relation to visa requirements, registration certificates and residence cards were identified as highly recurrent issues. The 2009 Guidelines currently only specifically deal with this publicity requirement in relation to entry visas in Section 2.2.1 of the 2009 Guidelines.

Potential options for review of the 2009 Guidelines in relation to publicity and the dissemination of information could therefore include:

- Adding a new Section on dissemination of information emphasizing that the availability of correct information on rights is an integral aspect of ensuring the ability of beneficiaries to effectively make use of those rights and further developing the need to provide information on specific matters.
- Introducing links to Commission efforts relating to dissemination of information on rights of EU citizens, for instance through the Your Europe Advice portal and the Single Digital Gateway.

B. Revisions to Existing Sections

(i) Definitions and beneficiaries (Articles 2 and 3)

Section 2 of the 2009 Guidelines provides clarifications about the beneficiaries of the Directive - both as EU citizens and as family members of an EU citizen. There is a significant amount of CJEU case- since 2009 in relation to returning nationals, dual nationals and primary carers of mobile EU children. Moreover, an important number of difficulties was identified for family members of EU citizens in being considered family members and hence, beneficiaries of the Directive, either as direct family members covered by Article 2 of the Directive or extended family members under Article 3.

Options for review of the 2009 Guidelines in relation to its beneficiaries could include:

- Clarifications of the status and rights of returning nationals, dual nationals and primary carers of mobile EU children, in line with *Lounes*, *Freitag*, *O. & B.*, *Banger*, *Deha Altiner & Ravn*, *Zhu and Chen*, *Alokpa & Moudoulou*, and *NA*.
- Restructuring Section 2.1 according to the main categories of core family members and extended family members identified in Articles 2(2) and 3(2) of the Directive.
- Further clarifications on the evidentiary requirements that may be imposed by a Member State, including, for instance, the obligations of the Member States under Regulation (EU) 2016/1191 on the use of public documents issued by another Member State and references to the Visa Handbook.
- Clarification on the requirements for registered partners, including those in same-sex partnerships, and clarifications with respect to same-sex partners in a durable relationship.
- References to recent CJEU case-law on the rights of family members, namely, *Iida*, *Oghieriakhi*, *Coman*, *Reyes*, *S.M.* and *Rahman*.

(ii) Right of entry (Article 5)

Article 5 of the Directive requires Member States to grant non-EU family members holding a valid passport the right to enter their territory. Non-EU family members moving with or joining an EU citizen may be required to have an entry visa. The refusal of visas on invalid grounds was nevertheless identified as a main difficulty alongside visa refusals without a clear reason (as discussed in the

context of procedural safeguards) and the imposition of excessive requirements on visa applicants. In addition, refusals to allow non-EU family members to apply for a visa from their country of lawful residence or presence and issues resulting from the imposition of visa fees, excessive delays in issuing visas, difficulties related to access to consulates and failures to apply the visa exemption were also recurrent issues. The withholding of travel documents during the visa application process was also an important issue.

These main difficulties are already addressed by Part III of the Visa Handbook that provides appropriate guidance with respect to visa applications by non-EU family members for those Member States that fully apply the Schengen *acquis* and for those Member States that do not fully apply it to the extent that the Handbook is based on the Directive.

Potential options could be to revise Section 2.2.1 of the 2009 Guidelines to:

- Reproduce or cross-refer to Part III of the Visa Handbook and to point 2.9 of Section I of Part Two of the Schengen Borders Code Handbook indicating that the applicability of most of the arrangements set out therein can be extended to the Member States not fully applying the Schengen *acquis* as they derive directly from the Directive. References can be introduced to Articles 7 and 9 of the Charter of Fundamental Rights of the EU in this context.
- Clarify that when family members decide to use the services of an external company, this can involve the payment of a service fee. However, non-EU family members must always have the possibility to apply for a visa from the consulate free of charge and no visa fee can be charged.
- Specify that processing times for visa applications of non-EU family members exceeding 15 days should be exceptional and duly justified as stated in Section 4.4 of Part III of the Visa Handbook.
- Introduce further clarifications in relation to the visa exemption for non-EU family members, including a cross-reference to Sections 2.1, 2.2 and 2.8 of Part III of the Visa Handbook and to recent case-law of the CJEU in *Sean McCarthy* and *Ryanair* as well as the clarification that the visa exemption also extends to 'Chen parents' and 'Surinder Singh cases'.
- Clarify in Section 2.1.1 that while Member States are entitled to check that the travel documents are genuine, administrative practices involving the withholding of original travel documents until a decision on an entry visa application is taken, may represent, depending on the specific circumstances of the case, an obstacle to the right of EU citizens and their family members to move and reside freely in the territory of another Member State.

(iii) Right of residence for more than three months for EU citizens (Articles 7, 8, 14 and 22)

Section 2.3 of the Guidelines covers the right of EU citizens to reside in another Member State for more than three months, in particular as economically active or inactive citizens, or as students, on the basis of Article 7(1). Despite this existing guidance, excessive requirements for EU citizens were identified as a main difficulty. Other main difficulties relate to excessive delays, the requirement to have sufficient resources and comprehensive sickness insurance, the status of worker or self-employed person and the retention of that status. Important difficulties were also reported in one Member State in relation to the requirement to obtain a personal identification number.

Potential options for review of the 2009 Guidelines could therefore cover these issues as well as references to CJEU case-law since 2009 in order to:

- Further clarify the exhaustiveness of the list of documents to be presented when registering in the host Member State, possibly through examples based on the specific difficulties identified, and amend the wording in this Section to reflect the registration requirement more accurately: as a 'registration of residence' or an 'application for registration' instead of an 'application for residence'.

Emphasise the need to issue the registration certificate immediately, as required by Article 8(2).
Further clarify that the evidence of sufficient resources as in Article 7(1)(b) cannot be limited in form, including references to recent CJEU case-law in *Kuldip Singh, Bajratari* and *Dano*.
Further clarifications could also be introduced as regards the assessment to be carried out for determining whether a person has sufficient resources for themselves and their family members not to

become an unreasonable burden on the social assistance system of the Member State in the context of an expulsion decision, in particular by introducing references to *Brey*.
Further clarifications on the 'comprehensive sickness insurance' requirement contained under Article 7(1)(c). References to currently pending case-law, namely *A.* and *VI.*, will likely also be able to introduced.
Introduce clarifications on the status of worker, through reference to the 2010 Commission Communication on the free movement of workers, and refer expressly to the situation of self-employed persons who enjoy a right of residence in the host Member States as active EU citizens under Article 7(1)(a), similar to the status of workers.
Specify the conditions for retention of the status of worker or self-employed person in situations of temporary inactivity on the basis of Article 7(3), in particular by adding references to *Tarola, Florea Gusa, Alimanovic, Saint-prix* and *Dakneviciute* on short-term employment and pregnancy.

(iv) Right of residence of more than three months for non-EU family members (Articles 7, 9 to 11 and 22)

Section 2.2.2 of the 2009 Guidelines provides guidance on the residence card of a family member of a Union citizen, which evidences their right of residence in accordance with Articles 7(2), 9(1) and 10. Refusals to issue residence cards on invalid grounds or the imposition of excessive requirements on non-EU family members applying for a residence card were identified as main difficulties. Moreover, a very significant number of sources mentioned delays in processing applications for Article 10 residence cards, including delays for appointments and delays in issuing certificates of application. In general, and albeit not specifically referring to Directive 2004/38, lengthy procedures are one of the two key challenges identified by respondents in the results of the 2020 public consultation on EU citizenship rights.

While these difficulties are to some extent already addressed by Section 2.2.2 of the 2009 Guidelines, this could be revised to:

- Specify in line with *McCarthy, Lounes* and *Diallo* that the purpose of the Directive is to facilitate the exercise of the primary and individual right to move and reside freely within the territory of the Member States which is conferred directly on EU citizens by Article 21(1) TFEU. Therefore, that right should, if it is to be exercised under objective conditions of dignity, be also granted to the family members of those citizens, irrespective of nationality.
- Add references to *McCarthy* and *Diallo* to stress the importance of the residence card in facilitating the free movement of non-EU family members and contextualise this to take into account the effect that invalid refusals, or excessive requirements could have on other rights, such as the right to take up employment or self-employment in the host Member State and the right to respect for family life and the right to found a family. It could be further emphasised that the list of documents in Article 10(2) is exhaustive and a reference to *Diallo* could be added.
- Clarify that residence cards issued to 'Chen parents' and in 'Surinder Singh cases' exempt their holder from the visa requirement under Article 5(2).
- Take into account Regulation (EU) 2019/1157, in particular, its Article 7(2).
- Provide further guidance on the timeframe for issuing the residence card, including references to *Diallo*, and place emphasis on the potentially far-reaching consequences excessive delays could have on a person's rights and daily life.
- Emphasise that Article 10(1) requires the certificate of application for a residence card to be issued immediately.

(v) Restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health (Articles 27 to 33)

Section 3 of the 2009 Guidelines provides extensive guidance on the restrictions to the right of entry and residence on grounds of public policy and public security in Articles 27 and 28, and the associated

procedural safeguards for such decisions in Articles 30 to 33. The 2009 Guidelines do not address the restrictions on grounds of public health set out in Article 29.

Despite the available guidance, difficulties continue to be reported in this area in respect of both EU citizens and their third-country family members, including refusals of entry, registration certificates or residence cards as well as enforcement of expulsion orders in the absence of a genuine, present and sufficiently serious threat affecting the fundamental interests of society, including on the sole basis of a prior conviction or in breach of the principle of proportionality.

Options for review of Section 3 of the 2009 Guidelines are mostly based on new CJEU case-law and could include the following additions:

- References to the clarifications provided by the CJEU on the application of Articles 27 and 28 in *Rendon Marin, Gaydarov* and *Aladzhov*, in the introductory paragraphs to Section 3.
- References to the clarifications provided by the CJEU in *Tsakouridis* and *P.I* in Section 3.1.
- References to *Gaydarov, Aladzhov, Byankov, Rendon Marin, P.I., K & HF* and *E* on the requirement that measures taken on grounds of public policy or security must be based exclusively on the personal conduct of the individual concerned in Section 3.2.
- References to *Aladzhov, K and HF and Byankov* on proportionality and the factors to be taken into account for assessing proportionality in Section 3.3.
- References to *M.G., Tsakouridis* and *B & Vomero* on enhanced protection against expulsion in Section 3.4.
- Clarifications in relation to the application of restrictive measures on free movement on grounds of public health, in view of the current situation with COVID-19.

(vi) Procedural safeguards (Articles 15(1) and 30 to 33)

Difficulties identified in relation to the procedural safeguards under the Directive, include the impossibility to access or delaying access to redress procedures and the failure to issue decisions in writing. The latter included, for instance, oral refusals and tacit refusals. Refusals of visas without a clear reason being given were also reported. Some of these issues are addressed in Section 3.6 of the Guidelines and in Section 4.10 of Part III of the Visa Handbook.

Potential options for review of Section 3.6 of the 2009 Guidelines could include:

- Adding further clarifications with respect to visa refusals without a clear reason being given, including a cross-reference to Section 4.10 of Part III of the Visa Handbook.
- Adding references to *Petrea*, *Gaydarov*, *Banger*, *Z.Z*, *Bensada Benallal* and *Chenchooliah*, including, for instance, the need to allow for a review of the legality of the decisions as regards matters of both fact and law in the light of EU law as well as of the proportionality of the decision, what is considered a 'reasonable time' for appeals and that other family members covered by Article 3(2) must also have access to a redress procedure before a national court.
- Referring to *Diallo* and specifying that, following the judicial annulment of a decision refusing to issue a residence card of 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 six-month period referred to in Article 10(1).
- Adding further clarifications in relation to the information requirement of EU citizens and their family members on the basis of Article 30, including references to *Petrea* on language and *Z.Z.* on information limitations in the interests of State security.

(vii) Fraud and abuse (Article 35)

Section 4 of the Guidelines provides extensive guidance on the conditions set out in Article 35 for Member States to restrict the right of free movement in case of abuse or rights, including for marriages of convenience. Since the adoption of the 2009 Guidelines, other guidance documents have addressed

this issue, including the 2014 Commission Handbook on marriages of convenience[6] and Section 5 of Part III of the revised Visa Handbook. Nevertheless, difficulties continue to be reported, in particular relating to refusals of visas and residence cards on the basis of suspicion or a marriage of convenience.

Options for review of Section 4 on fraud and abuse could include referring to the 2014 Commission Handbook on marriages of convenience and to recent CJEU case-law in *Sean McCarthy, O. & B.* and *L.N.*

[6] Communication from the Commission to the European Parliament and the Council, Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, COM(2014)604 final, 26 September 2014, and associated Commission Staff Working Document on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, SWD(2014)284 final.

1 METHODOLOGICAL NOTE

The aim of this Overall Report (Deliverable E) is to present in a structured way, suggestions for review of the 2009 Guidelines[1] detailing, where relevant, potential options. In particular, it:

- Identifies and explains in detail how the CJEU case-law since 2009 has addressed the main legal and administrative difficulties citizens have faced during the last five years with regard to the implementation of Directive 2004/38/EC in their contact with national administrations;
- Identifies any inconsistency between the 2009 Guidelines and the CJEU case-law including any issue where the text of the 2009 Guidelines seems to be incomplete or inaccurate;
- Indicates which new topics could be included in the reviewed Guidelines.

The Overall Report builds on:

- Deliverables A and B that catalogue and analyse all CJEU judgments delivered from 1 January 2009 until 18 January 2021 that relate to Articles 20(2)(a) and 21(1) TFEU, Directive 2004/38/EC and the 2009 Guidelines.
- Deliverables C and D identifying the problems faced by individuals with respect to the application of the Directive's requirements by administrative authorities in the last five years[2] through 28 Country Fiches (Deliverable C) and the identification of the main difficulties faced by individuals through a Thematic Report (Deliverable D) covering the 27 EU Member States.[3]

The potential options regarding the review of the 2009 Guidelines are the key output of this Overall Report and the underlying objective of the project as a whole. The formulation of suggestions for review of the 2009 Guidelines is set out in Section 2 of this Overall Report. It involved three key steps as described in the box below.

Development of suggestions for review		
Step 1	**Step 2**	**Step 3**
■ Collecting the information gathered in Deliverables A to D in a structured manner with respect to specific provisions of Directive 2004/38/EC. ■ Analysing the main difficulties that individuals have encountered in the last five years as described in Deliverable	■ Assessing where there are inconsistencies between the 2009 Guidelines and the CJEU case-law delivered since 2009. ■ Identifying inaccuracies in the 2009 Guidelines. ■ Identifying gaps with respect to topics covered by the 2009	■ Identifying potential options for review of the 2009 Guidelines. ■ Formulating potential options for review of the 2009 Guidelines. ■ Discussion with, and review by, the Consultative Body to ensure that the potential options are:

[1] Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2009) 313 final, 2 July 2009.

[2] The reference period for Deliverables C and D is January 2015 until April 2020.

[3] As the review of the Guidelines should ensure a more effective and uniform application of the Directive in the future, the difficulties identified in the UK, which ceased to be an EU Member State as of 1 February 2020, fall outside the scope of Deliverables D and E.

Development of suggestions for review		
D in light of the relevant CJEU judgments delivered since 2009.	Guidelines. ■ Identifying other guidance documents that address the main difficulties. ■ Identifying new topics that could be included.	(i) Fully evidenced and substantiated on the basis of Deliverable D and CJEU case-law. (ii) Representative – reflecting the main difficulties identified on the basis of the selection criteria outlined in Deliverable D and described therein. (iii) Usable - presented in such a way as to assist the Commission to take an informed decision on whether and which revisions to the 2009 Guidelines would be appropriate, and in a way that can easily be used by the Commission to proceed to the actual revision.

2 SUGGESTIONS FOR REVIEW OF THE 2009 GUIDELINES

The 2009 Guidelines on better transposition and application of Directive 2004/38/EC (2009 Guidelines) provided important clarifications on how to correctly apply Directive 2004/38/EC, in particular in view of the specific transposition problems identified in the 2008 report on the application of the Directive.[4]

In 2019, almost 18 million EU citizens were estimated to reside in an EU Member State other than their own, illustrating the overall success of the exercise of free movement of persons.[5] As one of the fundamental freedoms of the internal market, its correct implementation is of the utmost importance. The revised Guidelines should therefore aim at further eliminating any legal or administrative obstacles faced by EU citizens and their family members in the exercise of their rights under the TFEU, as set out in the Directive.

The suggestions for review of the 2009 Guidelines outlined in this Section are structured thematically in accordance with the main topics for which remaining difficulties or important CJEU case-law were identified in Deliverables A, B, C and D. For each of these topics, a number of potential options for review of the 2009 Guidelines are outlined with a view to addressing the main difficulties[6] in the application of the Directive faced by EU citizens and their family members in the last five years on the basis of important clarifications on the provisions of the Directive delivered by the CJEU since 2009. Moreover, the options take into account links that can be established with other guidance documents that have been adopted by the Commission since 2009 on specific aspects of relevance to the Directive, amongst others, the 2014 Handbook on marriages of convenience,[7] the Handbook on Schengen border controls,[8] and the Visa Handbook.[9]

In assessing the potential options for review a number of **horizontal considerations** are relevant:

- Revisions to the 2009 Guidelines should further improve the legal certainty for EU citizens and their family members who exercise their right to move and reside freely in another EU Member State, and support Member State authorities in the correct application of the Directive. They should therefore be drafted in simple and accessible language that ensures clarity and ease of reference both for citizens and national authorities. In this context, the 2020 EU Citizenship Report specifically mentions the Commission's intention to review the 2009 Guidelines, 'in order to improve legal certainty for EU citizens exercising their free movement rights, and to ensure a more effective and uniform application of the free movement legislation across the EU. The reviewed guidelines should reflect the diversity of families and therefore help all families - including rainbow families – exercise their right to free movement. They

[4] Report from the Commission to the European Parliament and the Council on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840 final, 10 December 2008.

[5] Eurostat, number of mobile EU citizens, migr_pop1ctz.

[6] Wherever reference is made to main difficulties, this refers to the fact that the issue in question satisfied the selection criteria set out in Deliverable D as regards recurrence of the issue in question within the sources of information reviewed; the significance of the issue and the fact that it was mentioned by the stakeholders interviewed and validated by members of the Consultative Body. The methodology used for the identification of the main difficulties is explained in Annex II to this Report.

[7] Communication from the Commission to the European Parliament and the Council, Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, COM(2014)604 final, 26 September 2014, and associated Commission Staff Working Document on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, SWD(2014)284 final.

[8] Annex to the Commission Recommendation establishing a common 'Practical Handbook for Border Guards' to be used by Member States' competent authorities when carrying out the border control of persons and replacing Commission Recommendation C(2006) 5186 of 6 November 2006, C(2019) 7131 final, 8 October 2019.

[9] 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.

should provide updated guidance for all interested parties, in particular EU citizens, and support the work of national authorities dealing with citizens' rights, as well as courts and legal practitioners.'[10]

- In view of the other guidance documents that bear relevance to the Directive, wherever the potential options suggest the introduction of cross-references or the inclusion of text from these other documents within the 2009 Guidelines, attention needs to be paid to which approach is most efficient and effective. For example, summarising information from other documents entails risks in terms of consistency resulting from potentially differently formulated guidance in different places while verbatim reproduction could render the Guidelines lengthy and the introduction of cross-references, while possibly cumbersome, would minimise the risks of duplication and would also counter inconsistencies that could arise in the future in the event that these other documents are updated.
- Consideration could be given to other issues that might not have an evidence-base in the research carried out under this study or within its reference period but might nevertheless benefit from further clarification in the Guidelines on the basis of separate research efforts. This could be the case, for example, with respect to restrictions to free movement on the basis of public health in light of the COVID-19 pandemic, with respect to which, the 2020 EU Citizenship Report specifically states that '[w]hen updating the guidelines, the Commission intends to address the application of restrictive measures on free movement, specifically those that are due to public health concerns'.[11]

2.1 DEFINITIONS AND BENEFICIARIES (ARTICLES 2 AND 3 OF THE DIRECTIVE; SECTION 2.1 OF THE GUIDELINES)

(i) Union citizen

Overview

Article 3(1) of the Directive specifies that the Directive applies to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in Article 2(2) who accompany or join them.

Section 2 of the 2009 Guidelines further clarifies that EU citizens who **return** to their home Member State after having resided in another Member State or, in certain circumstances, who have exercised their rights to free movement in another Member State without residing there (e.g. by providing services there) also benefit from the rules on free movement of persons. These specifications reflect case-law from the CJEU prior to 2009.[12] This case-law has subsequently been expanded[13] and clarified.[14]

Difficulties for EU citizens and their non-EU family members were however still identified for EU citizens when asserting their rights **as returning nationals** or for family members of returning nationals who have previously exercised their free movement rights.

Dual nationals and their family members also reported facing difficulties in exercising their rights derived either directly or by analogy from the Directive, in particular after naturalisation. The 2009

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[10] EU Citizenship Report 2020, p.23: https://ec.europa.eu/info/sites/info/files/eu_citizenship_report_2020_-_empowering_citizens_and_protecting_their_rights_en.pdf. The review of the 2009 Guidelines and the need to reflect the diversity of families and facilitate the exercise of free movement for all families, including rainbow families is also emphasized in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Unicom of Equality: LGBTIQ Equality Strategy 2020-2025, COM/2020/698 final

[11] EU Citizenship Report 2020, p.23.

[12] C-370/90 *Singh*, C-60/00 *Carpenter* and C-291/05 *Eind*, already mentioned in the 2009 Guidelines.

[13] C-456/12 *O. & B.*, C-673/16 *Coman and Others* and C-89/17 *Banger*.

[14] C-457/12 *S. & G.* and C-230/17 *Deha Altiner & Ravn*.

Guidelines do not currently contain further guidance on how the Directive's provisions apply to dual nationals.

Finally, specific difficulties were reported for the so called '**Chen parents**' in being considered as beneficiaries of free movement law and benefitting from a derived right of residence as primary carers of a mobile EU child.

The **CJEU** has adopted a significant amount of case-law related to returning nationals, dual nationals and primary carers of a mobile EU child since 2009, which clarifies that:

The Directive does not apply to dual EU citizens who reside in a Member State of which they are a national.[15]

- Article 21 TFEU does also not apply in a situation where a **dual citizen** has always resided in one of the Member States of which they are a national and has never exercised free movement rights, unless the situation includes the application of measures by a Member State that would have the effect of depriving the dual citizen of the genuine enjoyment of the substance of the rights conferred by virtue of his status as a Union citizen or of impeding the exercise of his right of free movement and residence within the territory of the Member States.[16]
- However, where **dual EU citizens** have exercised their free movement rights, they and their family members may fall within the scope of Article 21 TFEU, with the consequence that the Directive may be applied, **by analogy**, to their family members.[17] The CJEU held specifically that EU citizens who made use of their free movement rights to reside in another EU Member State and who had since obtained the nationality of the host Member State, while retaining the nationality of the Member State of origin, may, while no longer being a beneficiary under Directive 2004/38/EC, continue to rely on the rights derived from Article 21 TFEU. The same applies for non-EU family members of that dual national, under conditions which may not be stricter than those of Directive 2004/38/EC.[18]
- The *Surinder Singh* case-law on the right to return home has been extended to cover the situation of EU citizens who were not economically active in the host Member State.[19] The conditions for granting a **derived right of residence** to third-country nationals who are family members of **returning Union citizens** in their home Member State, should not, in principle, be more strict than those provided for by the Directive to family members of Union citizens in another Member State,[20] if the family members genuinely resided with the Union citizen in the host Member State in accordance with Articles 7 or 16 of the Directive.[21] Even though the Directive does not cover such a return, it should be applied by analogy to the conditions for the residence of Union citizens in a Member State other than that of which they are a national.[22] Short periods of residence, such as multiple stays during weekends or holidays, fall within the scope of Article 6 of the Directive and do not satisfy those conditions.[23]
- The *Carpenter* case-law on the right to return home of cross-border service providers has been extended to cover the situation of EU citizens who are cross-border workers.[24] Directive 2004/38/EC does not apply to **EU citizens** who are residing in the Member State of their

[15] C-165/16 *Lounes*, paras. 36 and 37.

[16] C-434/09 *McCarthy*, paras. 36 to 43.

[17] C-165/16 *Lounes*, paras. 51 and 61.

[18] C-165/16 *Lounes*, paras. 61 and 62.

[19] C-456/12 *O. & B.*, paras. 48-49.

[20] C-456/12 *O. & B.*, para. 49.

[21] C-456/12 *O. & B.*, para. 56.

[22] C-456/12 *O. & B.*, para. 50.

[23] C-456/12 *O. & B.*, para. 59.

[24] C-457/12 *S. & G.*, para. 40.

nationality and who **regularly travel** to other Member States as part of their employment and it does not confer a derived right to their family members. However, a derived right of residence may be conferred on the basis of Article 45 TFEU on the free movement of workers if the refusal of such a right would discourage EU workers from exercising their rights thereunder.[25]

- A Member State may however **refuse** to grant a residence right to the non-EU family member of an EU citizen who has returned home after residing in another Member State when the non-EU family member has not entered the Member State of origin of the EU citizen or has not applied for the residence document as a 'natural consequence' of the return of the EU citizen to their Member State of origin. In this case, other relevant factors must however also be taken into account in the overall assessment to show that family life which was created and strengthened in the host Member State has not ended.[26]
- Article 21(1) TFEU requires the Member State of which an EU citizen is a national to facilitate the provision of a residence authorisation to the non-EU partner with whom that EU citizen has a durable relationship, where the Union citizen, having exercised his right of freedom of movement in a second Member State in accordance with the conditions laid down in Directive 2004/38, returns with his partner to the Member State of which he is a national in order to reside there.[27]

The CJEU has not yet had the opportunity to pronounce itself on the question of whether dual EU citizens who move back to one of their Member States of nationality are considered to exercise free movement rights there. However, the Court did confirm in Freitag and Lounes that there is a link with EU law in respect of nationals of one Member State who are lawfully resident in the territory of another Member State of which they are also nationals.[28] The CJEU has also recognised in Lounes that family members of such dual EU citizens can continue to enjoy certain rights under EU law even if the residence of the EU citizen in his/her Member State of nationality is governed by the domestic law of that Member State.[29]

Potential options

In order the address the **main difficulties** described above, further clarifications in relation to returning and dual nationals could be introduced in Section 2 of the 2009 Guidelines, referring in particular to the CJEU case-law since 2009 as follows:

- Clarify the status and rights of dual nationals and their family members who have made use of their free movement rights.
- In this context, it could be highlighted that according to the CJEU there is a link with EU law in the situation of nationals of one Member State who are lawfully resident in the territory of another Member State of which they are also nationals.[30] Family members of such dual citizens can enjoy certain rights under EU law even if the residence of the EU citizen is governed by domestic law. [31]
- Include references to the recent case-law on returning nationals, including specifications that:
- The conditions for granting a derived right of residence to third-country family members of returning Union citizens in their home Member State should not, in principle, be stricter than those provided for by the Directive to family members of Union citizens in another Member State if the family members genuinely resided with their family member in the host Member

[25] C-457/12 *S & G*, paras. 34-44.

[26] C-230/17 *Deha Altiner & Ravn,* paras. 31-35.

[27] C-89/17 *Banger*, para. 35.

[28] C-165/16 *Lounes,* para. 50 and C-541/15 *Freitag*, para. 34.

[29] C-165/16 *Lounes*, para. 60.

[30] C-165/16 *Lounes,* para. 50 and C-541/15 *Freitag*, para. 34.

[31] C-165/16 *Lounes*, para. 61.

State in accordance with Articles 7 or 16 of the Directive, in line with *O. & B.*[32] The specification can be added that short periods of residence, such as multiple stays during weekends and holidays do not satisfy these conditions.[33] In this sense, Member States must also facilitate the grant of a right of residence to the non-EU partner who is in a durable relationship with an EU citizen who is a national of that State and who returns home after having resided in another Member State in line with the conditions laid down in Directive 2004/38 as held in *Banger*.[34]

- Member States may, however, refuse to grant such a derived residence right to a non-EU family member who has not entered the Member State of origin of the EU citizen or has not applied for a residence document as a 'natural consequence' of the return of the EU citizen to their Member State of origin, as long as other relevant factors are taken into account to assess whether the family life created in the host Member State has not ended, as in *Deha Altiner & Ravn*.[35]
- Include explanations on the right of residence of the non-EU primary carer of a mobile EU child, the so called **'Chen parents'**, in line with the CJEU judgment in *Chen*.[36] In *Chen*, the CJEU held that Article 21 TFEU and Directive 90/364 (replaced by Directive 2004/38/EC) confers on an EU minor who lives in a Member State different from the Member State of their nationality, who is covered by appropriate sickness insurance and who is in the care of a non-EU parent having sufficient resources for that minor not to become a burden on the public finances of the host Member State, a right to reside in that Member State. In addition, those same provisions allow the parent who is that EU minor's primary carer to reside with the child in the host Member State.[37] The 2009 Guidelines did not refer to this line of case-law.[38] The CJEU has since affirmed that a child with a right of residence pursuant to Directive 2004/38/EC is entitled to be accompanied by the person who is their primary carer.[39] In *NA*, the CJEU clarified that, in order to enjoy this residence right on the basis of Article 21 TFEU, the conditions set out in Article 7(1) of the Directive need to be satisfied by the minor EU citizen.[40] Hence, where Article 21 TFEU and Directive 2004/38/EC grant a right to reside in the host Member State to a minor child who is a national of another Member State and who satisfies the conditions of Article 7(1)(b) of that Directive, those same provisions allow a parent who is that national's primary carer to reside with that national in the host Member State.[41]

(ii) Family member

Overview

Article 2(2) of the Directive defines the core family members of an EU citizen, who have a right to enter and reside in the territory of the Member States when the EU citizen fulfils the conditions of the Directive. These comprise the EU citizen's spouse, partner in a registered partnership, direct descendants under 21 years of age and dependent descendants and ascendants of the EU citizen and of

[32] C-456/12 *O. & B.*, paras. 49-50.

[33] C-456/12 O. & B., para. 59.

[34] C-89/17 *Banger*, para. 35.

[35] C-230/17 *Deha Altiner & Ravn,* paras. 31-35.

[36] C-200/02 *Zhu and Chen*, paras. 45-46.

[37] C-200/02 *Zhu and Chen*, para. 46.

[38] C-200/02 *Zhu and Chen*, para. 41.

[39] C-86/12 *Alokpa & Moudoulou*, paras. 30-31.

[40] C-115/15 *NA*, paras. 75-76.

[41] C-115/15 *NA*, para. 79.

his or her spouse or partner. Moreover, **Article 3(2)** of the Directive requires the host Member State to facilitate, in accordance with its national legislation, the entry and residence of any other family members who are dependents or members of the household of the EU citizen, or who require the personal care of the EU citizen due to serious health grounds as well as the partner with whom the EU citizen has a durable relationship. **Section 2.1 of the 2009 Guidelines** provides guidance on the definition of family members and their status as beneficiaries under the Directive in four subsections, covering spouses and partners (Section 2.1.1), family members in direct line (Section 2.1.2), other family members (Section 2.1.3) and dependent family members (Section 2.1.4). Section 1 of the 2009 Guidelines recalls that the Directive 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 European Convention of Human Rights and the Charter of Fundamental Rights of the European Union.

- **Core family members (Article 2(2) of the Directive)**

Section 2.1.1 of the 2009 Guidelines and Section 4.8 of **Part III of the Visa Handbook**[42] clarify that **marriages** validly contracted anywhere in the world must in principle be recognised for the purpose of the application of the Directive. **Spouses** are considered direct beneficiaries under the Directive and should be granted a right to enter and reside in the territory of the Member States when fulfilling the specific requirements set out in the Directive. Nevertheless, the non-acceptance of the marriage certificate by the host Member State authorities was identified as one of the main difficulties encountered by spouses. Guidance on the acceptance of marriage certificates is provided in the Guidelines and the Visa Handbook. **Section 2.2.2 of the 2009 Guidelines** indicates that the list of documents to be presented with the application for a residence card in Article 10(2) is exhaustive. The Guidelines and Section 4.7.3 of Part III of the Visa Handbook clarify that Member States may ask for specific documents as supporting evidence of the family relationship but should not refuse other means of proof. For example, presenting a marriage certificate is not the only acceptable means of establishing the existence of family ties.

Section 2.2.2 of the 2009 Guidelines and Section 4.7.3 of Part III of the Visa Handbook further clarify that applicants may be requested, in specific cases to translate, notarise or legalise the documents when the national authority cannot understand the language in which the document is written or has a suspicion about the authenticity of the document. This clarification appears not to be consistent anymore with the requirements of Regulation (EU) 2016/1191 on public documents,[43] **for marriage certificates issued in another EU Member State**. The Regulation ends a number of administrative requirements related to the use of certain public documents issued in one EU Member State in another Member State, such as the requirements to have such documents authenticated and to present the original together with the certified copies. Translations of certain public documents are not required anymore as long as the document is accompanied by a multilingual standard form, which must be issued by the authority of the Member State of origin. While such difficulties were also reported for documents issued outside of the EU, the requirements of the Regulation do not apply to marriage certificates issued by the authorities of third countries. Finally, Section 4.8 of Part III of the Visa Handbook specifies that spouses cannot be required to have the document or relationship first registered in the Member State of the EU citizen's nationality. This clarification is not included in the 2009 Guidelines. In a few cases, however, it was reported that Member States first require registration of the marriage certificate in the country of nationality before they will recognise the relationship.

[42] 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/sites/homeaffairs/files/c-2020-395-commission-implementing-decision-annex_en.pdf

[43] 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 July 2016: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R1191

Specific difficulties were also reported for **same-sex spouses** in being considered as spouses under the Directive. The 2009 Guidelines currently do not contain specific guidance on the recognition of same-sex spouses under the Directive. However, these difficulties are at odds with the clear pronouncement of the CJEU that the term 'spouse' within the meaning of the Directive is gender-neutral and extends to spouses in same-sex marriages regulated by the laws of other Member States.[44]

Recent **CJEU case-law** moreover clarifies a number of issues related to the consideration of spouses as beneficiaries under the Directive:

- In *Iida*, the CJEU clarified that the spouse needs to accompany or join the EU citizen and hence reside in the same Member State as the EU citizen in order to be considered a beneficiary under the Directive.[45] There is however no requirement for the spouses to live together, as specified in *Iida* and *Ogieriakhi*,[46] which confirms previous case-law.[47] The marital relationship cannot be considered dissolved as long as it has not been terminated by the competent authority even if the spouses live apart.[48]
- In *Coman*, the CJEU clarified that the term 'spouse' under the Directive has an autonomous meaning under EU law, independent of Member State laws, extending to spouses in same-sex marriages.[49] Where a marriage was lawfully concluded in another Member State, EU law precludes the national authorities from refusing entry and residence rights to the same-sex spouse of the EU citizen based on the non-recognition of same-sex marriage in the Member State. The relationship of a same-sex couple may moreover fall within the notion of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple, in accordance with the case-law of the European Court of Human Rights.[50]

Article 2(2) also considers **registered partners**, with whom the EU citizen has contracted a registered partnership on the basis of the legislation of a Member State as beneficiaries under the Directive, if the legislation of the home Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the legislation of the home Member State. The 2009 Guidelines do not contain further guidance on the concept of 'registered partner' under the Directive. Nevertheless, difficulties in being considered as a family member under Article 2(2) were frequently reported by registered partners and were identified as a main difficulty. Registered partners were, for example, asked to provide 'confirmation of family status'.

Article 2(2) also grants the status of family member to the **direct descendants** of an EU citizen who are under the age of 21 or those who are dependants as well as to those of the spouse or registered partner of the EU citizen and to **dependent ascendants** of EU citizens or their spouse or partner. **Section 2.1.2 of the 2009 Guidelines** clarifies that the notion of direct relatives extends to adoptive relationships or minors in custody of a permanent legal guardian. The latter appears to be inconsistent with recent case-law from the CJEU in *S.M.*, where the CJEU clarifies that the concept of 'direct descendant' of a Union citizen includes both the biological and the adopted child of such a citizen. The Court continues that it does not include children placed under a legal guardianship which does not

[44] C-673/16 *Coman and Others*, paras. 48, 49 and 51.

[45] C-40/11 *Iida*, paras. 61 and 65.

[46] C-40/11 *Iida*, para. 58; C-244/13, *Ogieriakhi*, para. 37.

[47] Case 267/83 *Diatta*, para. 18.

[48] C-40/11 Iida, para. 58; C-244/13, *Ogieriakhi*, para. 37 confirming Case 267/83 *Diatta*, para. 20.

[49] C-673/16 *Coman and others*, paras. 35, 48, 49, 51 and 56.

[50] C-673/16 *Coman and others*, para. 50. Note that a case has been lodged by the same parties before the European Court of Human Rights, Application no. 2663/21, Relu-Adrian Coman and Others against Romania, lodged on 23 December 2020, https://hudoc.echr.coe.int/eng#{"fulltext":["Coman"],"documentcollectionid2":["COMMUNICATEDCASES"],"itemid":["001-208508"]}

create a parent-child relationship between the child and the guardian.[51] Nonetheless, children in a legal guardianship would fall within the scope of Article 3(2) of Directive 2004/38. Foster children and parents may have rights depending on the strength of the ties in a particular case. However, the CJEU has not explicitly clarified whether foster children are covered by Article 2(2) or 3(2).

Article 8(5) and 10(2) of the Directive as well as Section 2.1.2 of the 2009 Guidelines further clarify that national authorities are allowed to request **evidence** of the family relationship. Section 4.7.3 of Part III of the Visa Handbook clarifies that Member States may ask for specific documents as supporting evidence of the family relationship but should not refuse other means of proof. Nevertheless, the refusal to accept a birth certificate or, in absence of alternative evidence, a declaration of paternity was identified as a main difficulty encountered by descendants. In relation to the evidence provided to attest the family link, it is important to note that the changes introduced by Regulation (EU) 2016/1191 on public documents, set out above, are equally applicable to birth certificates, notarial documents and judgments, for instance, attesting parenthood or adoption, issued by EU Member States. As a consequence, such documents, **when issued within the EU**, have to be accepted in all Member States in accordance with the requirements of the Regulation and hence cannot be required to undergo legalisation or to have an apostille affixed. As regards birth certificates, a certified translation is no longer required when these are issued by another EU Member State and accompanied by a multilingual standard form. However, as mentioned above, **for certificates issued by non-EU countries**, Member States may, in individual cases, require such documents to be translated, notarised or legalised where the national authority cannot understand the language in which the document is written, or has a suspicion about the authenticity of the document.

Even though **Section 2.1.4 of the 2009 Guidelines** provides further clarification about the concept of '**dependency'**, the notion continues to lead to difficulties for descendants and ascendants of EU citizens. For example**,** a tenancy agreement or utility bill was refused because the dependent's name appeared on the document for the dwelling shared with the EU citizen. In some Member States, the difficulties related in particular to the consideration of dependent descendants (aged 21 or older) as family members. For dependent ascendants, reported difficulties include excessive requirements, such as the requirement for the dependent ascendant to live in the same household with the EU citizen after issuance of the residence card. Section 2.1.4 of the 2009 Guidelines and Section 4.7.3 of Part III of the Visa Handbook clarify that dependent status is the result of a factual situation characterised by the fact that material support for that family member is provided by the Union citizen who has exercised the right of free movement or by the citizen's spouse.[52] The Guidelines moreover provide further detail as to how national authorities should assess the notion of dependency for direct family members and confirm that evidence may be adduced by any appropriate means according to standing case-law of the CJEU. They clarify, among others, that the situation of dependence is to be assessed in the country from which the family member concerned comes and at the time of the application to join the Union citizen[53] and that there is no need to examine whether the family members concerned would in theory be able to support themselves. The Guidelines and Section 4.7.3 of Part III of the Visa Handbook specify that dependent family members are required to present documentary evidence that they are dependent, but that such evidence may be adduced by any appropriate means.[54]

Recent **CJEU case-law** further clarifies the notion of dependence in relation to direct descendants and ascendants:

- The status of 'dependent' family member of a Union citizen holding a right of residence is the result of a factual situation characterised by the fact that material support for the family member is provided by the holder of the right of residence, so that, when the converse situation occurs and the holder of the right of residence is dependent on a third-country

[51] C-423/12 *Reyes*, paras. 28 and 33.

[52] Reflecting Cases 316/85 *Lebon* and C-1/05 *Jia*, already mentioned in the Visa Handbook and the 2009 Guidelines.

[53] In line with C-1/05 *Jia*, para. 37, already mentioned in the 2009 Guidelines.

[54] C-215/03 *Oulane*, para. 53 and C-1/05 *Jia*, para. 41.

national, the third-country national cannot rely on being a 'dependent' relative in the ascending line of that right-holder, within the meaning of Directive 2004/38.[55] However, the third-country family member may instead be able to rely on the *Chen* line of case-law to claim a right of residence as the primary carer of an EU minor, given that enjoyment by a young child of a right of residence necessarily implies that the child is entitled to be accompanied by the person who is his primary carer and accordingly that the carer must be in a position to reside with the child in the host Member State for the duration of such residence.[56]

- The fact that the relative is deemed to be well placed to obtain employment and in addition intends to start work in the Member State does not affect the interpretation of the requirement in Article 2(2)(c) that the descendant be a 'dependant'.[57] The right to work is moreover in line with Article 23 of the Directive which expressly provides that family members having a right of residence also have the **right to take up employment** or self-employment in the host Member State.
- The concept of 'direct descendant' of a Union citizen includes both the biological and the adopted child of such a citizen. It does not include children placed under a legal guardianship which does not create a parent-child relationship between the child and the guardian (such as children placed under the Algerian *kafala* system). Nonetheless, children in a legal guardianship fall within the scope of Article 3(2) of Directive 2004/38. When implementing their obligation under Article 3(2) to facilitate entry and residence of the '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 of the European Union, including the right to (respect for) family life (Article 7) and the best interests of the child (Article 24).[58]

- **Other family members (Article 3(2) of the Directive)**

Article 3(2) of the Directive ensures that extended family members, namely other family members who are dependants, are members of the same household, or who strictly require the personal care of the EU citizen due to serious health reasons, and partners in a duly attested durable relationship, should benefit from the **facilitation of entry and residence** in the host Member State.

The 2009 Guidelines contain further clarifications regarding the durability of the relationship of ***de facto* partners** (Section 2.1.1) and the notion of dependency of '**other dependent family members**' (Section 2.1.4).

Section 2.1.4 in particular clarifies that Member States have a certain degree of discretion - although this is restricted - in laying down criteria for determining whether to grant the rights under the Directive to extended family members. The competent national authorities are required to carefully examine the personal circumstances of the applicants concerned, taking into consideration their relationship with the EU citizen and any other circumstances, such as financial or physical dependence. Difficulties were still identified in four Member States as a consequence of the evidence requested for demonstrating dependency or for being part of the same household.

With regard to partners in a durable relationship, Section 2.1.1 specifies that evidence may be required demonstrating that the applicant is a partner of the EU citizen and that the relationship is durable. Here too, evidence may be adduced by any means and must be assessed in light of the objective of the Directive to maintain the unity of the family in a broad sense. The Guidelines explicitly state that, while a minimum duration of the partnership may therefore be a criterion for assessing whether the relationship is durable, other aspects should also be taken into account. Nevertheless, difficulties were reported by *de facto* partners in being recognised as beneficiaries of the Directive, in particular due to

[55] C-40/11 *Iida*, para. 55 and C-86/12, *Alokpa & Moudoulou*, para. 25.

[56] C-86/12 *Alokpa & Moudoulou*, para. 28.

[57] C-423/12 *Reyes*, paras. 28 and 33.

[58] C-129/18 *S.M.,* paras. 54, 56 and 57.

excessively strict evidentiary requirements from Member States or the mere consideration of a minimum duration of the relationship in isolation of other factors. It was moreover reported that, in some Member States, same-sex relationships are not considered as durable relationships for the right of residence of the non-EU partner. The issue of same-sex partners in durable relationships is not currently addressed in the Guidelines.

Recent **CJEU case-law** clarifies that:

- Article 3(2) requires Member States to confer a certain advantage on third-country nationals covered by this provision in comparison to other third-country nationals.[59] In accordance with *Rahman*, this does not require a Member State to grant every application for residence submitted by a family member who shows to be dependent on a Union citizen.[60] However, it does require the Member States to ensure that their legislation contains criteria which enable those persons to obtain a decision on their application that is founded on an *extensive examination of their personal circumstances* and, in the event of a refusal, the *reasons* are given.[61] Member States have a wide discretion when selecting those criteria, but they must be consistent with the meaning of the term 'facilitate' and of the notion of dependence used in Article 3(2).[62] Every applicant is entitled to a judicial review of whether the national legislation and its application justify those conditions.[63]
- Children in a legal guardianship fall within the scope of Article 3(2) of Directive 2004/38. When implementing their obligation under Article 3(2) to facilitate entry and residence of the '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 of the European Union and need to carry out a balanced and reasonable assessment of all current and relevant circumstances of the case, taking account of the various interests at play and, in particular, of the best interests of the child concerned.[64]

Potential options

Section 2 of the 2009 Guidelines could be restructured according to the main categories of core family members and extended family members identified in Articles 2(2) and 3(2) of the Directive: spouses and registered partners (Section 2.1.1); direct descendants and ascendants (Section 2.1.2); partners in a durable relationship (Section 2.1.3); other dependent family members (Section 2.1.4). In this case, the notion of 'dependence' can be explained under Section 2.1.2 and cross-referred to in Section 2.1.4.

Moreover, the following clarifications could be added to Section 2 of the Guidelines to provide further guidance in relation to some of the **main difficulties** with the consideration as family members under the Directive and to further align the Guidelines and **recent legislation and guidance documents**:

- A clear statement of the obligations of Member States under Regulation (EU) 2016/1191 on public documents, in particular that Member States can no longer subject marriage certificates, birth certificates, notarial documents and judgments, for instance, attesting parenthood or adoption, **issued by other Member States** to requirements as to legalisation or the affixing of an apostille. Moreover, a certified translation of birth or marriage certificates may not be required when the original **is issued by another EU Member State** and is accompanied by a multilingual standard form. Finally, for all documents issued by an EU Member State, translations by a translator qualified to do so under the law of a Member State should be

[59] C-83/11 *Rahman*, para. 21.

[60] C-83/11 *Rahman*, para. 18.

[61] C-83/11 *Rahman*, para. 26.

[62] C-83/11 *Rahman*, para. 26.

[63] C-83/11 *Rahman*, para. 26.

[64] C-129/18 *S.M.*, para. 68.

accepted in all Member States, not only those by a sworn translator of the Member State of origin.

- A cross-reference to Section 4.8 of Part III of the Visa Handbook which clarifies that a marriage certificate cannot be subject to a registration requirement in the Member State of origin. Alternatively, the text of Section 4.8 of Part III of the Visa Handbook could be incorporated into the Guidelines.
- Clarification on the requirements for registered partners, including same-sex registered partnerships, which are not currently addressed in the Guidelines.
- Emphasise that national authorities may request evidence of the family relationship and dependency, including specific documents such as civil status certificates, but they may not refuse other evidence of the existence of such a family link. A reference to Section 4.7.3 of Part III of the Visa Handbook could also be made in the specific context of visa applications.
- Clarification that same-sex relationships may fall within the notion of durable relationships.[65]

In addition, in relation to some of the **main difficulties,** clarifications can be introduced in the Guidelines to reflect **recent CJEU case-law**, adopted since 2009:

- Clarify that the spouse needs to accompany or join the EU citizen and hence reside in the same Member State in order to be considered a beneficiary under the Directive, as in *Iida*,[66] but they do not necessarily need to live together at the same address.[67]
- Clarify in line with *Coman* that the term 'spouse' extends to spouses in same-sex marriages.[68] Where a marriage was lawfully concluded in another Member State, EU law precludes the national authorities from refusing entry and residence rights to the same-sex spouse of the EU citizen based on the non-recognition of same-sex marriage in the Member State. The relationship of a same-sex couple may moreover fall within the notion of 'private life' and that of 'family life' in the same way as the relationship of a heterosexual couple, in accordance with the case-law of the European Court of Human Rights.[69]
- Clarify in line with *Iida* and *Alopka & Moudoulo*u that, when the holder of the right of residence is dependent on a third-country national, the third-country national cannot rely on being a 'dependent' relative in the ascending line of that right-holder, within the meaning of Directive 2004/38.[70] In parallel, explanations on the right of residence in accordance with the *Chen* line of case-law could be added.
- Clarify in line with *Reyes* that the fact that a direct relative is deemed to be well placed to obtain employment or intends to start work in the Member State does not prevent them from being considered a 'dependant'.[71] The right to work derives from Article 23 of the Directive.
- Clarify that the concept of 'direct descendant' of a Union citizen includes any parent-child relationship, whether biological or legal (thus including biological and adopted children), as confirmed in *S.M*. However, it does not include children placed under a legal guardianship which does not create a parent-child relationship between the child and the guardian. Nonetheless, children in a legal guardianship fall within the scope of Article 3(2) of Directive 2004/38. When implementing their obligation under Article 3(2) to facilitate 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 of the European

[65] C-673/16 *Coman and others*, para. 50.

[66] C-40/11 *Iida*, paras. 61 and 65.

[67] C-244/13 *Ogieriakhi*, para. 37.

[68] C-673/16 *Coman and others*, paras. 48, 49, 51 and 56.

[69] C-673/16 *Coman and others*, para. 50.

[70] C-40/11 *Iida*, para. 55. and C-86/12, *Alokpa & Moudoulou*, para. 25.

[71] C-423/12 *Reyes*, para. 33.

Union, including the right to (respect for) family life (Article 7) and the best interests of the child (Article 24).[72] Finally, foster children and parents may fall within the scope of the Directive depending on the strength of the ties in a particular case. There is however currently no case-law explicitly clarifying whether foster children are covered by Article 2(2) or 3(2) of Directive 2004/38. Consideration could therefore be given as regards clarifying which provision of the Directive would cover foster children and parents in the light of *S.M.*

- Clarify in line with *Rahman* that Article 3(2) of the Directive requires Member States to confer a certain advantage to third-country nationals covered by this provision in comparison to other third-country nationals. Member States must establish criteria in their 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.[73] Member States have a wide discretion in selecting those criteria, as long as they are consistent with the normal meaning of the term 'facilitation'. Finally, every applicant should be entitled to a judicial review.[74]
- Specify the minimum requirements for the assessment of dependence that apply for the dependent family members covered under Article 2(2) and the other dependent family members covered under Article 3(2)(a). Family ties may exist without the family member of the Union citizen having resided in the same State as that citizen or having been a dependant of that citizen shortly before or at the time when the latter settled in the host State.[75] On the other hand, EU law requires that the situation of dependence must exist in the country from which the family member concerned comes, at the very least at the time when he applies to join the Union citizen on whom he is dependent.[76]
- Clarify that, for dependent family members covered under Article 3(2), the authorities should carefully examine the personal circumstances of the applicants concerned, taking into consideration their relationship with the EU citizen and any other circumstances, such as financial or physical dependence and the degree of relationship between the family member and the Union citizen whom he wishes to accompany or join.[77]

2.2 RIGHT OF EXIT (ARTICLE 4 OF THE DIRECTIVE)

Overview

Article 4(1) of the Directive states that without prejudice to the provisions on travel documents applicable to national border controls, all Union citizens with a valid identity card or passport and their family members who are not nationals of a Member State and who hold a valid passport have the right to leave the territory of a Member State to travel to another Member State. **Article 4(2)** prohibits the imposition of an exit visa or equivalent formality on the persons to whom Article 4(1) applies.

Difficulties for EU citizens and non-EU family members who hold a residence card in exercising their right of exit, including difficulties when leaving the territory of a Member State without the EU relative or refusal of the right to exit of EU minors travelling without their parents,[78] were identified main difficulties.

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[72] C-129/18 *S.M.,* paras. 54, 56 and 57.

[73] C-83/11 *Rahman*, para. 21.

[74] C-83/11 *Rahman*, para. 26.

[75] C-83/11 *Rahman*, para. 33.

[76] C-83/11 *Rahman*, paras. 33 and 35 and C-423/12 *Reyes*, para. 33.

[77] C-83/11 *Rahman*, paras. 22 and 23.

[78] Information is not available as to whether or not the Member States in which this difficulty was identified apply the same restriction to their own nationals.

CJEU case-law before 2009, makes clear that the right of freedom of movement includes both the right for Union citizens to enter a Member State other than the one of origin and the right to leave the State of origin and that the fundamental freedoms guaranteed by the Treaty would be rendered meaningless if the Member State of origin could, without due justification, prohibit its own nationals from leaving its territory in order to enter the territory of another Member State.[79]

CJEU case-law after 2009, further clarifies that:

- Article 4(1) of the Directive may be invoked by Union citizens against their Member State of origin.[80]
- Any prohibitions on the right to leave a Member State require a strict interpretation[81] and cannot be invoked to serve economic ends[82] or solely on the ground that a person owes a legal person governed by private law a debt exceeding a statutory threshold.[83]

The absence of guidance on the interpretation of Article 4 of the Directive, may be seen as a gap in the 2009 Guidelines.

Potential options

On the basis of the above, the right of exit could be added as a **new topic** to the 2009 Guidelines in order to address the **main difficulties** identified by clarifying the interpretation of Article 4 of the Directive in line with CJEU case-law.

In particular, this new Section could:

- Emphasise that the right of exit applies both to EU citizens and their non-EU family members and is an integral aspect of the right of freedom of movement.
- Add references to *Gaydarov*, *Aldzhov* and *Byankov* to specify that:
  - The right of exit can also be invoked by EU citizens against their Member State of origin.[84]
  - Prohibitions on the right to leave can only be justified on grounds of public policy, public security or public health in accordance with Article 27 of the Directive.[85] Here a cross-reference to the part of the Guidelines dealing with Article 27 could also be included (see potential options in Section 2.13 below).
  - Prohibitions on the right to leave cannot be invoked to serve economic ends[86] or solely on the ground that a person owes a legal person governed by private law a debt which exceeds a statutory threshold and is unsecured.[87]

The possibility of providing additional examples of prohibitions that would not be in line with Article 4 of the Directive might also be considered and could be the subject of a separate research effort.

[79] C-33/07 *Jipa*, para. 18. This case (para.23) is already mentioned in Sections 1 and 3 of the 2009 Guidelines wherein it is stated that derogations from the principle of freedom of movement of persons must be interpreted strictly.

[80] C-430/10 *Gaydarov*, paras. 24-27 and C-434/10 *Aladzhov*, paras. 24-27.

[81] C-430/10 *Gaydarov*, paras. 29-36.

[82] C-434/10 *Aladzhov*, paras. 28-30.

[83] C-249/11 *Byankov*, para. 48.

[84] C-430/10 *Gaydarov*, paras. 24-27 and C-434/10 *Aladzhov*, paras. 24-27.

[85] C-430/10 *Gaydarov*, para. 30.

[86] C-434/10 *Aladzhov*, para. 29.

[87] C-249/11 *Byankov*, para. 48.

2.3 RIGHT OF ENTRY (ARTICLE 5 OF THE DIRECTIVE; SECTION 2.2.1 OF THE 2009 GUIDELINES)

(i) Unjustified refusal, excessive requirements and absence of facilitated arrangements for visa applications

Overview

Article 5(1) of the Directive requires Member States to grant non-EU family members holding a valid passport the right to enter their territory. In accordance with **Article 5(2) of the Directive** and **Section 2.2.1 of the 2009 Guidelines**, Member States may require non-EU family members moving with or joining an EU citizen to whom the Directive applies to have an entry visa. Such family members have not only the right to enter the territory of the Member State, but also the right to obtain an entry visa as confirmed by the CJEU.[88]

Section 2.2.1 of the 2009 Guidelines also states that Member States may only require presentation of a valid passport and evidence of the family link and that Member States must grant such family members every facility to obtain the necessary visas as per Article 5(2) of the Directive.

The refusal of visas on invalid grounds was nevertheless identified as a main difficulty alongside visa refusals without a clear reason (as discussed further in Section 2.15 below on procedural safeguards) and the imposition of excessive requirements on visa applicants. In addition, refusals to allow non-EU family members to apply for a visa from their country of lawful residence or presence and issues resulting from the failure to apply facilitation arrangements (in particular with respect to applying an accelerated procedure rather than general visa rules) or the inability for non-EU family members not having a visa to enter despite other information evidencing that they benefit from free movement as family members were also recurrent issues.

For those Member States that are part of the Schengen area, rules related to the procedure for the issuance of visas are laid down in Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code).[89] While the Visa Handbook[90] is not applicable in its entirety to those Member States not fully applying the Schengen *acquis* (Bulgaria, Croatia, Cyprus, Ireland and Romania), **Part III of the Visa Handbook** sets out specific details on how to **process visa applications under the Directive** including which documents core family members may be required to present and stipulations as to how Member State discretion should be exercised with respect to 'extended' family members in line with Recital 6 of the Directive, 'taking into consideration their relationship with the Union citizen or any other circumstances, such as their financial or physical dependence on the Union citizen'. It also clarifies how the notion of granting 'every facility to obtain the necessary visa' should be interpreted and when non-EU family members should be allowed to apply for a visa from their country of lawful residence or presence. Section 1.8 of Part II of the Visa Handbook explicitly refers to the possibility under Article 6 of the Visa Code for a visa application to be submitted by a person who is legally present – but not residing – in the jurisdiction of the consulate where the application is submitted, if the applicant can justify why the application could not be lodged at a consulate in their place of residence. Examples of such justification given in the Visa Handbook include the fact that it would be excessive to require the person concerned to return to their country of residence to apply for the visa. Section 3.1 of Part III of the Visa Handbook explains that consulates may refuse to accept a visa application pursuant to Article 6 if the justification provided by the visa applicant for lodging the application at that consulate is considered insufficient. In addition, Section 6 of Part III of the Visa

[88] C-503/03 *Commission v Spain*, para. 42, already mentioned in the 2009 Guidelines.

[89] Consolidated text: Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code): https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A02009R0810-20200202

[90] 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/sites/homeaffairs/files/c-2020-395-commission-implementing-decision-annex_en.pdf

Handbook refers to Article 5(4) of the Directive and the requirement to issue the visa at the border where the non-EU family member proves that they are covered by the right of free movement and there is no evidence that they pose a risk to public policy, public security or public health. Point 2.9 of Section I of Part Two of the Schengen Borders Code Handbook[91] also addresses this issue.

The issue of visa refusals without a clear reason is also already addressed by Section 4.10 of Part III of the Visa Handbook stating that refusal to issue a visa to a family member of an EU citizen must always be fully reasoned and list all the specific factual and legal grounds on which the negative decision was taken, so that the person concerned may take effective steps to ensure their defence. This is further discussed in Section 2.15 below in the context of procedural safeguards.

Insofar as they are based on the right of entry recognised by the Directive, the rules set out in Part III of the Visa Handbook are relevant also to the Member States not fully applying the Schengen *acquis*.

Potential options

The main difficulties mentioned above are already addressed by Part III of the Visa Handbook that provides appropriate guidance with respect to visa applications by non-EU family members for those Member States that fully apply the Schengen *acquis* and as explained above, for those Member States that do not fully apply it to the extent that the Handbook is based on the Directive.

Potential options to further address the **main difficulties** highlighted could be to:

- Include a cross-reference to Part III of the Visa Handbook (in particular its Sections 1, 3.1, 3.2, 4.3, 4.6, 4.7, 4.9, 4.10 and 6 (in the latter case, with an additional reference to point 2.9 of Section I of Part Two of the Schengen Borders Code Handbook)) or reproduce the relevant sections within Section 2.2.1 of the 2009 Guidelines indicating that the applicability of most of the arrangements set out therein can be extended to the EU Member States not fully applying the Schengen *acquis* as they derive directly from the Directive. Reference to Sections 4.7, 4.9 and 6 would require additional explanations to the extent that adaptations would be necessary in order for them to be extended to the Member States not fully applying the Schengen *acquis* insofar as those Sections contain cross-references to provisions of the Visa Code in particular in relation to documentary requirements and the visa format.
- As regards visa refusals without a clear reason, add a cross-reference to Section 3.9 of the 2009 Guidelines on procedural safeguards as possibly revised on the basis of the options set out in Section 2.15 of this Report.
- Emphasise within Section 2.2.1 of the 2009 Guidelines that visa refusals on invalid grounds could in turn also affect the right to respect of family life and the right to found a family as protected by Articles 7 and 9 of the Charter of Fundamental Rights of the European Union.

(ii) Visa fee, access to consulates and excessive delays

Overview

Article 5(2) of the Directive and **Section 2.2.1 of the 2009 Guidelines** expressly state that visas for non-EU family members must be issued free of charge, as soon as possible and on the basis of an accelerated procedure. These issues have not been addressed in CJEU case-law since 2009 but Section 2.2.1 of the 2009 Guidelines does specify that, by analogy with Article 23 of the Visa Code, the Commission considers that delays of more than four weeks are not reasonable and **Part III of the Visa Handbook** contains guidance on the matter.

[91] Annex to the Commission Recommendation establishing a common "Practical Handbook for Border Guards" to be used by Member States' competent authorities when carrying out border control of persons and replacing Commission Recommendation C(2006) 5186 of 6 November 2006, 8 October 2019, C(2019) 7131 final.

Excessive delays for issuing visas or obtaining appointments to submit the application for an entry visa were identified as a main difficulty. The imposition of a visa fee coupled with a reported lack of access to consulates and/or the requirement to apply for a visa through an external service provider were also identified as main difficulties. However, it is noted that Your Europe Advice queries, constituting the main source of information for this difficulty, do not always make clear whether the fee is imposed by the national administration or whether this is rather a service fee charged by an external service provider. While the former could potentially be a misapplication of the Directive, the latter would not necessarily be a breach provided this stays within the limitations set by national law or Article 17 of the Visa Code as the case may be.

Potential options

Based on the above, potential options for addressing the **main difficulties** that could also operate as indications that Member States that do not fully apply the Schengen *acquis* should also follow the guidance set out in the Visa Handbook with respect to beneficiaries of the Directive, could be to:

- Emphasise directly within Section 2.2.1 of the 2009 Guidelines that non-EU family members must always have the possibility to apply for a visa from the consulate free of charge and should not be discouraged from availing themselves of this right, and add a cross-reference to Section 4.1 of Part III of the Visa Handbook that specifically states that no visa fee can be charged. Alternatively, the text of Section 4.1 of Part III of the Visa Handbook could be incorporated into the 2009 Guidelines. This Section is based solely on the Directive and would therefore not require special adjustments for the Member States that do not fully apply the Schengen *acquis*.
- Further underline the statement in Section 2.2.1 of the 2009 Guidelines that where family members decide to use the services of an external company (for example, to set up an appointment), the imposition of charges by the external service provider is permissible. This could be done by adding a cross-reference to Section 4.2 of Part III of the Visa Handbook stating that if 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 provider, they should pay for these services. Alternatively, the text of Section 4.2 of Part III of the Visa Handbook could be incorporated into the 2009 Guidelines However, with respect to the Member States not fully applying the Schengen *acquis* the statement in Section 4.2 of Part III of the Visa Handbook that service fees must duly respect the requirements of Article 17(4) of the Visa Code would require adaptations to specify the extent to which this should or should not be used as a benchmark for those Member States.
- Specify directly within Section 2.2.1 of the 2009 Guidelines that processing times for visa applications of non-EU family members exceeding 15 days ‘should be exceptional and duly justified’ as stated in Section 4.4 of Part III of the Visa Handbook, possibly coupled with examples of what might be considered as exceptional circumstances justifying a delay.

(iii) Visa exemption

Overview

Article 5(2) of the Directive and **Section 2.2.1 of the 2009 Guidelines** refer specifically to Article 10 residence cards as exempting their holders from the visa requirement under Regulation (EU) 2018/1806[92] when they travel together with or join the EU citizen. Section 2.1 of **Part III of the Visa Handbook** and Point 2.8 of Section I of Part Two of the **Schengen Borders Code Handbook**[93] clarify that the visa exemption applies not only to non-EU family members holding an Article 10 residence card but also to those family members holding a valid permanent residence card issued under Article 20 of the Directive. Section 2.2.1 of the 2009 Guidelines also specifies that residence cards not issued under the Directive[94] can exempt the holder from the visa requirement under Schengen rules.

Failures to apply the visa exemption to non-EU family members were nevertheless identified as one of the main difficulties encountered by individuals.

CJEU case-law clarifies that:

- In establishing the visa exemption, the Directive does not draw a distinction on the basis of the Member State of entry as 'there is nothing at all in Article 5 indicating that the right of entry of family members of the Union citizen who are not nationals of a Member State is limited to Member States other than the Member State of origin of the Union citizen'.[95]
- Member States must recognise Article 10 residence cards for the purposes of allowing entry into their territory to non-EU family members without a visa 'unless doubt is cast on the authenticity of that card and the correctness of the data appearing on it by concrete evidence that relates to the individual case in question and justifies the conclusion that there is an abuse of rights or fraud'.[96]
- The visa exemption also applies to non-EU family members holding an Article 20 permanent residence card since it is apparent from Recital 8 of the Directive, in the light of which Article 5(2) must be interpreted, 'that an exemption from the requirement to obtain a visa to enter the territory of the Member States should benefit family members of a Union citizen who have already obtained 'a' residence card. […] it is the fact of having obtained a residence card, of whatever kind, pursuant to the provisions of Directive 2004/38, which justifies their exemption from the requirement to obtain a visa.'[97] Article 5(2) must therefore be interpreted as meaning that possession of an Article 20 permanent residence card 'exempts a person who is not a national of a Member State, but who is a family member of a Union citizen and who holds such a card, from the obligation to obtain a visa in order to enter the territory of the Member States.'[98]

[92] Regulation (EU) 2018/1806 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: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018R1806&from=en

[93] Annex to the Commission Recommendation establishing a common "Practical Handbook for Border Guards" to be used by Member States' competent authorities when carrying out border control of persons and replacing Commission Recommendation C(2006) 5186 of 6 November 2006, 8 October 2019, C(2019) 7131 final.

[94] It may assist clarity to refer to the term 'residence permit' as used in both Article 21 of the Convention Implementing the Schengen Agreement and Article 6 of the Schengen Border Code to distinguish such a document from a 'residence card' issued under Directive 2004/38/EC.

[95] C-202/13 *Sean McCarthy and Others*, para. 41.

[96] C-202/13 *Sean McCarthy and Others*, para. 53.

[97] C-754/18 *Ryanair*, para. 32.

[98] C-754/18 *Ryanair*, para. 38.

- Within the Schengen area, the visa exemption under Article 5(2) of the Directive is not limited to non-EU family members who hold a residence card or permanent residence card issued by a Member State which fully applies the Schengen *acquis* and therefore extends to where that card was issued by a Member State that does not fully apply the Schengen *acquis*.[99]
- The Article 20 permanent residence card constitutes sufficient proof that the holder of the card is a family member of a Union citizen and has the right to enter a Member State without a visa upon presenting the residence card, without further verification of the person's status as a family member or any further justification being required.[100]

It appears that the reference to the visa exemption being limited to travelling or joining the EU citizen *in the host Member State* within Section 2.2.1 of the 2009 Guidelines may not be consistent with the CJEU's pronouncement in *Sean McCarthy* that Article 5 of the Directive does not draw a distinction on the basis of the Member State of entry.

In addition, the absence of a specific statement that the visa exemption also applies to holders of Article 20 permanent residence cards and the absence of an express indication that the visa exemption extends also to residence cards issued by Member States not fully applying the Schengen *acquis* might be considered as gaps in the 2009 Guidelines.

Potential options

In order to address the **main difficulties** identified while also bringing coherence between the 2009 Guidelines, the Visa Handbook, the Schengen Borders Code Handbook and CJEU case-law, the following could be added to Section 2.2.1 of the 2009 Guidelines:

- A cross-reference to Section 2.1 of Part III of the Visa Handbook, in particular that in order to benefit from the visa exemption under Article 5(2) of the Directive, residence cards or permanent residence cards do not have to be of a specific format or do not have to bear a particular title. Alternatively, the text of Section 2.1 of Part III of the Visa Handbook could be incorporated into the 2009 Guidelines. This Section is based solely on the Directive and would therefore not require special adjustments for the Member States not fully applying the Schengen *acquis*. However, as explained in Section 2.6 below, this matter is now dealt with by Regulation (EU) 2019/1157[101] that would also need to be taken into account in this context.
- Clarification in line with *Sean McCarthy* that Article 5 of the Directive does not draw a distinction on the basis of the Member State of entry - there is nothing indicating that the visa exemption of residence card holders is limited to the Member States other than the Member State of origin of the Union citizen. A Member State cannot require a non-EU family member of an EU citizen in possession of a residence card issued by another Member State to obtain a visa to enter its territory.
- Reference to Article 20 permanent residence cards in line with *Ryanair* and a cross-reference to Section 2.1 of Part III of the Visa Handbook and Point 2.8 of Section I of Part Two of the Schengen Borders Code Handbook that already clarify that the visa exemption applies not only to non-EU family members holding an Article 10 residence card but also to those family members holding a valid permanent residence card issued under Article 20 of the Directive.
- Clarification that the visa exemption also benefits family members who hold a residence card that was issued by a Member State that does not fully apply the Schengen *acquis* in line with *Ryanair*.

[99] C-754/18 *Ryanair*, para. 47.

[100] C-754/18 *Ryanair*, para. 55.

[101] 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R1157

- Clarification that the visa exemption also extends to residence cards issued to 'Chen parents' and in 'Surinder Singh cases', in line with Section 2.2 of Part III of the Visa Handbook which states that family members who do not fall within the scope of Article 2(2) or 3(2) of the Directive can still be issued with a residence card that is relevant under Article 5(2) of the Directive and which would exempt their holders from the visa requirement. Here, the Visa Handbook explicitly refers to residence cards issued to 'Zhu and Chen parents' and residence cards issued to family members of EU citizens who have returned to the Member State of their nationality. A cross-reference to Section 2.2 of Part III of the Visa Handbook could be added into the 2009 Guidelines or the text of that Section could be directly inserted in the 2009 Guidelines as it is based on the Directive and would therefore not require special adjustments for the Member States not fully applying the Schengen *acquis*.
- A reference to the possible impact which misapplications of the visa exemption might have on the rights to respect of family life and to found a family as protected by Articles 7 and 9 of the Charter of Fundamental Rights of the European Union.

(iv) Other

Overview

Another main difficulty identified is the withholding of travel documents of non-EU family members, and in some cases of their EU family members, during the visa application process. For example, in case of delay, this may cause difficulties such as preventing further visa applications from being made to other Member States when the EU citizen and their family member have planned a holiday to several Member States covering both Schengen and non-Schengen States. This issue is not addressed by the Directive, the 2009 Guidelines, the Visa Handbook or CJEU case-law.

Potential options

In the absence of a distinct provision within the Directive, a potential option for addressing this **main difficulty** could be to:

- Add in Section 2.2.1 of the 2009 Guidelines a clarification that while Member States are entitled to check that the travel documents are genuine, administrative practices involving the withholding of original travel documents until a decision on an entry visa application is taken, may represent, depending on the specific circumstances of the case, an obstacle to the right of EU citizens and their family members to move and reside freely in the territory of another Member State.

2.4 RIGHT OF RESIDENCE OF UP TO THREE MONTHS (ARTICLE 6 OF THE DIRECTIVE; SECTION 2.3 OF THE 2009 GUIDELINES)

Overview

Under **Article 6 of the Directive**, Union citizens have the right of residence on the territory of another Member State for a period of up to three 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 Union citizen need only to be in possession of a valid passport.

The 2009 Guidelines do not address Article 6, as their **Section 2.3** focuses on the right of residence for more than three months.

Although no main difficulties were identified with respect to the right of residence up to three months, there is relevant **CJEU case-law** that could be referred to when revising the 2009 Guidelines.

Potential options

As stated above, **no main difficulties** were identified in relation to Article 6 of the Directive. Nevertheless, the 2009 Guidelines could add a reference to the *G.M.A.* case, where it was stressed that Article 6 of the Directive applies without distinction to all Union citizens, irrespective of the intention with which those citizens enter the host Member State. The CJEU held that, as a consequence, the right of residence of an EU citizen entering another Member State with the intention to seek employment is governed for the first three months by that Article and no condition other than holding a valid identity document can be requested.[102]

2.5 RIGHT OF RESIDENCE OF MORE THAN THREE MONTHS AND ADMINISTRATIVE FORMALITIES FOR EU CITIZENS (ARTICLES 7, 8, 14 AND 22 OF THE DIRECTIVE; SECTION 2.3 OF THE 2009 GUIDELINES)

(i) Unjustified refusal and excessive documentation in relation to registration certificates

Overview

In accordance with **Article 7(1) of the Directive**, EU citizens have a right of residence on the territory of another Member State for a period of longer than three months if they: (a) are workers or self-employed persons in the host Member State; (b) have sufficient resources and comprehensive sickness insurance cover in the host Member State; (c) are following a course of study in the host Member State and have comprehensive sickness insurance cover there or (d) are family members accompanying an EU citizen who satisfies one of the aforementioned conditions.

Article 8(1) of the Directive allows the host Member State to require a Union citizen to register with the relevant authorities for residence of more than three months. As clarified in **Section 2.3 of the 2009 Guidelines**, the 'list of documents to be presented with the application for residence', as set out in **Article 8(3)** of the Directive is exhaustive. No additional documents can be requested. This is emphasised in **Recital 14** of the Directive which adds that 'the supporting documents required by the competent authorities for the issuing of a registration certificate or of a residence card should be comprehensively specified in order to avoid divergent administrative practices or interpretations constituting an undue obstacle to the exercise of the right of residence by Union citizens and their family members.'

The imposition of excessive requirements on EU citizens, such as rental agreements or sufficient resources for EU citizens who are workers or self-employed, was nevertheless identified as a main difficulty. Sometimes EU citizens were required to present a passport as a valid identity card was not accepted. In some cases, the right of residence was refused on invalid grounds, including, for instance, due to – the then upcoming - Brexit. Stakeholders also reported particular difficulties for EU citizens without a fixed address (homeless) in registering in the host Member State, considering that access to an address with a shelter organisation was considered to be reliance on social assistance.

Recital 11 of the Directive recalls that the fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures. It emphasises the fundamental status of the right to free movement of Union citizens, as recognised in Articles 20 and 21 TFEU. Therefore, the formulation used in the Guidelines referring to the 'application for residence' with respect to Union citizens could arguably not be sufficiently accurate given that Article 8(1), supported by Recital 11, merely allows Member States to require EU citizens to register with the authorities. The right to reside in another EU Member State, in compliance with the conditions of the Directive, derives directly from the TFEU.

[102] C-710/19 *G.M.A.* paras. 35-36.

Potential options

While Section 2.3 of the 2009 Guidelines already specifies that the list of documents to be presented with the application is exhaustive, the **continued recurrence of difficulties** for EU citizens indicates that further clarifications could be introduced in the 2009 Guidelines. Potential options might therefore be to:

- Further clarify the exhaustiveness of the list of documents to be presented when registering in the host Member State by introducing examples based on the main difficulties identified: for example, to specify that a requirement to prove sufficient resources cannot be imposed on workers or self-employed persons and that pay slips, rental agreements, proof of deregistration in other Member States, etc. may not be required either. In this context, a reference could be introduced to Recitals 11 and 14 of the Directive. It could be clarified that Member States should at all times accept a valid identity card issued by another Member State.
- Amend the wording in the second paragraph of Section 2.3 of the 2009 Guidelines where reference is made to the 'application for residence' of EU citizens by introducing a more accurate reference to the registration requirement for EU citizens consistently with the terminology used by Article 8 of the Directive. Consideration may be given to using the terms 'registration of residence' or 'application for registration' instead.
- As regards refusals to issue a registration certificate to a Union citizen without a clear reason, add a cross-reference to Section 3.9 of the 2009 Guidelines on procedural safeguards as possibly revised on the basis of the options set out in Section 2.15 of this Report.

(ii) Excessive delays

Overview

Article 8(2) of the Directive provides that registration certificates must be issued immediately upon presentation of the relevant documentation.

Excessive delays can represent a substantial difficulty for EU citizens and result in additional burdens. For example, in one case, the long delays in issuing registration certificates, meant that the EU citizen had to pay tuition fees for the children, while no fees would have been payable if the registration had occurred in a timely fashion.

The 2009 Guidelines currently do not make reference to the requirement that a registration certificate must be issued immediately. This requirement is however explicit in Article 8(2) of the Directive.

Potential options

Article 8(2) which provides that registration certificates must be issued immediately is a clearly formulated legal obligation for Member States under the Directive. However, excessive delays in the issuing of registration certificates or in obtaining appointments was identified as a **widespread problem**. In addition, the results of the public consultation on EU citizenship rights which feeds the 2020 EU Citizenship Report identify lengthy and unclear administrative procedures as one of the two key challenges for citizens moving to another Member State.[103] Hence, the following option could be considered:

- Emphasise the importance of Article 8(2) of the Directive to issue a registration certificate immediately directly within Section 2.3 of the 2009 Guidelines, in contrast with the requirements for residence cards issued to non-EU family members under Section 2.2.2 of the 2009 Guidelines.

[103] Results of the Public Consultation on EU Citizenship Rights 2020, December 2020, p.17-18, https://ec.europa.eu/info/sites/info/files/report_on_the_public_consultation_on_eu_citizenship_rights_2020_en.pdf

The use of other measures could be considered regarding this key issue in the implementation of the Directive.

(iii) Sufficient resources

Overview

Article 7(1)(b) of the Directive sets out the conditions for residence in another Member State for economically inactive citizens, namely, to have sufficient resources for themselves and their family members not to become a burden on the social assistance system, and to have comprehensive sickness insurance. **Article 8(4)** specifies that Member States may not lay down a fixed amount which they regard as 'sufficient resources' but must take into account the personal situation of the person concerned.[104] **Section 2.3.1 of the 2009 Guidelines** reiterates this and further clarifies the application of the notion of sufficient resources stating that it 'must be interpreted in the light of the objective of the Directive 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 of the host Member State'. Difficulties to prove sufficient resources were however identified as a main difficulty. These resulted either from a lack of clarity as to what constitutes sufficient resources or from the refusal to accept evidence of sufficient resources which takes a certain form, such as a bank account held in another Member State as opposed to an account held in the host Member State.

CJEU case-law and the 2009 Guidelines provide further clarifications about the requirement for economically inactive citizens to dispose of sufficient resources, in particular as regards the threshold and types of resources and the assessment to be undertaken by national authorities. Section 2.3.1 of the Guidelines clarifies that a first step to assess the existence of sufficient resources should be whether the EU citizen would meet the national criteria to be granted the basic social assistance benefit as required in Article 8(4) of the Directive. According to the Guidelines, where this criterion is not applicable, the minimum social security pension should be taken into account. In any case, Article 8(4) prohibits the Member States from laying down a fixed amount for 'sufficient resources', below which the right of residence could be refused. The personal situation of the individual concerned should be taken into account. Section 2.3.1 of the 2009 Guidelines also states that 'resources do not have to be periodic and can be in the form of accumulated capital'. There can be no limitation of the evidence of sufficient resources.[105]

In this context, the Guidelines also specify that resources from a third person must be accepted.[106] Still, refusals to take into account the resources of the family members of the EU citizen were identified as a main difficulty in recent years.

The CJEU has pronounced itself further on this particular issue since 2009 and confirmed its interpretation of the Directive. In particular:

- In *Kuldip Singh*, the CJEU repeated that a Union citizen has sufficient resources for himself and his family members not to become a burden on the social assistance system of the host Member State during his period of residence even where those resources derive in part from those of his spouse who is a third-country national.[107]
- In *Bajratari*, the CJEU stated that Article 7(1)(b) merely requires a Union citizen to have sufficient resources at his disposal to prevent him from becoming an unreasonable burden on the social assistance system of the host Member State during his period of residence, without

[104] Confirmed by the CJEU in, for instance, C-140/12, *Brey*, para. 68.

[105] C-424/98 *Commission v Italy*, para. 37, already mentioned in the 2009 Guidelines.

[106] The Guidelines refer in this context to case C-408/03 *Commission v Belgium*, para. 40 et seq.

[107] C-218/14 *Kuldip Singh*, para. 77.

establishing any other conditions, in particular as regards the origin of the resources.[108] This also applies if his resources are derived from income obtained from the unlawful employment of his third-country national father who has no residence card and work permit.[109]

- In *Dano*, which concerned a 'special non-contributory cash benefit', the CJEU clarified that Article 7(1)(b) of the Directive seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence.[110] The Court further held that the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether the citizen meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.[111]

Recital 16 of the Directive emphasises that 'as long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled'. Section 2.3.1 of the 2009 Guidelines explains that the authorities of the Member States must carry out a proportionality test when assessing whether an individual who was granted a minimum subsistence benefit and whose resources can no longer be regarded as sufficient has become an unreasonable burden. Section 2.3.1 provides three sets of criteria based on Recital 16 of the Directive and derived from Article 14 of the Directive, related to duration, personal situation and the amount of aid granted. Finally, the Guidelines clarify that only receipt of social assistance benefits can be considered relevant to determining whether a person is a burden on the social assistance system.

While some difficulties were identified in relation to the assessment as to whether an EU citizen had become an unreasonable burden on the social assistance system of a host Member State, these did not qualify as main difficulties. The difficulties faced by EU citizens in relation to 'sufficient resources' more commonly related to the evidence to be presented at the time of registration in the host Member State, as mentioned above.

Potential options

Given that the **main difficulties** highlighted above are to some extent already addressed by Section 2.3.1 of the 2009 Guidelines, revisions could focus on the evidence that may be required to demonstrate whether an EU citizen has sufficient resources. Potential options might be to:

- Add concrete examples to the clarification in Section 2.3.1 that the evidence of sufficient resources cannot be limited in form: for example, by refusing to accept bank statements from another Member State.
- Add references to *Kuldip Singh* [112] and *Bajratari*[113] where the Guidelines specify that resources from a third person must be accepted.
- Clarify, in line with *Dano*, which concerned a 'special non-contributory cash benefit', that Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence.[114] The financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to

[108] C-93/18 *Bajratari*, para. 34

[109] C-93/18 *Bajratari*, para. 42.

[110] C-333/13 *Dano*, para. 76.

[111] C-333/13 *Dano*, para. 80.

[112] C-218/14 *Kuldip Singh*, para. 77.

[113] C-93/18 *Bajratari*, para. 42.

[114] C-333/13 *Dano*, para. 76.

determine whether the citizen meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.[115]

- A cross-reference to the part of the Guidelines dealing with Article 12 could also be included (see potential options in Section 2.7 below) so as to highlight that in case of death or departure of the Union citizen, pursuant to Article 12(3) of Directive 2004/38/EC, the retention of the right of residence in the host Member State of children who are in education there and the parent who is their primary carer is not subject to the condition that they have sufficient resources and comprehensive sickness insurance cover.[116]

In relation to the assessment of whether a person has sufficient resources for themselves and their family members not to become an unreasonable burden on the social assistance system of the Member State **in the context of an expulsion decision**, the following options could moreover be considered in order to take into account recent **CJEU case-law**:

- In line with *Brey*, clarify that the mere fact that a national of a Member State receives social assistance is not sufficient to show that they constitute an unreasonable burden on the social assistance system of the host Member State and hence can be expelled for this reason.[117] However, highlight that the fact of being eligible for a social assistance benefit 'could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b)'.[118]
- Clarify that the Member State should, before adopting an expulsion decision on this ground, examine the personal situation of the person concerned, including whether they are experiencing temporary difficulties and take into account the duration of their residence, their personal circumstances, and the amount of aid which has been granted to them.[119]
- A cross-reference could be introduced to the part of the Guidelines dealing with Article 24 (see potential options in Section 2.10 below) where further clarifications are suggested for the assessment of whether a claim for a social assistance benefit constitutes a failure to comply with the sufficient resources requirement laid down for not economically active citizens.[120]

(iv) Comprehensive sickness insurance

Overview

Article 7(1) of the Directive requires **inactive citizens and students** to have comprehensive sickness insurance cover in the host Member State.

Section 2.3.2 of the 2009 Guidelines clarifies that 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. For this

[115] C-333/13 *Dano*, para. 80.

[116] C-310/08 Ibrahim, para. 56 and C-480/08 Teixeira, paras.68 and 69.

[117] C-140/12 *Brey*, para. 75.

[118] C-140/12 *Brey*, para. 63

[119] C-140/12 *Brey*, para. 69.

[120] C-333/13 *Dano*, para. 80.

assessment, Member States must act in accordance with the limits imposed by Community law and in accordance with the principle of proportionality.[121] The 2009 Guidelines state that 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 pensions as per Regulation (EC) 883/2004[122] and that the European Health Insurance Card offers such comprehensive cover where the EU citizen does not move residence as understood under Regulation (EC) 883/2004 to the host Member State and has the intention to return to the competent Member State.

Despite the fact that the 2009 Guidelines make clear that Member States should not adopt a restrictive approach, individuals report on excessively strict requirements to fulfil the comprehensive sickness insurance requirement. For example, stakeholders highlighted the non-acceptance of private health cover, only accepting S1 forms or excessively strict requirements for private insurance while no such cover exists on the market of that Member State. Catch-22 situations were reported where the citizen could not obtain a registration certificate without providing specific proof of health insurance while the health insurance could not be obtained in the Member State of origin without a registration certificate.

The issue of what constitutes comprehensive sickness insurance has been brought before the Court of Justice in a number of pending cases.[123] The Commission has also issued a letter of formal notice against the United Kingdom for its policy of refusing to accept that reliance on the public national health service meets the requirements for holding comprehensive sickness insurance.[124] Further clarifications on the notion of comprehensive sickness insurance may therefore be provided by the CJEU in the near future.

Potential options

With a view to addressing the **main difficulties** described above, the 2009 Guidelines could:

- Introduce further clarifications on the 'comprehensive sickness insurance' requirement.
- Introduce a reference to Recital 31 of the Directive which recalls that, in accordance with the prohibition of discrimination contained in the Charter, Member States should implement the Directive without discrimination between the beneficiaries.
- Refer to the pending CJEU judgments in *A*[125] and *VI*.[126] In *A*, the Advocate General has considered that an economically inactive Union citizen who complies with the conditions set out in Article 7(1)(b) and who, after moving the centre of all of his interests to a host Member State, demonstrates a genuine link of integration with that State, should not be automatically refused access to the social security system of that Member State. The EU citizen should be allowed to receive health care benefits provided by the State, on the same conditions as nationals, on the ground that he is not employed or self-employed within its territory.[127] In *VI*, the Court has been asked to confirm whether the reciprocal arrangements regarding health insurance cover which are in place between the United Kingdom and Ireland can meet the requirement of holding comprehensive sickness insurance for the purposes of the national measures which transpose Article 7(1)(b) of the Directive.

[121] C-413/99 *Baumbast*, paras. 89-94), already mentioned in the Guidelines.

[122] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0883&from=EN

[123] C-535/19 *A* on a reference from the Latvian courts; C-247/20 *VI* on a reference from the UK courts.

[124] Commission, Citizens' rights: Commission urges the United Kingdom to ensure a comprehensive sickness insurance for EU citizens, October infringements package: key decisions, (30 October 2020):

https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687

[125] C-535/19 *A* (pending).

[126] C-247/20 *VI* (pending).

[127] Opinion of Advocate General Saugmandsgaard Øe in Case C-535/19 *A* delivered on 11 February 2021.

(v) Status of worker and self-employed

Overview

In accordance with **Article 7(1)(a) of the Directive**, EU citizens have a right of residence on the territory of another Member State for a period of longer than three months if they are workers or self-employed persons in the host Member State. **Article 8(3)** specifies the evidence that may be required by a host Member State for the registration certificate to be issued: a valid identity card or passport and a confirmation of engagement from the employer, certificate of employment, or proof of self-employment. **Section 2.3 of the 2009 Guidelines** clarifies that the list of documents in Article 8(3) is exhaustive and that no additional documents can be requested.

Nevertheless, there continue to be significant difficulties concerning excessive documentary requirements for proof of work or self-employment. In addition, despite extensive CJEU case-law on the meaning of 'worker', a restrictive understanding of the notion of worker was also reported. The recognition of self-employed status was also identified as a main difficulty, including situations in which persons were required to register as self-employed persons in the host Member State in order to obtain a registration certificate while the status could not be obtained without a registration certificate. The CJEU has clarified that the term 'worker' has a meaning in EU law and cannot be subject to national definitions or be interpreted restrictively.[128]

Guidance on the definition of 'worker' is provided in the **2010 Commission Communication** 'Reaffirming the free movement of workers: rights and major developments', not in the 2009 Guidelines. In addition, the 2009 Guidelines do not explicitly deal with the registration of residence by self-employed persons which may be considered a gap.

Potential options

Based on the above, potential options aimed at addressing the **main difficulties** identified could be to revise Section 2.3 of the 2009 Guidelines as follows:

- Introduce clarifications within the 2009 Guidelines on the status of worker. Given the existence of a specific guidance document on this topic, namely the 2010 Commission Communication 'Reaffirming the free movement of workers: rights and major developments', it would be of utmost importance to refer to the Communication in this context. As set out in the introduction to Section 2 of this Report, there are several options for referring to other guidance documents. Guidance on the notion of worker could be reproduced in the 2009 Guidelines. These clarifications could focus on the main difficulties identified, such as how to deal with registrations by persons on temporary or probationary, or part-time contracts. Any further changes to the Commission Communication on workers would however not automatically be reflected in the 2009 Guidelines. Alternatively, a cross-reference to specific sections of the Communication could be introduced in the Guidelines in order to ensure a consistent approach.
- Further clarify the exhaustiveness of the list of documents to be presented when registering in the host Member State by introducing examples based on the main difficulties identified: for example, to specify that a requirement to prove sufficient resources or payments of social security contributions cannot be imposed on workers or self-employed persons.
- Emphasise that self-employed persons enjoy a right of residence in the host Member State as active EU citizens, similar to that of workers. While evidence of self-employment may be required, this may not result in a catch-22 situation whereby a person is required to register in the host Member State as a self-employed person as a precondition for obtaining a registration certificate nor in excessive evidentiary requirements.

[128] C-75/63 and C-53/63, as referred to in Commission Communication COM(2010)373 final.

(vi) Retention of worker or self-employed status

Overview

Article 7(3) of the Directive sets out in which conditions former workers or self-employed persons retain their status of worker or self-employed person. This covers the situations in which the person (a) is temporarily unavailable to work as the result of an illness or accident, (b) is in duly recorded involuntary unemployment after having been employed for one year and having registered as a jobseeker, (c) is in duly recorded involuntary unemployment after having completing a fixed-term employment of less than a year or after having become involuntarily unemployed during the first year and having registered as a jobseeker, in which case the status can be retained for no less than six months; and (d) embarks on vocational training. In the latter case, the training must be related to the previous employment, unless the person became involuntarily unemployed.

Article 7(3) thus guarantees that all EU citizens in a position of temporary inactivity retain their status of worker and, consequently, their right to reside in the host Member State in those situations, the duration of which depends on the specific cause of the inactivity.

Difficulties related to the retention of worker or self-employed status were identified as main difficulties. They covered, for instance, the refusal to recognise the right to retain worker status or withdrawals of the residence card of the non-EU spouse of an EU citizen who should have benefited from Article 7(3). The absence of further guidance on the retention of worker or self-employed status may be considered as a gap in the 2009 Guidelines.

Recent **CJEU case-law** clarifies that:

- Article 7(3)(a) does not cover the situation of pregnancy and the aftermath of childbirth. However, in line with *Saint-Prix*, a woman who temporarily gives up work because of the late stages of her pregnancy retains the status of 'worker' within the meaning of Article 45 TFEU, provided that she returns to work or finds another job within a reasonable period after the birth of her child.[129] The CJEU reached a similar conclusion for self-employed women in *Dakneviciute* with respect to Article 49 TFEU.[130]
- EU citizens who have ceased to work in a self-employed capacity in another Member State, because of an absence of work owing to reasons beyond their control, after having carried on that activity for more than one year, are covered by Article 7(3)(b) of Directive 2004/38 and retain the status of self-employed persons.[131]
- An EU citizen who was a worker in another Member State within the meaning of Article 7(1)(a) of the Directive before becoming involuntarily unemployed, retains that status for a period of no less than six months, based on Article 7(3)(c) of the Directive, if the person concerned had worker status prior to the unemployment and registered as a jobseeker, even if the employment was of a short duration, as in *Tarola*.[132]
- After the expiry of the six-month period referred to in Article 7(3)(c) of Directive 2004/38, an EU citizen may retain a right of residence under Article 14(4(b) of the Directive provided they are registered as looking for work and have a genuine chance of being engaged.[133]

[129] C-507/12 *Saint-Prix*, paras. 28 and 40.

[130] C-544/18 *Dakneviciute*, para. 34.

[131] C-442/16 *Florea Gusa*, para. 38.

[132] C-483/17 *Tarola*, paras. 46-48.

[133] C-67/14 *Alimanovic and Others*, paras. 52 and 56-58

Potential options

The **main difficulties** identified above, could be addressed through the following additions to Section 2.3 of the 2009 Guidelines under a new subsection on the retention of the status of worker or self-employed person:

- As emphasised by the CJEU in *Tarola* and *Florea Gusa*,[134] specify that a reading of the provisions of Article 7(1)(a) in conjunction with those of Article 7(3) of Directive 2004/38 shows that entitlement to retain the status of worker as provided for in the latter provision is afforded to all Union citizens who have pursued an activity in the host Member State, whatever the nature of that activity - that is to say, whether they worked in an employed or self-employed capacity.
- Further clarification of the implications of the right to retain worker or self-employed status for EU citizens and the derived continued right of residence of their family members, as summarised in paragraphs 44 and 45 of *Tarola*: a Union citizen who has pursued an activity in an employed or self-employed capacity in the host Member State retains his status of worker indefinitely (i) if he is temporarily unable to work as the result of an illness or accident, (ii) if he worked in an employed or self-employed capacity in the host Member State for more than one year before becoming involuntarily unemployed, or (iii) if he has embarked on vocational training.[135] By contrast, under Article 7(3)(c) of Directive 2004/38, a Union citizen who has pursued an activity in an employed or self-employed capacity in the host Member State for a period of less than one year retains his status of worker only for a period of time which that Member State may determine, provided it is no less than six months.[136] This covers situations in which the employee's contract was of short duration (less than a year) and situations in which a worker has been obliged, for reasons beyond his control, to stop working in the host Member State before one year has elapsed, regardless of the nature of the activity or the type of employment contract entered into for that purpose (regardless of whether he worked as an employed or self-employed person and whether he entered into a fixed-term contract of more than a year, an indefinite contract or any other type of contract).[137]
- Clarification in line with *Alimanovic*, that EU citizens may retain a right of residence after the expiry of the six-month period referred to in Article 7(3)(c) of Directive 2004/38 on the basis of Article 14(4(b) of the Directive provided they are registered as a jobseeker and have a genuine chance of being engaged.[138]
- Clarification in line with *Saint-Prix*, that Article 7(3)(a) of Directive 2004/38 does not cover the situation of pregnancy and the aftermath of childbirth, but that a woman who temporarily gives up work because of the late stages of her pregnancy retains the status of 'worker' within the meaning of Article 45 TFEU, provided that she returns to work or finds another job within a reasonable period after the birth of her child.[139] A similar reference could be included for self-employed women based on *Dakneviciute* with respect to Article 49 TFEU.[140]

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[134] C-483/17 *Tarola*, para. 39 and C-442/16 *Florea Gusa*, paras. 37 and 38.

[135] C-483/17 *Tarola*, para. 44.

[136] C-483/17 *Tarola*, para. 45.

[137] C-483/17 *Tarola*, paras. 47-48.

[138] C-67/14 *Alimanovic and Others*, paras. 52 and 56-58

[139] C-507/12 *Saint-Prix*, paras. 28 and 40.

[140] C-544/18 *Dakneviciute*, para. 34.

- A cross-reference could be added to the potential new section on retention of right of residence by jobseekers as outlined in Section 2.8 below.

(vii) Other

Overview

Some Member States require EU citizens to register in the population register and obtain a personal identification number from the tax authorities. A personal identification number is required in those Member States in order to access employment, affiliate to social security and access public services, including healthcare, or services provided by private service providers. While the situation only concerns one Member State, difficulties in obtaining such a personal identification number were reported in such high numbers, that they have been identified as main difficulties faced by EU citizens. The main reasons for refusal to issue a personal identification number are reportedly, first, the requirement to demonstrate residence of more than one year in the host Member State, and, secondly, strict requirements for demonstrating possession of comprehensive sickness insurance. A refusal to issue a personal identification number not only affects the free movement of persons and generates discrimination on grounds of nationality, it also poses obstacles to the effective exercise of fundamental freedoms relating to the single market, given its detrimental effects on the free movement of workers and the right of EU citizens to receive services.

Article 7 of the Directive grants EU citizens a right of residence in another Member State after having lived there for three months. As mentioned above, Recital 11 of the Directive recalls that the fundamental and personal right of residence in another Member State is conferred directly on Union citizens by the Treaty and is not dependent upon their having fulfilled administrative procedures. Article 7(1) allows a host Member State to require inactive EU citizens to hold comprehensive sickness insurance for themselves and their family members. The interaction of the EU residence rules with national rules relating to the issuance of personal identification numbers is not currently addressed in the 2009 Guidelines. There is no CJEU case-law on the requirement of a personal identification number to complete administrative procedures in the host Member State. However, the Court of Justice has previously indicated that Member States are entitled to maintain population registers for the purpose of the registration of EU citizens and their family members.[141]

Potential options

With respect to the abovementioned **main difficulty**, potential options could be to include further clarifications regarding the situation of personal identification numbers and under which conditions this requirement could exist in compliance with EU law. However, since it is essentially a problem in only one Member State, the use of other measures could be considered regarding this issue.

2.6 RIGHT OF RESIDENCE OF MORE THAN THREE MONTHS AND ADMINISTRATIVE FORMALITIES FOR NON-EU FAMILY MEMBERS AND RIGHT TO WORK (ARTICLES 7, 9 TO 11, 22 AND 23 OF THE DIRECTIVE; SECTION 2.2.2 OF THE 2009 GUIDELINES)

(i) Unjustified refusal and excessive requirements in relation to residence cards

Overview

Article 7(2) of the Directive provides for a derived right of residence for more than three months for family members who are not nationals of a Member State, accompanying or joining the Union citizen

[141] C-524/06 *Huber*.

in the host Member State, provided that the Union citizen satisfies one of the conditions referred to in Article 7(1)(a), (b) or (c). This provision should be viewed alongside Recital 5 of the Directive stating that the right of all Union citizens to move and reside freely within the territory of the Member States should, if it is to be exercised under objective conditions of freedom and dignity, be also granted to their family members, irrespective of nationality.

Article 9(1) requires Member States to issue a residence card to non-EU family members where the planned period of residence is for more than three months. The right of residence of non-EU family members is evidenced by the issuing of a document called 'residence card of a family member of a Union citizen' in accordance with **Article 10(1)** of the Directive.

The Directive does not prescribe a specific format for the residence card and **Section 2.2.2 of the 2009 Guidelines** states that:

- 'The format of the residence card is not fixed, so Member States are free to lay it down as they see fit. However, the residence card must be issued as a self-standing document.'
- 'The denomination of this residence card must not deviate from the wording prescribed by the Directive as different titles would make it materially impossible for the residence card to be recognised in other Member States as exempting its holder from the visa requirement under Article 5(2).'

This matter is now dealt with by Regulation (EU) 2019/1157[142] that clarifies the situation with respect to residence documents issued to Union citizens and their family members exercising their right of free movement. In particular, Article 7(1) of the Regulation provides that when issuing residence cards to non-EU family members, Member States must use the format established by Regulation 1030/2002.[143] Article 7(2) of the Regulation then provides that by way of derogation from Article 7(1), the card must bear the title 'Residence card' or 'Permanent residence card' and Member States must indicate that these documents are issued to a family member of a Union citizen in accordance with Directive 2004/38/EC. Article 8 of the Regulation deals with the phasing out of existing residence cards.[144]

The importance of the residence card in facilitating the free movement of non-EU family members by benefitting from a visa exemption as per Article 5(2) of the Directive was recognised by the **CJEU** in *Sean McCarthy and Others*[145] and *Diallo*.[146]

However, as explained in Section 2.3 above, Section 2.2 of Part III of the Visa Handbook states that while family members are issued with Article 10 residence cards or Article 20 permanent residence cards, in certain situations, family members finding themselves in a different situation (namely those who do not fall within the scope of Article 2(2) or 3(2) of the Directive) can still be issued with a residence card that is relevant under Article 5(2) of the Directive and exempt their holders from the visa requirement. Here, the Visa Handbook refers to residence cards issued to 'Chen parents' and

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[142] 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32019R1157

[143] Regulation (EC) No 1030/2002 of 13 June 2002 laying down a uniform format for residence permits for third-country nationals: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32002R1030

[144] Article 8(1) of Regulation (EU) 2019/1157 states that residence cards of family members of Union 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 not meeting minimum security standards or which do not include a functional MRZ. The latter will cease to be valid at their expiry or by 3 August 2023, whichever is earlier.

[145] C-202/13 *Sean McCarthy and Others*, paras. 40 and 41.

[146] C-246/17 *Diallo*, para. 67.

residence cards issued to family members who have returned to the Member State of their nationality ('Surinder Singh cases').

There is therefore a lack of consistency between the 2009 Guidelines and the Visa Handbook insofar as the former does not refer to the residence cards issued to 'Chen parents' and in 'Surinder Singh cases'. However, in accordance with CJEU case-law, 'Chen parents' derive a right of residence from the minor in their care, who resides in the host Member State in accordance with Article 7(1)(b) of the Directive, from Directive 2004/38 and Article 21 TFEU.[147] As regards 'Surinder Singh cases', the Court has held that the conditions for granting a derived right of residence to the non-EU family member of an EU citizen, following their return to the Member State of which the EU citizen is a national and after having resided together in a host Member State, should not in principle be more strict than those provided for by Directive 2004/38, which applies by analogy in such cases.[148]

Article 10(2) of the Directive lists the documents to be presented for the purpose of issuing the residence card and **Section 2.2.2 of the 2009 Guidelines** states clearly that the 'list of documents to be presented with the application for a residence card is exhaustive, as confirmed by Recital 14. No additional documents can be requested.'

The imposition of excessive requirements on non-EU family members applying for a residence card was nevertheless identified as a main difficulty. Examples of excessive requirements which have been reported include the imposition of requirements to present a birth certificate, to apply within five days of arrival in the host Member State, to provide proof of health insurance despite worker status of the EU citizen, to present pay slips, bank statements, etc. Such requirements go beyond Article 10(2) of the Directive and the specification in Section 2.2.2 of the 2009 Guidelines.

Refusals to issue residence cards on invalid grounds were also identified as highly recurrent. In some cases, the issuance of a residence card was refused because the entry visa was not of the correct type or had expired, because of a lack of employment despite proof of self-sufficiency or due to a failure to recognise the rights of returning nationals. Furthermore, invalid grounds were reported as being invoked to justify not processing applications, these included refusals to process a non-EU family member's application until the EU citizen's application for a registration certificate has been processed or requiring that the third-country national family member holds a visa before applying for a residence card contrary to CJEU case-law.[149]

In addition to creating obstacles or impediments to the practical and effective enjoyment of rights under the Directive, such as the right to take up employment or self-employment in the host Member State in accordance with **Article 23** of the Directive, these difficulties must also be considered in the broader context of the right to respect for family life and the right to found a family as protected by Articles 7 and 9 of the **Charter of Fundamental Rights of the European Union**.

Potential options

While the **main difficulties** highlighted above are to some extent already addressed by Section 2.2.2 of the 2009 Guidelines, this could be revised to further emphasise the importance of the derived right of free movement of non-EU family members. To this end, potential options could be to:

- Specify in line with *McCarthy*,[150] *Lounes*[151] and *Diallo*[152] that the purpose of Directive 2004/38/EC is to facilitate the exercise of the primary and individual right to move and reside

[147] C-86/12 *Alokpa & Moudoulou,* para.29; C-115/15 *NA*, para. 79; C-165/14 *Rendón Marín*, para. 52.

[148] C-456/12 *O. & B.*, para. 50; C-133/15 *Chavez-Vilchez and Others*, paras. 54-55; C-230/17 *Deha Altiner & Ravn*, para. 27; C-165/16 *Lounes,* para. 61; C-673/16 *Coman*, para. 25; C-89/17 *Banger*, para. 17.

[149] See C-459/99 *MRAX*; C-127/08 *Metock*.

[150] C-202/13 *Sean McCarthy and Others*, paras. 31 and 33.

[151] C-165/16 *Lounes*, para. 31.

freely within the territory of the Member States which is conferred directly on EU citizens by Article 21(1) TFEU. Therefore, in accordance with Recital 5 of the Directive, that right should, if it is to be exercised under objective conditions of dignity, be also granted to the family members of those citizens, irrespective of nationality.

- Add references to *McCarthy*[153] and *Diallo*[154] to stress the importance of the residence card in facilitating the free movement of non-EU family members and contextualise this to take into account the effect that invalid refusals, or excessive requirements could have on other rights, in particular:
    - The right to take up employment or self-employment in the host Member State in accordance with Article 23 of the Directive.
    - The right to respect for family life and the right to found a family as protected by Articles 7 and 9 of the Charter of Fundamental Rights of the European Union.
- Strengthen the statement in Section 2.2.2 of the 2009 Guidelines that the list of documents in Article 10(2) of the Directive is exhaustive with a reference to the assertion in *Diallo* that national authorities must only verify whether the third-country national '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.'[155] Therefore, third-country nationals 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.[156]
- Clarify in Section 2.2.2 of the 2009 Guidelines that residence cards issued to 'Chen parents' and in 'Surinder Singh cases' exempt their holder from the visa requirement under Article 5(2) and provide guidance on how to ensure such visa exempting effect. This would bring Section 2.2.2 of the 2009 Guidelines in line with the relevant CJEU case-law and align with the statement in Section 2.2 of Part III of the Visa Handbook that family members finding themselves in a different situation (who do not fall within the scope of Article 2(2) or 3(2) of the Directive) are issued with a residence card that is relevant under Article 5(2) of the Directive.
- Revise Section 2.2.2 of the 2009 Guidelines to take into account Regulation (EU) 2019/1157, in particular, its Article 7(2).

(ii) Excessive delays

Overview

Article 10(1) of the Directive requires the 'Residence card of a family member of a Union citizen' to be issued no later than six months from the date on which the application was submitted and a certificate of application for a residence card be issued immediately. **Section 2.2.2 of the 2009 Guidelines** specifies that the maximum period of six months is justified only where examination of the application involves public policy considerations. However, a very significant number of sources mentioned delays in processing applications for Article 10 residence cards, including delays for appointments and delays in issuing certificates of application. Certificates of application are not mentioned in the 2009 Guidelines.

While delays might not ultimately affect the actual ability to reside in the host Member State, the **CJEU** acknowledged the importance of the residence card in *Diallo* in that it enables the third-country national 'to certify, in so far as the material conditions required for the purposes of obtaining his right

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[152] C-246/17 *Diallo*, para. 64.

[153] C-202/13 *Sean McCarthy and Others*, paras. 40 and 41.

[154] C-246/17 *Diallo*, para. 67.

[155] C-246/17 *Diallo*, para. 63.

[156] C-246/17 *Diallo*, para. 65.

of residence are met, the existence of his derivative right of residence, facilitating both the exercise of that right and his integration in the host Member State' and because the third-country national in turn benefits from a visa exemption in line with Article 5(2) of the Directive[157] as explained above.

Difficulties related to excessive delays may also be viewed in parallel with difficulties encountered pending the application process (residence card application process still ongoing while the entry visa expires; difficulties to demonstrate a right to reside, work, or open a bank account). In particular, difficulties for non-EU citizens to travel while the residence card application process is still ongoing, because passports and original documents are withheld by the national administrations during the application process were also identified as main difficulties.

As with the refusal of residence cards on invalid grounds, excessive delays can also impact the right to take up employment or self-employment in the host Member State under **Article 23** of the Directive, and the rights to respect for family life and to found a family as protected by the **Charter of Fundamental Rights of the European Union**.

Potential options

In light of the abovementioned **main difficulties**, and taking into account that, even if not referring expressly to Directive 2004/38, lengthy procedures are one of the two key challenges identified by respondents in the results of the 2020 public consultation on EU citizenship rights,[158] Section 2.2.2 of the 2009 Guidelines could be revised as follows:

- Add references to key points from Diallo explaining that:
  - The concept of 'issuing', referred to in Article 10(1) of the Directive implies that within the six-month period '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.'[159] At the same time, the Directive must be interpreted as precluding national requirements whereby competent national authorities must issue automatically a residence card of a family member of an EU citizen to the person concerned, where the period of six months 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.[160]
  - The obligation for Member States to issue the residence card to a family member of a Union citizen within the mandatory period of six months necessarily implies the adoption and notification of a decision to the person concerned before that period expires and the same applies when the competent national authorities refuse to issue the residence card of a family member of a Union citizen to the person concerned. [161] Here a link could be made to the requirement for the notification of decisions covered by Section 3.6 of the 2009 Guidelines as possibly updated in line with the options set out in Section 2.15 below.
  - EU law must be interpreted as precluding national provisions, which allow, following the judicial annulment of a decision refusing to issue a residence card of a family member of a Union citizen, the competent national authority

[157] C-246/17 *Diallo*, paras. 66-67.

[158] Results of the Public Consultation on EU Citizenship Rights 2020, December 2020, p.17-18, https://ec.europa.eu/info/sites/info/files/report_on_the_public_consultation_on_eu_citizenship_rights_2020_en.pdf.

[159] C-246/17 *Diallo*, para. 36.

[160] C-246/17 *Diallo*, para. 56.

[161] C-246/17 *Diallo*, paras. 38 and 39.

automatically to regain the full period of six months referred to in Article 10(1) of the Directive.[162] Here too a link could be made to Section 3.6 of the 2009 Guidelines as possibly updated in line with the options set out in Section 2.15 below.

- Emphasise the potentially far-reaching consequences excessive delays could have on a person's rights, for example, where applicants are unable to demonstrate a right to work or to travel or are unable to access services such as opening bank accounts. As regards the right to work, reference could also be made to Article 23 of the Directive. The possible impact of excessive delays on the right to respect for family life and the right to found a family as protected by Articles 7 and 9 of the Charter of Fundamental Rights of the European Union could also be expressly mentioned.
- Reproduce the requirement in Article 10(1) of the Directive that the certificate of application for a residence card must be issued immediately, while underlining that delays in obtaining appointments to apply for residence cards, and therefore receiving a certificate of application, also have broader consequences as described in the previous point and that in practice this has sometimes led to family members leaving the host Member State to apply for another visa abroad instead of obtaining a certificate of application.

(iii) Validity period of residence cards

Overview

In accordance with **Article 11(1) of the Directive**, Article 10(1) residence must be valid for five years from the date of issue or for the envisaged period of residence of the Union citizen, if this period is less than five years. **Section 2.2.2 of the 2009 Guidelines** makes reference to Article 11(1) when specifying that 'the residence card must be issued as a self-standing document and not in the form of a sticker in a passport, as this could limit the validity of the card in violation of Article 11(1).'

The issuance of residence cards with a validity period shorter than five years is not addressed by the 2009 Guidelines and was identified as a main difficulty.

Potential options

Although identified as a **main difficulty**, the issuance of residence cards with a validity period of less than five years was not mentioned by any of the stakeholders consulted nor is it separately addressed in CJEU case-law. It is therefore considered that is not possible to put forward sufficiently evidenced-based or useful options for revisions to the 2009 Guidelines other than to:

- Underline the weight of properly issuing residence cards including with respect to their validity period, in terms of their evidential value and in facilitating the exercise of free movement and residence rights by non-EU family members. This could be supported by cross-references to relevant CJEU case-law described in previous headings of this Section and might be dealt with alongside the potential option set out in point (iv) of Section 2.9 below regarding the validity period of permanent residence cards.

[162] C-246/17 *Diallo*, paras. 68-70.

2.7 RETENTION OF THE RIGHT OF RESIDENCE BY FAMILY MEMBERS IN THE EVENT OF DEATH OR DEPARTURE OF THE UNION CITIZEN AND IN THE EVENT OF DIVORCE, ANNULMENT OF MARRIAGE OR TERMINATION OF REGISTERED PARTNERSHIP (ARTICLES 12 AND 13 OF THE DIRECTIVE)

Overview

Article 12 of the Directive deals with the retention of the right of residence by non-EU family members in the event of the Union citizen's death of departure from the host Member State and **Article 13 of the Directive** governs retention of the right of residence by non-EU family members in the event of divorce, annulment of marriage or termination of a registered partnership.

The 2009 Guidelines do not address the interpretation of Articles 12 and 13.

Although no main difficulties were identified with respect to these provisions of the Directive, there is relevant **CJEU case-law** that could be referred to when revising the 2009 Guidelines.

Potential options

As stated above, **no main difficulties** were identified in relation to Articles 12 and 13 of the Directive. Nevertheless, the 2009 Guidelines could add references to the relevant **CJEU case-law** since 2009, where clarifications were brought about as regards the relationship between Directive 2004/38/EC and Regulation (EU) 492/2011;[163] the non-applicability of Article 13 to durable partnerships; the timing requirements in case of divorce and departure of the EU citizen, including in the case of domestic violence.

In particular, reference could be made to:

- *Czop and Punakova*, *Ibrahim* and *Teixeira*, where the CJEU clarified that the residence right of children of present or former workers and their primary carer under Article 10 of Regulation (EU) 492/2011 is not subject to the conditions of Directive 2004/38/EC.[164]
- *Ibrahim and Teixeira*, where the CJEU clarified that in case of death or departure of the Union citizen, pursuant to Article 12(3) of Directive 2004/38/EC, the right of residence in the host Member State of children who are in education there and the parent who is their primary carer is not subject to the condition that they have sufficient resources and comprehensive sickness insurance cover.[165]
- *Hadj Ahmed*, where the CJEU held that Article 13(2) of Directive 2004/38/EC does not cover the situation where the durable partnership of a third-country national and an EU citizen has come to an end.[166] This article does not protect unmarried or unregistered partners.
- *Kuldip Singh and Others*, where the CJEU clarified that in circumstances covered by Article 13(2)(a) of the Directive, namely where the marriage lasted at least three years including one year in the host Member State, the retention of the right of residence on the basis of a divorce necessitates that the EU citizen remains in the host Member State until the initiation of the divorce procedure.[167] In *NA*, it was clarified that this also applies in the situation of Article 13(2)(c), in circumstances where the non-EU national has been a victim of domestic violence.[168]

[163] 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011R0492

[164] C-147/11 and C-148/11 *Czop and Punakova*, paras. 24-34; C-310/08 *Ibrahim* paras 50 and 59; C-480/08 *Teixeira* paras. 61 and 70.

[165] C-310/08 *Ibrahim*, para. 56 and C-480/08 *Teixeira*, paras.68 and 69

[166] C-45/12 *Hadj Ahmed*, paras. 36-37.

[167] C-218/14 *Kuldip Singh and Others*, para. 70.

[168] C-115/15 *NA*, para. 50.

2.8 RETENTION OF THE RIGHT OF RESIDENCE BY JOBSEEKERS (ARTICLE 14(4)(B) OF THE DIRECTIVE)

Overview

Article 14(4)(b) of the Directive states that by way of derogation from Article 14(1) and (2) and without prejudice to the provisions of Chapter VI,[169] an expulsion measure may in no case be adopted against Union citizens and their family members if the Union citizens entered the territory of the host Member State in order to seek employment. In this case, the Union citizens and their family members may not be expelled for as long as the Union citizens can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged.

Article 14(4)(b) results from the codification of CJEU case-law pre-dating the Directive[170] and complements **Article 45 TFEU** on the free movement of workers. In referring to Union citizens' right of residence up to three months without conditions or formalities other than holding a valid identity card or passport, Recital 9 of the Directive expressly states that this is 'without prejudice to a more favourable treatment applicable to job-seekers as recognised by the case-law of the Court of Justice'.

Issues related to jobseekers retaining a right of residence under Article 14(4)(b) of the Directive were identified as a main difficulty. The problems as reported include the inability for jobseekers to reside for six months while looking for work and a restrictive interpretation of the concept of a genuine chance of being engaged.

These issues are not currently addressed by the 2009 Guidelines. However, the **2010 Commission Communication** 'Reaffirming the free movement of workers: rights and major developments'[171] and the **2013 Commission Communication** 'Free movement of EU citizens and their families: Five actions to make a difference'[172] provide some clarifications in relation to the reasonable period of time to look for work and the criteria for concluding that the jobseeker is genuinely seeking work.

The issue of how much time Member States should allow jobseekers to reside in their territory in order to look for work without having to demonstrate a genuine chance of being engaged is not specified in the Directive but was recently clarified in **CJEU case-law**.[173] The Court held that the host Member State must grant the Union citizen 'a reasonable period of time' to look for work which starts from the time when the citizen registers as a jobseeker. The Court considered that a period of six months from the date of registration does not appear, in principle, to be insufficient for those purposes.[174] It is only after the expiry of that period, that the host Member State may require jobseekers to show not only that they are continuing to seek employment but also that they have a genuine chance of being engaged.[175]

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[169] Chapter VI of the Directive deals with restrictions on the right of entry and the right of residence on grounds of public policy, public security or public health.

[170] C-292/89 *Antonissen*; C-138/02 *Collins*. Other relevant cases relating to the obligation incumbent on Member States to allow jobseekers a reasonable period of time to look for work include C-171/91 *Tsiotras* and C-344/95 *Commission v Belgium*.

[171] 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' COM (2010) 373 final, 13 July 2010.

[172] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Free movement of EU citizens and their families: Five actions to make a difference', COM (2013) 837 final, 25 November 2013.

[173] C-710/19 *G.M.A*.

[174] C-710/19 *G.M.A*. para. 42.

[175] C-710/19 *G.M.A*. para. 51.

Indications regarding the assessment of evidence that the jobseeker is seeking employment and has a genuine chance of being engaged, in particular, that the national authorities should carry out an overall assessment of all relevant factors, were also recently provided by the CJEU.[176] These factors include the fact that the jobseeker has registered with the national body responsible for jobseekers, that they regularly approach potential employers with letters of application or that they have attended employment interviews and due account must be given to the situation of the national labour market in the sector corresponding to the occupational qualifications of the jobseeker in question.[177]

In addition, the CJEU has clarified in which circumstances jobseekers can rely on the principle of equal treatment and entitlement to social assistance in the host Member State depending on whether the EU citizen previously enjoyed a right of residence as a worker and is subsequently in involuntary unemployment and registered as a jobseeker or whether the EU citizen has not yet worked in the host Member State.[178] The CJEU also held that jobseekers are entitled to financial benefits intended to facilitate access to the labour market as they are not considered as social assistance under Article 24(2) of the Directive.[179]

The absence of guidance on the interpretation of Article 14(4)(b) of the Directive, may be seen as a gap in the 2009 Guidelines.

Potential options

With a view to addressing the **main difficulties** highlighted above, a **new topic** could be added to the 2009 Guidelines in a Section dedicated to the right of residence of jobseekers.

The new Section could focus in particular on Article 14(4)(b) of the Directive and contain the following elements based on clarifications brought about by other guidance documents and CJEU case-law:

- Explanations related to how much time Member States should allow jobseekers to reside in their territory. To this end, the Guidelines could:
  - Confirm in line with *G.M.A.* that the right of residence of jobseekers during the first three months in the host Member State is also covered by Article 6 of Directive 2004/38.[180]
  - Specify by referring to *G.M.A* that 'Article 45 TFEU and Article 14(4)(b) of Directive 2004/38 must be interpreted as meaning that a host Member State is required to grant a reasonable period of time to a Union citizen, which starts to run from the time when that Union citizen registered as a jobseeker, in order to allow that person to acquaint himself or herself with potentially suitable employment opportunities and take the necessary steps to obtain employment.'[181] During this reasonable period of time, jobseekers are only required to demonstrate that they are looking for work.[182]
  - Indicate that the period of residence for jobseekers should be at least six months by reproducing the relevant parts of (or adding cross-references to) the 2013 Commission Communication 'Free movement of EU citizens and their

[176] C-710/19 *G.M.A*. para. 47.

[177] C-710/19 *G.M.A*. para. 47.

[178] C-67/14, *Alimanovic and Others*, paras. 57 and 58.

[179] C-22/08 and C-23/08, *Vatsouras and Koupatantze*, para. 45.

[180] C-710/19 *G.M.A*. para. 35.

[181] C-710/19 *G.M.A*. para. 51.

[182] C-710/19 *G.M.A*. paras. 43-46.

families: Five actions to make a difference'[183] specifying that jobseekers can reside in the host Member State 'for up to six months without conditions and possibly longer if they show that they have a genuine chance of finding a job.' Reference should also be made to *G.M.A* where the CJEU considered that a period of six months from the date of registration does not appear, in principle, to be insufficient.[184]
    - Specify by referring to *G.M.A* that while during the six-month period, the host Member State may only require jobseekers to show that they are seeking employment, after the expiry of that period, the host Member State may require jobseekers to show not only that they are continuing to seek employment but also that they have a genuine chance of being engaged.[185]
- Explanations related to the interpretation of the existence of evidence that the jobseeker is seeking employment and has a genuine chance of being engaged. To this end, the Guidelines could:
    - Reproduce the relevant parts of (or add cross-references to) Part II of the 2010 Commission Communication 'Reaffirming the free movement of workers: rights and major developments'.[186]
    - Provide clarifications as to how evidence that the jobseeker has a genuine chance of being employed should be assessed in line with *G.M.A* where the CJEU held that it is for the national authorities of the host Member State 'to assess the evidence adduced to that effect by the jobseeker in question. In that regard, those authorities and courts will have to carry out an overall assessment of all relevant factors such as, for example, [..], the fact that the jobseeker has registered with the national body responsible for jobseekers, that he or she regularly approaches potential employers with letters of application or that he or she goes to employment interviews. In the context of that assessment, those authorities and courts must take into account the situation of the national labour market in the sector corresponding to the occupational qualifications of the jobseeker in question. By contrast, the fact that that jobseeker refused offers of employment which did not correspond to his or her professional qualifications cannot be taken into account for the purpose of considering that that person does not satisfy the conditions laid down in Article 14(4)(b) of Directive 2004/38.'[187]

In addition, explanations relating to the circumstances in which jobseekers can rely on the principle of equal treatment and entitlement to social assistance in the host Member State could be added. The inclusion of this option is aimed at taking into account CJEU case-law and difficulties identified with respect to equal treatment as explained in Section 2.10 below rather than a main difficulty based on Article 14(4)(b) of the Directive. To this end, the Guidelines could:

- Add a reference to *Alimanovic* where the Court held that:

[183] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Free movement of EU citizens and their families: Five actions to make a difference', COM (2013) 837 final, 25 November 2013.

[184] C-710/19 *G.M.A*. para. 42.

[185] C-710/19 *G.M.A*. para. 51.

[186] 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' COM (2010) 373 final, 13 July 2010.

[187] C-710/19 *G.M.A*. para. 47.

  - Where an EU citizen who has enjoyed a right of residence as a worker is in involuntary unemployment after having worked for less than a year and has registered as a jobseeker with the relevant employment office, he retains the status of worker and the right of residence for no less than six months. During that period, he can rely on the principle of equal treatment and is entitled to social assistance.[188]
  - Where an EU citizen has not yet worked in the host Member State or where the citizen no longer retains worker status, the citizen may retain a right of residence under Article 14(4(b) of the Directive and cannot be expelled from that Member State for as long as he can provide evidence that he is continuing to seek employment and that he has a genuine chance of being engaged. However, in these cases, the host Member State may refuse to grant any social assistance with no individual assessment.[189]
- Add a reference to *Vatsouras and Koupatantze* where the Court held that benefits of a financial nature which, independently of their status under national law, are intended to facilitate access to the labour market cannot be regarded as constituting 'social assistance' within the meaning of Article 24(2) of the Directive.[190]
- Add cross-references to the revised Section 2.3 of the 2009 Guidelines and to the new Section of the Guidelines dealing with equal treatment that might be developed in line with the options set out in Sections 2.5 above and 2.10 below.

2.9 PERMANENT RESIDENCE (ARTICLES 16 TO 21 OF THE DIRECTIVE)

(i) Unjustified refusal and excessive requirements in relation to permanent residence documents

Overview

In accordance with **Article 16(1) of the Directive**, Union citizens who have resided legally for a continuous period of five 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 the Directive on the right of residence. On the basis of **Article 16(2)**, this right also applies to family members who are not nationals of a Member State and have legally resided with the Union citizen in the host Member State for a continuous period of five years. **Article 16(4)** specifies that once acquired, the right of permanent residence can be lost only through absence from the host Member State for a period exceeding two consecutive years.

Article 19 deals with the document certifying permanent residence for Union citizens and **Article 20** deals with the permanent residence card for non-EU family members.

The Directive's provisions on permanent residence are not addressed by the 2009 Guidelines but have been interpreted on several occasions in **CJEU case-law**. Among other things, the CJEU has clarified that Directive 2004/38/EC does not oblige EU citizens to apply for any residence document when they acquire a right of permanent residence in a host Member State.[191] The Directive, however, provides for the issue, upon application, of a document certifying the permanence of their residence, without requiring such a formality.[192] While the Directive does not list the documents which may be legitimately requested by the host Member State in respect of applications for a permanent residence document, this should be issued after the host Member State has verified the completion of a

[188] C-67/14 *Alimanovic and Others*, para. 53.

[189] C-67/14 *Alimanovic and Others*, paras. 52 and 56-58.

[190] C-22/08 and C-23/08, *Vatsouras and Koupatantze*, para. 45.

[191] C-123/08 *Wolzenburg,* para. 50.

[192] C-123/08 *Wolzenburg,* para. 51.

continuous period of legal residence (in general five years).[193]

The imposition of excessive requirements in connection with permanent residence documentation was identified as a main difficulty both in respect of EU citizens applying for a document certifying permanent residence under Article 19 of the Directive as well as non-EU family members applying for a permanent residence card under Article 20 of the Directive. Issues identified include reported requests for documents which do not have the purpose of verifying past periods of lawful residence or requiring applicants to prove the pursuit of an economic activity or possession of sufficient resources after the completion of the continuous five-year period of residence. Moreover, in some cases where EU citizens had already acquired a permanent residence right in the host Member State, it is reported that non-EU spouses were requested to submit evidence of meeting the conditions of Article 7 when applying for their derived right of residence.

In addition, the refusal of applications for permanent residence documentation without justification or on the basis of invalid grounds (for example, applications being refused because the applicants had not been in continuous employment for five years even if they were otherwise legally resident during that time) was also identified as a main difficulty. As regards unjustified refusals affecting non-EU family members, examples include refusals based on the absence of cohabitation between the family member and their EU spouse, even though this is not a requirement according to well established CJEU case-law.[194]

The absence of guidance on the interpretation of the Directive's rules on permanent residence, may be seen as a gap in the 2009 Guidelines.

Potential options

In light of the above, a **new topic** dealing specifically with permanent residence could be added to the 2009 Guidelines either as a new heading within Section 2 of the 2009 Guidelines or as a separate new Section. In either case, the Guidelines could address the **main difficulties** identified by taking into account CJEU case-law to:

- Underline the declaratory nature of documents attesting the permanence of the residence of EU citizens in line with *Wolzenburg* where the CJEU held that the Directive's provisions on permanent residence provide 'merely for the issue, upon application, of a document attesting to the permanence of their residence, without requiring that formality. Such a document has only declaratory and probative force but does not give rise to any right'.[195] Similarly, as stated in *Ryanair* as regards non-EU family members, the issue of the Article 20 permanent residence card constitutes a formal recognition of the situation of the person concerned, as attested by that document.[196] Here a cross-reference could also be added to any new guidance added to the 2009 Guidelines in line with the potential options outlined in Section 2.11 below with respect to Article 25 of the Directive.
- Explain in line with *Ziolkowski and Szeja* and *Alarape and Tijani* that legal residence for the purpose of acquiring the right of permanent residence under Article 16(1) of the Directive means residence in compliance with the conditions of the Directive, in particular, those set out in its Article 7(1).[197] This could be accompanied with confirmation that, once permanent residence has been acquired, residence of the person concerned is no longer subject to the conditions provided for in Chapter III of the Directive as contained in Articles 6 to 15 (as stated in Article 16(1) of the Directive).

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[193] See also as regards non-EU family members C-754/18 *Ryanair*, para. 50: 'It follows that the issue of a permanent residence card by a Member State implies that that State has necessarily verified, in advance, that the person concerned has that status.'

[194] C-244/13 *Ogieriakhi*, para 47.

[195] C-123/08 *Wolzenburg*, para. 51 referencing C-85/96 *Martinez Sala*, para. 53.

[196] C-754/18 *Ryanair*, para. 53.

[197] C-424/10 *Ziolkowski and Szeja,* para. 46; and C-529/11 *Alarape and Tijani,* para. 35.

- Specify as per *Dias* that periods of continuous legal residence confer on EU citizens the right of permanent residence with effect from the actual moment at which they are completed.[198]
- State that aside from situations involving a threat to public policy or public security or the existence of fraud or abuse, an application for permanent residence may only be refused where the conditions are not met. In general, this is the case, in the event the applicant has not completed the required five-year period of lawful residence in the host Member State either in their own right or as a family member. This should not be subjected to supplementary administrative requirements[199] or to the conditions provided for in Chapter III of the Directive on the right of residence (as stated in Article 16(1) of the Directive).
- Specify, in line with *Ogieriakhi*, that Article 16(2) of the Directive must be interpreted as meaning that a third-country national who, during a continuous period of five years has resided in a Member State as the spouse of a Union citizen working in that Member State, must be regarded as having acquired a right of permanent residence under that provision, even though, during that period, the spouses decided to separate and commenced residing with other partners, and the home occupied by that national was no longer provided or made available by the spouse with Union citizenship.[200]
- As regards refusals of permanent residence cards without justification, add a cross-reference to Section 3.9 of the 2009 Guidelines on procedural safeguards as possibly revised on the basis of the options set out in Section 2.15 of this Report.

(ii) Calculation of continuous period of legal residence

Overview

The Directive does not set out how the five-year continuous period of legal residence should be calculated, nor is this issue addressed by the 2009 Guidelines. There is however a significant corpus of **CJEU case-law** that has emerged in respect of the continuous period of lawful residence under **Article 16 of the Directive** that is relevant to the issues with the calculation of the five-year period, which was noted as a main difficulty alongside the non-consideration of the rules on continuity of residence.

The CJEU has clarified that:

- The right of permanent residence provided for in Article 16(1) could be acquired only as from 30 April 2006, namely the deadline for transposition of the Directive as set out in Article 40(1).[201]
- However, any period of residence completed in a host Member State before 30 April 2006, in accordance with earlier EU law instruments, must be taken into account for the purposes of the acquisition of the right of permanent residence.[202]
- In addition, any absence from the host Member State of less than two consecutive years, which occurred before 30 April 2006 but following a continuous period of five years of lawful residence completed before that date, does not affect the acquisition of the right of permanent residence.[203]
- Likewise, any period of residence of less than two consecutive years completed without the conditions governing the entitlement to a right of residence having been satisfied, which occurred before 30 April 2006 and after a continuous period of five years of lawful residence

[198] C-325/09 *Dias*, para. 57.

[199] C-123/08 *Wolzenburg*, para. 52.

[200] C-244/13 *Ogieriakhi*, para. 47.

[201] C-162/09 *Lassal*, para. 38; C-244/13 *Ogieriakhi*, para. 29.

[202] C-162/09 *Lassal*, para. 40; C-325/09 *Dias,* para. 43.

[203] C-162/09 *Lassal,* para. 58.

completed prior to that date, are not such as to affect the acquisition of the right of permanent residence.[204]

- Any period of residence completed by a national of a non-Member State in the territory of a Member State before the accession of that non-Member State to the EU must be taken into account for the purpose of the acquisition of the right of permanent residence under Article 16(1), provided those periods were completed in compliance with the conditions laid down in Article 7(1).[205]
- A period of residence completed on the basis of other EU instruments, such as Regulation (EU) 492/2011,[206] can only be relied upon to claim a right of permanent residence after a continuous period of five years of residence in a host Member State when the conditions of Article 7(1) have also been met.[207]
- A period of residence which complies with the law of the host Member State, but which does not satisfy the conditions laid down in Article 7(1) of the Directive cannot be regarded as a 'legal' period of residence for the purposes of acquisition of the right of permanent residence.[208]
- Periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods, cannot be taken into consideration in the context of the acquisition of the right of permanent residence by the family member. Continuity of residence is interrupted by such periods of imprisonment.[209]
- Clarify that Member States are entitled under Article 37 of the Directive to grant permanent residence on terms which are more favourable than the conditions set out in Articles 16 to 21.

Article 17 of the Directive also provides that the right of permanent residence may in certain circumstances be acquired after a continuous period of less than five years. For the purpose of acquiring the right of permanent residence in the host Member State before completion of a continuous period of five years of residence pursuant to Article 17(1)(a) of the Directive, a worker who ceases to work upon having reached the age laid down by the law of that Member State for entitlement to an old age pension must at that time (meaning, when they stop working) fulfil the conditions that the worker must have been working in that Member State at least for the preceding twelve months and must also have continuously resided in that Member State for more than three years.[210]

Potential options

In view of the above, a **new topic** on the calculation of the five-year period of continuous legal residence could be added to the 2009 Guidelines to address the **main difficulties** identified by taking into account CJEU case-law. Potential options could be to:

- Specify when periods of residence completed in a host Member State before 30 April 2006 must be taken into account for the purposes of the acquisition of the right of permanent residence in line with *Lassal*, *Dias* and *Ogieriakhi*. In particular that:
  - Periods of residence in the host Member State before the transposition date of Directive 2004/38/EC, in accordance with earlier EU law instruments, must be taken into account for

[204] C-325/09 *Dias,* para. 55.

[205] Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*; Joined Cases C-147/11 and C-148/11 *Czop and Punakova*.

[206] 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.

[207] C-529/11 *Alarape and Tijani,* para. 48.

[208] Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, para. 47.

[209] C-378/12 *Onuekwere*, para. 27.

[210] C-32/19 *A.T.,* para. 44.

the purposes of the acquisition of the permanent residence right.[211] However, periods of residence in the host Member State before the transposition date of Directive 2004/38/EC cannot be regarded as having been completed legally for the purposes of acquisition of the permanent residence right, where conditions governing entitlement to any right of residence have not been satisfied.[212]
    - Absences from the host Member State of less than two consecutive years, which occurred before the transposition date of the Directive but following a continuous period of five years' legal residence completed before that date do not affect the acquisition of the right of permanent residence pursuant to Article 16(1) of the Directive.[213]
- Specify in line with *Ziolkowski and Szeja* and *Czop and Punakova* as regards periods of residence prior to a Member State's accession that:
    - In the absence of specific provisions in the Act of Accession, periods of residence completed by a national of a non-Member State in the territory of a Member State before the accession of the non-Member State to the EU must be taken into account for the purpose of the acquisition of the right of permanent residence under Article 16(1) if those periods were completed in compliance with the conditions laid down in Article 7(1).[214]
    - Conversely, a period of residence which complies with the law of a Member State but does not satisfy the conditions laid down in Article 7(1) cannot be regarded as a 'legal' period of residence for the purposes of acquisition of the right of permanent residence.[215]
- Specify in line with *Alarape and Tijani* that the only periods taken into consideration for the acquisition of the right to permanent residence are those completed in accordance with the conditions laid down in Directive 2004/38/EC, and that residence based solely on Regulation (EEC) 1612/68[216] does not have to be taken into consideration, where the conditions set out Directive 2004/38/EC are not satisfied.[217]
- Clarify in line with *Onuekwere* that, aside from the circumstances mentioned in Article 16(4) of the Directive, elements which undermine the link of integration with the host Member State could also lead to the loss of the right of permanent residence.[218] Therefore:
    - Article 16(2) of the Directive 'must be interpreted as meaning that the periods of imprisonment in the host Member State of a third-country national, who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods, cannot be taken into consideration in the context of the acquisition by that national of the right of permanent residence for the purposes of that provision'[219] and
    - Article 16(2) and (3) 'must be interpreted as meaning that continuity of residence is interrupted by periods of imprisonment in the host Member State of a third-country national who is a family member of a Union citizen who has acquired the right of permanent residence in that Member State during those periods.'[220]
- Mention the possibility to acquire the right of permanent residence after a continuous period of less than five years in certain circumstances and add a reference to A.T. where the CJEU held that

[211] C-162/09 *Lassal*, paras. 40 and 59; C-244/13 *Ogieriakhi*, para 29.

[212] C-325/09 *Dias*, para. 67.

[213] C-162/09 *Lassal*, para. 59.

[214] Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, para. 63 and Joined Cases C-147/11 and C-148/11 *Czop and Punakova*, para. 40.

[215] Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, paras. 47 and 51.

[216] Regulation (EEC) 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (repealed): https://eur-lex.europa.eu/eli/reg/1968/1612/oj/?uri=CELEX:31968R1612

[217] C-529/11 *Alarape and Tijani*, para. 48.

[218] C-378/12 *Onuekwere*, para. 25 referencing *Dias*, paras. 59, 63 and 65.

[219] C-378/12 *Onuekwere*, para. 27.

[220] C-378/12 *Onuekwere*, para. 32.

Article 17(1)(a) of the Directive 'must be interpreted as meaning that, for the purpose of acquiring the right of permanent residence in the host Member State before completion of a continuous period of 5 years of residence, the conditions that the person must have been working in that Member State for the preceding 12 months and must have resided in that Member State continuously for more than 3 years apply to workers who, at the time they stop working, have reached the age laid down by the law of that Member State for entitlement to an old age pension.'[221]

(iii) Excessive delays

Overview

As regards Union citizens, **Article 19(2) of the Directive** requires the document certifying permanent residence to be issued as soon as possible and as regards non-EU family members, **Article 20(1)** requires the permanent residence card to be issued within six months of the submission of the application. Non-EU family members are required to apply for a permanent residence card before the expiry of the residence card which has been issued to them under Article 10 pursuant to **Article 20(2)** of the Directive.

Excessive delays in issuing permanent residence documentation to EU citizens and non-EU family members have been identified as a main difficulty alongside extensive delays in obtaining an appointment to enable EU citizens and their family members to submit an application for permanent residence documentation.

While **Section 2.2.2 of the 2009 Guidelines** refers to a possible justification for delays to the six-month deadline on the basis of public policy considerations, this was only done within the context of the deadline for the issuance of a residence card under Article 10 of the Directive as explained in Section 2.6 above. However, similar deadlines apply in the context of applications for permanent residence cards and the **CJEU case-law** described in Section 2.6 above may therefore also be relevant in this context.

Potential options

In light of the abovementioned **main difficulty**, and taking into account that, even if not referring expressly to Directive 2004/38, lengthy procedures are one of the two key challenges identified by respondents in the results of the 2020 public consultation on EU citizenship rights,[222] within the **new topic** on permanent residence that could be added to the 2009 Guidelines as outlined under the previous headings of this Section, the following can be suggested:

- Assess the extent to which it would be appropriate to add a cross-reference to the CJEU case-law relevant to the six-month period for the issuance of Article 10 residence cards and whether those interpretations and the considerations set out in Section 2.6 above as regards the broader impact of excessive delays on other rights could also be relevant for delays in the issuance of Article 20 permanent residence cards.

(iv) Validity period of permanent residence cards

Overview

Article 20(1) of the Directive states that the permanent residence card is renewable automatically every ten years.

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[221] C-32/19 *A.T.*, para. 44.

[222] Results of the Public Consultation on EU Citizenship Rights 2020, December 2020, p.17-18, https://ec.europa.eu/info/sites/info/files/report_on_the_public_consultation_on_eu_citizenship_rights_2020_en.pdf.

The issuance of permanent residence documents with a limited validity of less than the 10-year period of validity or the issuance of a regular (non-permanent) residence card instead of a permanent residence card were identified as main difficulties.

While this issue is not addressed by the 2009 Guidelines, the **CJEU** has emphasized the significance of correctly issuing a permanent residence card in that possession of such card implies that the host Member State has necessarily verified, in advance, that the person concerned has that status without there being any subsequent need for an additional verification of that status.[223]

Potential options

Although identified as a **main difficulty**, the issuance of permanent residence cards with a validity period of less than ten years is not addressed in other guidance documents or in CJEU case-law. It is therefore considered that it is not possible to put forward sufficiently evidenced-based or useful options for revisions to the 2009 Guidelines other than to:

- Underline the importance of correctly issuing permanent residence cards including with respect to their validity period, taking into account the evidential value of these cards and the fact that the cards facilitate the exercise of free movement and residence rights for non-EU family members.

2.10 EQUAL TREATMENT AND RELATED RIGHTS (ARTICLES 23 AND 24 OF THE DIRECTIVE)

(i) Right to work

Overview

Article 23 of the Directive grants the right to take up employment or self-employment to family members of an EU citizen, irrespective of nationality, who have the right of residence or the right of permanent residence in a Member State. The CJEU has clarified that family members who derive a right of residence in a host Member State as dependents of EU citizens have a right to take up employment there and maintain their right of residence even after they have ceased to be dependants.[224] This links with **Article 25 of the Directive** which provides that the exercise of a right cannot be made conditional upon possession of a certificate of application, of a residence card or of a permanent residence card by a family member as discussed in Section 2.11 below.

Potential options

In order to take into account recent **CJEU case-law**, a **new topic** could be added to the 2009 Guidelines in a Section dedicated to the right to work. The following clarifications could be introduced in this Section:

- Refer to the right to work of family members under Article 23 of the Directive including a reference to *Reyes* in which the Court held that dependent family members of EU citizens have a right to take up employment in the host Member State and that this does not affect their right of residence even after they have ceased to be dependants.[225]
- Clarify the relationship between Articles 23 and 25 of the Directive which provides that the right to work of family members cannot be made conditional upon possession of a certificate of application, of a residence card or of a permanent residence card.

[223] C-754/18 *Ryanair*, para. 55.

[224] C-423/12 *Reyes,* paras. 31-32.

[225] C-423/12 *Reyes*, paras. 31-32.

(ii) Equal treatment

Overview

Article 24(1) of the Directive grants the right to enjoy equal treatment with nationals of the host Member State to all EU citizens residing in the host Member States on the basis of the Directive and to all their family members who have a right of residence or permanent residence. **Article 24(2)** allows Member States not to confer social assistance to the EU citizen during the first three months of residence or during the first six months of residence for jobseekers. Moreover, the host Member State is not required to provide maintenance aid for studies, including vocational training, consisting in student grants and loans to persons other than workers, self-employed persons, persons who retain such status, and the members of their family prior to the acquisition of a right of permanent residence.

Recital 31 of the Directive recalls that, in accordance with the prohibition of discrimination contained in the Charter, Member States should implement the Directive without discrimination between the beneficiaries of the Directive on grounds such as sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. When exercising free movement rights, the issue of equal treatment should be considered in the context of Article 21 of the **Charter of Fundamental Rights of the European Union** prohibiting discrimination based on any such grounds.

The CJEU has confirmed that the principle of non-discrimination on grounds of nationality, as laid down in Article 18 TFEU and in Article 24 for EU citizens within the scope of Directive 2004/38/EC, prohibits not only direct discrimination on grounds of nationality but also all indirect forms of discrimination.[226] 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.[227]

The absence of guidance on Article 24 and the right to equal treatment in the 2009 Guidelines is considered to be an important gap, particularly in view of the fact that more than one fifth of the respondents to the public consultation on EU citizenship rights in 2020,[228] indicated having experienced some sort of discrimination when residing in another Member State.

Within the application of Article 24 of Directive 2004/38, one area identified as a main difficulty, is equal treatment for the access to social assistance. Difficulties related, for instance, to problems in accessing social assistance by permanent resident EU citizens or the refusal of social assistance to a person who had retained worker status following a dismissal.[229]

Difficulties or refusals of access to healthcare were also identified as main difficulties and are mostly linked to the catch-22 situation identified in one Member State with respect to the personal number without which it is not possible for EU citizens and their family members to access a number of services, including healthcare as explained in point (vii) of Section 2.5 above. In addition, in the results of the public consultation on EU citizenship rights carried out in the framework of the 2020 EU Citizenship Report, almost one fifth of the respondents reported in general difficulties with access to the healthcare system.[230]

As regards social assistance, **CJEU case-law** clarifies that:

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[226] C-73/08 *Bressol*, para. 40 and C-75/11, Commission v Austria, para. 49..

[227] C-75/11 *Commission v Austria*, para 52.

[228] Results of the Public Consultation on EU Citizenship Rights 2020, December 2020, p.17-18, https://ec.europa.eu/info/sites/info/files/report_on_the_public_consultation_on_eu_citizenship_rights_2020_en.pdf.

[229] It should be noted that, although difficulties were identified for permanent residents, access to housing benefits is not limited to permanent residents.

[230] Results of the Public Consultation on EU Citizenship Rights 2020, December 2020, p.17-18, https://ec.europa.eu/info/sites/info/files/report_on_the_public_consultation_on_eu_citizenship_rights_2020_en.pdf

- The concept of social assistance must be interpreted as covering all assistance introduced by public authorities, whether at national, regional or local level, that can be claimed by individuals who do not have resources sufficient to meet their own basic needs and the needs of their family and who, by reason of that fact, may become a burden on the public finances of the host Member State during their period of residence which could have consequences for the overall level of assistance which may be granted by that State.[231]
- Benefits of a financial nature which are intended to facilitate access to the labour market cannot be regarded as constituting social assistance within the meaning of Article 24(2) of the Directive.[232] The CJEU ruled in *Vatsouras and Koupatantze* that the concept of social assistance must be defined by reference to the objective pursued by the benefit and not by formal criteria.
- Union citizens can claim equal treatment with nationals of the host Member State under Article 24(1) of Directive 2004/38 only if their residence in the territory of the host Member State complies with the conditions of the Directive.[233] In *Dano*, the CJEU specified that social assistance can be refused if they exercise their right of free movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.[234]
- Where EU citizens retain their status as worker on the basis of the Directive and have registered as jobseekers with the relevant employment office, they retain their right of residence and the right to equal treatment with nationals of the Member State in relation to access to social assistance benefits. For EU citizens who retain the status of workers, any entitlement under national law to social benefits may be conditional upon a specified period of employment, to the extent that, under the principle of equal treatment, the same condition is applied to nationals of the Member State concerned.[235]
- By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole.[236]
- It is clear from Recital 16 of the Directive that, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him.[237] However, the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State.[238]
- In *Alimanovic*, the CJEU stated that the assistance awarded to a single applicant can scarcely be described as an 'unreasonable burden' for a Member State, within the meaning of Article 14(1) of Directive 2004/38. However, while an individual claim might not place the Member

[231] C-140/12 *Brey*, para. 61.

[232] C-22/08 and C-23/08, *Vatsouras and Koupatantze*, para. 45.

[233] C-333/13 *Dano*, para. 69; C-67/14 *Alimanovic*, para. 49; C-299/14 *Garcia Nieto*, para. 38.

[234] C-333/13, Dano, para. 78.

[235] C-483/17 *Tarola*, para. 55.

[236] C-140/12 *Brey*, para. 72.

[237] C-140/12 *Brey*, para. 69.

[238] C-140/12 *Brey*, para. 75.

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.[239]

- In the case of Article 24(2), where a derogation is allowed during the first three months of residence for EU citizens who are not workers, self-employed persons, persons who retain that status and their family members, the Member State may refuse to grant social assistance benefits, with no individual assessment being necessary.[240]
- Where the EU jobseeker has however not yet worked in the Member State or no longer retains the status as a worker, the Member State may refuse to grant social assistance benefits, even without carrying out an individual assessment of the situation of the person concerned.[241]
- The derogation in Article 24(2) of the Directive cannot be used against EU citizens who also have a right of residence as primary carers of children in education of former workers under Article 10 of Regulation 492/2011.[242]

Potential options

On the basis of the above, a **new topic** could be added to the 2009 Guidelines in a Section dedicated to equal treatment in order to address the **main difficulties** related to access to social assistance. The new topic could:

- Clarify the notion of 'social assistance' covered by Article 24, in line with *Vatsouras and Koupatantze* and *Brey*. It must be interpreted as covering all assistance introduced by public authorities, whether at national, regional or local level, that can be claimed by individuals who do not have resources sufficient to meet their own basic needs and the needs of their family and who, by reason of that fact, may become a burden on the public finances of the host Member State during their period of residence which could have consequences for the overall level of assistance which may be granted by that State.[243] 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.[244]
- Clarify that 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 complied with the conditions of Directive 2004/38/EC, in line with *Dano*,[245] *Alimanovic*[246] and *Garcia Nieto*.[247] In *Dano*, the CJEU specified that social assistance can be refused if they exercise their right of free movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.[248]
- As regards social security benefits, clarify the relationship between Article 24 of the Directive, Regulation (EC) 883/2004 on the coordination of social security systems and Regulation (EU) No 492/2011 on freedom of movement for workers. While Article 24 of the Directive covers the right to equal treatment, more specific provisions apply to the social security benefits covered by Regulation (EC) 883/2004. *Dano*,[249] *Alimanovic*[250] and *Garcia Nieto*[251] all

[239] C-67/14 *Alimanovic*, para. 62.

[240] C-299/14 *Garcia Nieto*, para. 46.

[241] C-67/14 *Alimanovic and Others*, paras. 57-59 and 62.

[242] C-181/19 *Jobcenter Krefeld*, paras. 60, 67 and 69.

[243] C-140/12 *Brey*, para. 61.

[244] C-22/08 and C-23/08 *Vatsouras and Koupatantze*, para. 45.

[245] C-333/13 *Dano*, para. 69.

[246] C-67/14 *Alimanovic*, para. 49.

[247] C-299/14 *Garcia Nieto*, para. 38.

[248] C-333/13, Dano, para. 78.

[249] C-333/13 *Dano*, para. 69.

concerned special non-contributory benefits which present characteristics of both social security benefits and social assistance. However, child benefits or disability benefits are covered by Regulation (EC) 883/2004. Workers covered by Regulation (EU) No 492/2011 may benefit from specific equal treatment provisions under this Regulation. For instance, the derogation in Article 24(2) of the Directive cannot be used against EU citizens who have a right of residence as primary carer of children in education under Article 10 of Regulation 492/2011.[252]

- Clarify, in line with *Alimanovic*, that where EU citizens retain their status as worker on the basis of the Directive, they retain their right of residence and the right to equal treatment with nationals of the host Member State in relation to access to social assistance benefits.[253]
- When a person retains his status as a worker and has registered as a jobseeker, they retain this status for no less than six months. However, where the EU jobseeker has not yet worked in the Member State or no longer retains their status as a worker, the Member State may refuse to grant social assistance benefits, even without carrying out an individual assessment of the situation of the person concerned.[254] Here a link could be made to the potential new Section in the Guidelines on the retention of the right of residence of jobseekers under Article 14(4)(b) of the Directive that might be developed as outlined in Section 2.11 above.
- Specify that in the framework of Article 24(2), during the first three months of residence for EU citizens who are not workers, self-employed persons, persons who retain that status and their family members, access to social assistance may be refused without carrying out an individual assessment of the situation of the person concerned.[255]

A second subsection of the new Section dedicated to equal treatment could provide further clarifications that would take into account the **main difficulty** identified in relation to access to healthcare and could make reference to the pending case before the CJEU in *A*.[256] The revised Guidelines could, in this context, also refer to the new Section on 'comprehensive sickness insurance', as suggested in Section 2.5 above.

2.11 GENERAL PROVISIONS CONCERNING RESIDENCE DOCUMENTS (ARTICLE 25 OF THE DIRECTIVE)

Overview

Article 25(1) of the Directive provides that possession of a registration certificate, a document certifying permanent residence, a certificate attesting submission of an application for a family member residence card, of a residence card or of a permanent residence card, may under no circumstances be made a precondition for the exercise of a right or the completion of an administrative formality, as entitlement to rights may be attested by any other means of proof.

This provision was not addressed in the 2009 Guidelines, but the declaratory nature of residence

[250] C-67/14 *Alimanovic*, para. 49.

[251] C-299/14 *Garcia Nieto*, para. 38.

[252] C-181/19 *Jobcenter Krefeld*, paras. 60, 67 and 69.

[253] C-67/14 *Alimanovic and Others*, paras. 53-54.

[254] C-67/14 *Alimanovic and Others*, paras. 57-59 and 62.

[255] C-299/14 *Garcia Nieto*. para. 46.

[256] C-535/19 *A*.

documents has been mentioned in various CJEU judgments predating the Guidelines.[257] The imposition of requirements making possession of residence documentation a pre-condition for the exercise of a right or completion of an administrative formality was nevertheless identified as a main difficulty.

Since 2009, the **CJEU has confirmed its earlier case-law** on the declaratory nature of residence documents both as regards EU citizens[258] and their family members.[259]

More specifically, the CJEU clarified that:

- The granting of a residence permit to a national of a Member State[260] or the issuance of residence cards such as those referred to in Article 10 of the Directive to a third-country national family member,[261] must be regarded, not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of EU law.
- The declaratory character of residence permits means that those permits merely certify that a right already exists for the person concerned.[262] The issuance of residence documentation thus constitutes a formal finding of the factual and legal situation of the person concerned with regard to the Directive.[263] Article 10 residence cards[264] and Article 20 permanent residence cards[265] also have a declaratory, as opposed to a constitutive character, and constitute a formal recognition of the situation of the person concerned.
- The declaratory character means that residence may not be regarded as illegal only because the citizen does not hold a residence permit. Conversely, a Union citizen's residence may not be regarded as legal solely on the ground that such a permit was validly issued to the citizen.[266]

The absence of guidance on the interpretation of Article 25(1) of the Directive, may be seen as a gap in the 2009 Guidelines.

Potential options

In light of the above, the **main difficulty** identified could be addressed through a **new topic** dealing specifically with Article 25 of the Directive either as a separate new Section in the 2009 Guidelines or alongside the revisions to Section 2 of the 2009 Guidelines as set out in Sections 2.5, 2.6 and 2.9 above. In either case, the Guidelines could:

- Emphasise the declaratory nature of residence documents, framing this in the context of the broader effect that making their possession a precondition for the exercise of a right or the completion of an administrative formality could have when EU citizens and their family

[257] 48/75 *Royer*. See further C-85/96 *Martinez Sala*, C-138/02 *Collins*; C-215/03 *Oulane* and C-408/03 *Commission v Belgium* as regards EU citizens; see also C-459/99 *MRAX* and C-157/03 *Commission v Spain* as regards non-EU family members.

[258] C-325/09 *Dias*. See also C-123/08 *Wolzenburg* in respect of permanent residence documents in the context of European arrest warrant proceedings.

[259] C-456/12 *O. and B.*; C-246/17 *Diallo*; C-754/18 *Ryanair*.

[260] C-325/09 *Dias*, para. 48 referring also to C-408/03 *Commission* v *Belgium*, paras. 62 and 63 and case-law cited therein.

[261] C-246/17 *Diallo*, para. 48 referring also to C-325/09 *Dias*, para. 48 and C-456/12 *O. and B.*, para. 60.

[262] C-127/08 *Metock and Others*, para. 52 and C-325/09 *Dias*, para. 54).

[263] C-754/18 *Ryanair*, para. 52 referring to C-325/09 *Dias*, para. 48; C-202/13 *McCarthy and Others*, para. 49 and C-246/17 *Diallo*, para. 48.

[264] C-456/12 *O. and B*, para. 60 and C-325/09 *Dias*, para. 49.

[265] C-754/18 *Ryanair*, para. 53.

[266] C-325/09 *Dias*, para. 54.

members seek to complete various formalities (e.g. obtaining national identification or social security numbers, seeking the assistance of public employment agencies, or accessing essential services provided by the private sector, such as opening a bank account).

- Add a reference to *Dias* where the CJEU stated that 'the right of nationals of a Member State to enter the territory of another Member State and to reside there for the purposes intended by the [Treaty on the Functioning of the EU] is a right conferred directly by the Treaty, or, as the case may be, by the provisions adopted for its implementation. The grant of a residence permit to a national of a Member State is to be regarded, not as a measure giving rise to rights, but as a measure by a Member State serving to prove the individual position of a national of another Member State with regard to provisions of European Union law.'[267] Similarly, as held in *O. and B.*, Article 10 residence cards have 'a declaratory, as opposed to a constitutive, character.'[268] By analogy, as held in *Ryanair*, 'the issue of the permanent residence card referred to in Article 20 of that Directive also constitutes a formal recognition of the situation of the person concerned, as attested by that document'.[269]
- Add references to *Dias*, *O. and B.*, *Diallo* and *Ryanair* to emphasise that the granting of a residence document constitutes:
  - A measure serving to prove the individual position of a national of another Member State[270] or of a third-country national in the case of Article 10 residence cards,[271] with regard to provisions of EU law.
  - A formal finding of the factual and legal situation of the person concerned with regard Directive 2004/38/EC.[272]
- Add an explanation as per *Dias* that 'just as such a declaratory character means that a citizen's residence may not be regarded as illegal, within the meaning of European Union law, solely on the ground that he does not hold a residence permit, it precludes a Union citizen's residence from being regarded as legal, within the meaning of European Union law, solely on the ground that such a permit was validly issued to him.'[273]

2.12 VERIFICATION OF RIGHTS AND CHECKS (ARTICLES 14 AND 26 OF THE DIRECTIVE)

Overview

Article 14(2) of the Directive specifies that EU citizens and their family members have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein. The provision continues that, in specific cases where there is a reasonable doubt as to whether EU citizens or their family members satisfy these conditions, Member States may verify if they are fulfilled, though not systematically. **Article 26 of the Directive** allows for compliance checks relating to the registration certificate or residence card where such requirements also apply to nationals for the identity card.

[267] C-325/09 *Dias*, para. 48, referencing C-408/03 *Commission* v *Belgium*, paras. 62 and 63 and case-law cited.

[268] C-456/12 *O. and B*, para. 60.

[269] C-754/18 *Ryanair*, para. 53.

[270] C-325/09 *Dias*, para. 48.

[271] C-246/17 *Diallo*, para. 48.

[272] C-754/18 *Ryanair*, para. 52. See also C-325/09 *Dias* para. 48; C-202/13 *Sean McCarthy and Others* para. 49; C-246/17, *Diallo*, para. 48).

[273] C-325/09 *Dias*, para. 54.

The 2009 Guidelines do not address the interpretation of Articles 14(2) and 26 of the Directive and no main difficulties were identified with respect to these provisions.

The CJEU confirmed the wording of Article 14(2) of the Directive which allows that national authorities carry out a verification of the conditions set out in Article 7 in the event of doubt, including prior to awarding child benefit, as long as it is not done systematically.[274]

Potential options

Although **no main difficulties** have been identified regarding the systematic verification of rights, the 2009 Guidelines could introduce a reference to the CJEU's ruling in *Commission v United Kingdom* that national authorities can proceed with a verification of the conditions in Article 7 prior to awarding child benefit, in the event of doubt, and as long as this is not done systematically.[275]

2.13 RESTRICTIONS ON GROUNDS OF PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH (ARTICLES 27, 28 AND 29 OF THE DIRECTIVE; SECTION 3 OF THE 2009 GUIDELINES)

Overview

Articles 27 to 33 of the Directive govern restrictions on the right of entry and residence on grounds of public policy, public security and public health. **Articles 30 to 33** contain procedural guarantees and are discussed in Section 2.15 below.

Article 27 sets out the general principles, establishing that restrictions can be adopted on grounds of public policy, public security and public health and that these grounds cannot be invoked to serve economic ends. The measures must comply with the proportionality principle and be based exclusively on the individual's personal conduct, which must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society. **Article 28** provides for protection against expulsion. **Article 28(1)** sets out a rule applying to all cases, establishing that the Member State must take account of considerations such as how long the individual concerned has resided on its territory, the individual's age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of the individual's links with the country of origin. **Articles 28(2) and (3)** provide enhanced protection against expulsion. For permanent residents, restrictions can only be taken on serious grounds of public policy or public security. For EU citizens who have resided in the host Member State for the previous 10 years or are minors (except if the expulsion is necessary in the best interests of the child), restrictions can only be adopted on imperative grounds of public security. **Article 29** details restrictions on grounds of public health.

Section 3 of the 2009 Guidelines is dedicated to restrictions on grounds of public policy or public security. It states at the outset that provisions granting freedom of movement 'must be given a broad interpretation, whereas derogations from that principle must be interpreted strictly'[276] and provides extensive guidance on that basis:

- Section 3.1 provides guidance on the notions of public policy and public security;
- Section 3.2 deals with personal conduct and the threat;
- Section 3.3 deals with the requirement to carry out a proportionality assessment and the criteria that must be considered;
- Section 3.4 covers increased protection against expulsion in the case of permanent residents, residents for more than 10 years and minors;

[274] C-308/14 *Commission v United Kingdom*, para. 84.

[275] C-308/14 *Commission v United Kingdom*, para. 84.

[276] Here the 2009 Guidelines reference Cases 139/85 *Kempf* (para. 13) and C-33/07 *Jipa* (para. 23).

- Section 3.5 provides guidance with respect to urgent removals;
- Section 3.6 deals with procedural safeguards the contents of which are covered in Section 2.15 of this Report.

Despite the available guidance, difficulties continue to be reported in this area in respect of both EU citizens and family members who are third-country nationals. The difficulties include refusals of entry, registration certificates or residence cards as well as enforcement of expulsion orders in the absence of a genuine, present and sufficiently serious threat affecting the fundamental interests of society, including on the sole basis of a prior conviction or in breach of the principle of proportionality.

The relevant provisions of Directive 2004/38 on restrictions on the rights of entry and residence on grounds of public policy or public security have been the subject of a significant number of preliminary rulings before the **CJEU** since 2009. In particular:

- In the framework of the right of exit covered by Article 4 of the Directive (discussed in Section 2.2 above), the CJEU has confirmed that Article 27 of the Directive may be relied upon by an individual against their Member State of origin when that Member State imposes restrictions on their ability to exit its territory.[277]
- In a number of cases, the Court confirmed its established case-law pre-dating the Directive according to which measures taken on grounds of public policy or public security must be based exclusively on the **personal conduct** of the individual concerned.[278] For instance, in *Gaydarov*, *K & HF and Rendon Marin*, the Court clarified that the previous criminal conviction of the person is not itself sufficient to automatically consider that the person represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society[279] nor is it sufficient to conclude that such a threat does not exist.[280] In *P.I.* the Court indicated that the requirement of such a genuine, present and serious threat implies, in general, that there exists in the individual a propensity to act in the same way in the future.[281] In *Aladzhov and Byankov*, the Court equally confirmed that measures on grounds of public policy and public security must be based exclusively on the personal conduct of the individual concerned and that the mere existence of a tax liability or of a debt of a legal person owned by the person is not sufficient to prohibit an individual from leaving the country.[282]
- In *K and HF*,[283] the Court held that the fact that a family member of an EU citizen had previously been refused refugee status on the ground that there are serious reasons to believe that he committed a war crime or a crime against humanity or was guilty of acts contrary to the purposes and principles of the United Nations does not enable the authorities to automatically consider that their mere presence represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society, which would justify the adoption of measures taken on grounds of public policy or security. The Court clarified that such decisions should be taken on a **case-by-case basis** and that account must be taken of several factors, such as the nature and gravity of the alleged conduct of the individual concerned, the duration and legality of his residence in the host Member State, the period of time that has elapsed since that conduct, the individual's behaviour during that period, the extent to which he currently poses a danger to society, and the solidity of social, cultural and

[277] C-430/10 *Gaydarov*, para. 31; C-434/10 *Aladzhov,* para. 32.

[278] See for instance C-430/10 *Gaydarov,* para. 42; C-434/101 *Aladzhov,* para 42.

[279] C-430/10 *Gaydarov*, para.38; C-165/14 *Rendón Marín,* paras. 65.

[280] C-193/16 *E v Subdelegación del Gobierno en Álava*, paras. 19-26.

[281] C-348/09 *P.I,* para 34.

[282] C-434/101 *Aladzhov,* para 42 and 43; C-249/11 *Byankov*, paras. 35-48.

[283] Joined Cases C-331/16 and C-366/16 *K v Staatssecretaris van Veligheid en Justitie and HF v Belgische Staat*, paras. 39-49, 52-60.

family links with the host Member State.[284]

- The Court has also confirmed that third-country nationals who are the primary carers of EU children (Chen parents) cannot be automatically refused the grant of a residence card on the sole ground that they have a criminal record, without assessment of their personal conduct or of any danger that they could represent to public policy or public security.[285] The application of the provisions to *Chen* parents is not covered by the 2009 Guidelines.
- In the context of the **enhanced protection** from expulsion, in *Tsakouridis*[286] the Court confirmed that trafficking in narcotics as part of an organised group that could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it, is capable of being covered by the concept of 'imperative grounds of public security' in Article 28(3) of Directive 2004/38. In any case, the trafficking in narcotics is to be considered a 'serious ground of public policy or public security' captured by Article 28(2) which could justify an expulsion decision against permanent resident EU citizens and their family members.[287] In *P.I.*[288] it was held that the sexual exploitation of minors is capable of constituting 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 and thus be covered by the concept of 'imperative grounds of public security', capable of justifying an expulsion measure under Article 28(3) of individuals who have resided in the host Member State for ten or more years, as long as the manner in which such offences were committed discloses particularly serious characteristics.
- The CJEU has provided clarifications with regard to the **calculation of the residence period** for the purposes of enhanced protection. In order to benefit from the enhanced protection against expulsion on the basis of ten years of residence, that period of residence must, in principle, be continuous and must be calculated by counting back from the date of the expulsion decision.[289] For the assessment of ten years of continuous residence, all the relevant factors must be taken into account in each individual case, in particular the duration of each period of absence, the cumulative duration, frequency reasons of the absences and whether such reasons imply that the person's centre of interests has moved to another State.[290] In addition, the enhanced protection against expulsion on the basis of ten years of residence can only be claimed by an EU citizen who has a right of permanent residence.[291] Periods of imprisonment interrupt, in principle, the continuity of residence needed to acquire enhanced protection provided for in Article 28(3)(a) of Directive 2004/38 and affect the decision regarding the grant of the enhanced protection, even where the person concerned resided in the host Member State for the ten years prior to imprisonment.[292] However, the fact that that person resided in the host Member State for the ten years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been broken.[293] On the calculation of the period of residence for the purposes of enhanced protection against expulsion, Section 3.4 of the 2009 Guidelines only states that Member States are, as a rule, not

[284] Joined Cases C-331/16 and 366/16 *K. & H.F*, para. 70.

[285] C-165/14 *Rendón Marín,* paras. 57-67.

[286] C-145/09 *Tsakouridis*, para. 56.

[287] C-145/09 *Tsakouridis*, para. 56.

[288] C-348/09 *P.I*, para. 33.

[289] C-400/12 *M.G,* para. 24 and Joined Cases C-316/16 and C-424/16 *B and Vomero*, paras. 64-65, 85-94.

[290] C-145/09 *Tsakouridis*, para. 38.

[291] Joined Cases C-316/16 and C-424/16 *B and Vomero,* paras. 44-55.

[292] Joined Cases C-316/16 and C-424/16 *B and Vomero*, paras. 66-82.

[293] C-400/12 *M.G*, paras 36-38. It should be noted in this context that the periods of imprisonment in the host Member State cannot be taken into consideration for the acquisition of the right of permanent residence as the continuity of residence is interrupted by periods of imprisonment in the host Member State, as clarified in C-378/12, *Onuekwere*. See also Section 2.9 on Permanent Residence.

obliged to take time 'actually spent behind bars into account', where no links with the host Member State are built. The impact of periods of imprisonment on permanent residence rights is discussed in point (ii) of Section 2.9 below.

Potential options

Further clarifications could be introduced in Section 3 of the 2009 Guidelines to address the **main difficulties** identified in respect of restrictions on grounds of public policy and public security by referring to the relevant CJEU case-law. In particular:

- In the introductory paragraphs to Section 3 of the 2009 Guidelines, references could be added to *Rendón Marín*, *Gaydarov* and *Aladzhov*:
  - In *Rendón Marín*, the Court extended the application of Articles 27 and 28 to third-country national primary carers of EU children (Chen parents),[294] when ruling that Chen parents could not be automatically refused the grant of a residence card for the sole reason that they have a criminal record,[295] without the Member State making an assessment of their personal conduct or of any danger that they could represent to public policy or public security.[296]
  - In *Gaydarov* and *Aladzhov*, the CJEU confirmed that Article 27 of the Directive may be relied upon by an individual against their Member State of origin when that Member State imposes restrictions on their ability to exit its territory.

- In Section 3.1 of the 2009 Guidelines on public policy and public security, reference could be added to:
  - *Tsakouridis*, in which the Court held that the fight against crime in connection with dealing in narcotics as part of an organised group is capable of being covered by the concept of 'imperative grounds of public security' in Article 28(3) of Directive 2004/38.[297] The Court added that dealing in narcotics as part of an organised group is *a fortiori* covered by the concept of 'public policy' for the purposes of Article 28(2) of Directive 2004/38.[298]
  - A similar approach was taken as regards the sexual exploitation of minors in *P.I.* in which the Court considered that 'it is open to the Member States to regard such criminal offences as constituting 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 and thus be covered by the concept of 'imperative grounds of public security' capable of justifying an expulsion measure under Article 28(3), as long as the manner in which such offences were committed discloses particularly serious characteristics'.[299]

- In Section 3.2 of the 2009 Guidelines on personal conduct, reference could be made to:
  - *Gaydarov*, *Aladzhov*, *Rendón Marín* and *E.* which have all confirmed that measures taken on grounds of public policy or public security must be based exclusively on the personal conduct of the individual concerned.[300] Further clarifications could be

[294] C-165/14 *Rendón Marín*, paras. 57-67.

[295] C-165/14 *Rendón Marín*, para. 67.

[296] C-165/14 *Rendón Marín*, para. 64.

[297] C-145/09 T*sakouridis*, para. 56.

[298] C-145/09 T*sakouridis*, para. 54.

[299] C-348/09 *P.I*, para. 33.

[300] C-430/10 *Gaydarov,* para. 42; C-434/10 *Aladzhov,* para 42; C-165/14 *Rendón Marín*, para. 59, C-193/16 *E v Subdelegación del Gobierno en Álava*, para. 19.

introduced based, for instance, on *Gaydarov, K & HF and Rendon Marin*, that the previous criminal conviction of the person (including one criminal conviction issued by a non-EU third country)[301] is not itself sufficient to automatically consider that the person represents a genuine, present and sufficiently serious threat to one of the fundamental interests of society[302] nor is it sufficient to conclude that such a threat does not exist.[303] In *P.I.* the Court indicated that the requirement of such a genuine, present and serious threat implies, in general, that there exists in the individual a propensity to act in the same way in the future.[304]

- *K and HF*, in which the Court held that the fact that a family member of an EU citizen had previously been refused refugee status on the ground that there are serious reasons to believe that he committed a war crime or a crime against humanity or was guilty of acts contrary to the purposes and principles of the United Nations cannot automatically lead to the conclusion that their mere presence represents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.[305] The decision to adopt measures on grounds of public policy or security must be taken on the basis of a case-by-case assessment of each individual situation.[306] The finding that there is such a threat must be based on an assessment of the personal conduct of the individual concerned, taking into consideration the findings of fact in the decision to exclude that individual from refugee status and the factors on which that decision is based, particularly the nature and gravity of the crimes or acts that he is alleged to have committed, the degree of his individual involvement in them, whether there are any grounds for excluding criminal liability, and whether or not he has been convicted. That overall assessment must also take account of the time that has elapsed since the date when the crimes or acts were allegedly committed and the individual's subsequent conduct, particularly in relation to whether that conduct reveals the persistence in him of a disposition hostile to the fundamental values enshrined in Articles 2 and 3 TEU, capable of disturbing the peace of mind and physical security of the population.[307]
- In *Aladzhov and Byankov*, the Court equally confirmed that measures on grounds of public policy and public security must be based exclusively on the personal conduct of the individual concerned and that the mere existence of a tax liability or of a debt of a legal person owned by the person is not sufficient to prohibit an individual from leaving the country.[308] See also below on proportionality.

- In Section 3.3 of the 2009 Guidelines on the proportionality assessment, references could be made to:
  - *Aladzhov, K and HF and Byankov*. The Court stated that it is apparent from Article 27(2) and the Court's settled case-law, that a measure which restricts the right of freedom of movement may be justified only if it complies with the principle of proportionality, which presupposes determining whether that measure is appropriate to ensure the achievement of the objective it pursues and does not go beyond what is necessary to attain it.[309] For instance, the prohibition to leave the territory due to the

[301] C-430/10 *Gaydarov,* paras. 36-39

[302] C-430/10 *Gaydarov*, para.38; C-165/14 *Rendón Marín,* paras. 65.

[303] C-193/16 *E v Subdelegación del Gobierno en Álava*, paras. 19-26.

[304] C-348/09 *P.I,* para 34.

[305] Joined Cases C-331/16 and C-366/16 *K and HF*, para. 51.

[306] Joined Cases C-331/16 and C-366/16 *K and HF*, para. 52.

[307] Joined Cases C-331/16 and C-366/16 *K and HF*, para. 66.

[308] C-434/10 *Aladzhov,* para 43 and 43; C-249/11 *Byankov*, paras. 35-48.

[309] C-434/10 *Aladzhov*, para. 47 and Joined Cases C-331/16 and 366/16 *K. & H.F*, para. 61; C-249/11 *Byankov*, paras. 35-43.

impossibility to recover a debt from the person, as in *Aladzhov*, should be considered in view of the principle of proportionality and consider several factors, including whether there were no other measures than that of a prohibition to leave the territory that would have been equally effective to obtain the debt recovery and which would not have affected the freedom of movement.[310]

- In accordance with the principle of proportionality, the competent authorities of the host Member State must, in addition, 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.[311] In order to adopt an expulsion decision with due regard to the principle of proportionality, account must be taken of, inter alia, the nature and gravity of the alleged conduct of the individual concerned, the duration and, when appropriate, the legality of his residence in the host Member State, the period of time that has elapsed since that conduct, the individual's behaviour during that period, the extent to which he currently poses a danger to society, and the solidity of social, cultural and family links with the host Member State.[312]

- In Section 3.4 of the 2009 Guidelines on increased protection against expulsion, references could be added to:
  - *M.G.*, and *B & Vomero* in relation to the calculation of the period of uninterrupted residence for the purposes of enhanced protection. In *M.G.*, the CJEU held that in order to benefit from the enhanced protection against expulsion on the basis of ten 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 the expulsion of the person concerned.[313] This was also confirmed in *B & Vomero*.[314]
  - The need to take into account all relevant factors in each individual case for the assessment of the ten years of continuous residence, in particular, the duration of each period of absence, the cumulative duration, frequency reasons of the absences and whether such reasons imply that the person's centre of interests has moved to another State.[315]
  - In addition, the enhanced protection against expulsion on the basis of ten years of residence can only be claimed by an EU citizen who has a right of permanent residence.[316]
  - The Court's clarification that periods of imprisonment interrupt, in principle, the continuity of residence needed to acquire enhanced protection as provided for in Article 28(3)(a) of Directive 2004/38.[317] However, the fact that the person resided in the host Member State for the ten years prior to imprisonment may be taken into consideration as part of the overall assessment required in order to determine whether the integrating links previously forged with the host Member State have been

[310] C-434/10 *Aladzhov*, para. 47. See also C-249/11 *Byankov*, para. 47.

[311] Joined Cases C-331/16 and 366/16 *K. & H.F*, para. 67.

[312] Joined Cases C-331/16 and 366/16 *K. & H.F*, para. 70.

[313] C-400/12 *M.G.,* para. 24.

[314] Joined Cases C-316/16 and C-424/16 *B and Vomero*, paras. 64-65, 85-94.

[315] C-145/09 *Tsakouridis*, para. 38.

[316] Joined Cases C-316/16 and C-424/16 *B and Vomero,* paras. 44-55.

[317] Joined Cases C-316/16 and C-424/16 *B and Vomero*, paras. 66-82. It should be noted in this context that the periods of imprisonment in the host Member State cannot be taken into consideration for the acquisition of the right of permanent residence, as clarified in C-378/12, *Onuekwere*.

broken.[318]

In addition to the above, it is noted that the 2009 Guidelines are also silent on the issue of restrictions imposed on public health and there has been no case-law on the subject to date. However, as outlined in the 2020 EU Citizenship Report, when updating the Guidelines, the Commission intends to address the application of restrictive measures on free movement, specifically those that are due to public health concerns.[319]

2.14 RESTRICTIONS ON GROUNDS OTHER THAN PUBLIC POLICY, PUBLIC SECURITY OR PUBLIC HEALTH/PROCEDURAL SAFEGUARDS (ARTICLE 15 OF THE DIRECTIVE)

Overview

According to **Article 15(1) of the Directive**, the procedures provided for by Articles 30 and 31 are to apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health and **Article 15(3)** prohibits Member States from imposing a ban on entry in the context of an expulsion decision to which Article 15(1) applies.

The main difficulties identified with respect to the imposition of restrictions on grounds other than public policy, public security or public health relate to the expulsion of EU citizens on invalid or questionable grounds, and, in some cases, the imposition of an entry ban even though this is not permitted under Article 15(3) of the Directive.

While there is no express reference to Article 15 of the Directive, **Section 3.6 of the 2009 Guidelines** addresses procedural safeguards as explained in Section 2.15 below. In addition, **CJEU case-law** has clarified that:

- Other family members covered by Article 3(2) of the Directive must be able to rely on the procedural safeguards which are contained in Article 31 and which apply by virtue of Article 15(1) of the Directive in circumstances where authorisation to reside in the host Member State has been refused on grounds other than public policy, public security or public health.[320]
- Article 15 of the Directive applies to the expulsion of a third-country national who is the spouse of an EU citizen and who has ceased to have a right of residence under the Directive due to the departure of the EU citizen from that Member State. While the spouse no longer benefits from a right of residence in the host Member State pursuant to Directive 2004/38/EC due to the EU citizen's departure, Directive 2004/38/EC is applicable to an expulsion decision taken against such person.[321]

Potential options

Revisions to the 2009 Guidelines aimed at addressing the **main difficulties** related to Article 15 of the Directive could be viewed in parallel with potential options for revisions related to Articles 30 and 31 of the Directive as set out in Section 2.15 below.

Therefore, as regards Article 15(1) of the Directive whereby the procedural safeguards provided for by Articles 30 and 31 apply by analogy to all decisions restricting free movement on grounds other than public policy, public security or public health, reference is made to the potential options outlined in Section 2.15 below and with respect to which:

[318] C-400/12 *M.G*, paras 36-38.

[319] EU Citizenship Report 2020, p.23.

[320] C-89/17 *Banger*, paras. 43-49.

[321] C-94/18 *Chenchooliah*, para. 79.

- A cross-reference to Article 15(1) of the Directive could be made to specify that the same approach is to be followed to the extent that Articles 30 and 31 can in fact be applied 'by analogy'.[322] To this effect, reference could be made to *Chenchooliah* where the CJEU held that '[t]he expression 'by analogy' must be understood as meaning that the provisions of Articles 30 and 31 of Directive 2004/38 are applicable, in the context of Article 15 thereof, only if they can actually be applied, with the necessary adjustments, if appropriate, to decisions made on grounds other than public policy, public security or public health.'[323] The Court considered that this would not be the case with regard to Article 30(2) and the third indent of of Article 31(2) or Article 31(4) of the Directive. The application of those provisions must be strictly confined to expulsion decisions made on grounds of public policy, public security or public health, and they do not therefore apply to expulsion decisions covered by Article 15 of the Directive.[324] Nevertheless, as explained in Section 2.15 below, Article 30(1) of the Directive clearly states that the notification of a decision must be in such a way that the persons concerned 'are able to comprehend its content and the implications for them'. Therefore, such persons must be fully informed of the reasons for the decision even where the restrictions are imposed on grounds other than public policy, public security and public health as the provision of such information is a fundamental prerequisite in ensuring effective access to judicial redress and the right to an effective remedy under the Charter of Fundamental Rights of the European Union.

In addition, a **new topic** on restrictions on grounds other than public policy, public security or public health could be added to the 2009 Guidelines to:

- Take into account the CJEU's interpretation in *Chencooliah* that the scope of Article 15 covers expulsion decisions made on grounds wholly unrelated to any danger to public policy, public safety or public health but which are connected to the fact that a non-EU family member of a Union citizen who, in the past, enjoyed a temporary right of residence under the Directive deriving from the exercise by the Union citizen of his right to freedom of movement, now no longer has such a right of residence following the departure of that citizen from the host Member State and his return to the Member State of which he is a national.[325] While the non-EU family member no longer benefits from a right of residence in the host Member State pursuant to Directive 2004/38/EC, the Directive is applicable to an expulsion decision taken against such person.[326] The relevant safeguards laid down in Articles 30 and 31 of the Directive are applicable 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.[327] The CJEU emphasized that the right of access to judicial procedures for seeking redress must be granted in accordance with Article 31(1) of the Directive, since such procedures form part of the 'implementation of Union law' within the meaning of Article 51(1) of the Charter of Fundamental Rights of the European Union and 'the rules governing such procedures, the purpose of which is to safeguard the rights conferred by Directive 2004/38, must comply with, inter alia, the requirements pertaining to the right to an effective remedy enshrined in Article 47 of that charter.'[328]

[322] C-94/18 *Chenchooliah*, paras. 71 and 80.

[323] C-94/18 *Chenchooliah*, para. 81.

[324] C-94/18 *Chenchooliah*, paras. 82 and 83. Article 30(2) refers specially to information on the public policy, public security or public health grounds on which an Article 27(1) decision is based and the third indent of Article 31(4) refers specifically to expulsion decisions on imperative grounds of public security under Article 28(3) of the Directive.

[325] C-94/18 *Chenchooliah*, para. 73.

[326] C-94/18 *Chenchooliah*, para. 79.

[327] C-94/18 *Chenchooliah*, para. 89.

[328] C-94/18 *Chenchooliah*, para. 84.

This new topic could be included in the 2009 Guidelines either by:

- Adding a new Section dedicated to Article 15 of the Directive; or
- Within a new Section covering both restrictions on grounds of public policy, public security and public health as outlined in Section 2.13 above as well as restrictions on other grounds.

2.15 PROCEDURAL SAFEGUARDS (ARTICLES 15(1) AND 30 TO 33 OF THE DIRECTIVE; SECTION 3.6 OF THE 2009 GUIDELINES)

(i) Notification and review of decisions

Overview

Recital 25 of the Directive refers to the need to specify the procedural safeguards in detail in order to ensure a high level of protection of the rights of Union citizens and their family members in the event of their being denied leave to enter or reside in another Member State, as well as to uphold the principle that any action taken by the authorities must be properly justified.

Article 30(1) of the Directive requires that beneficiaries of the Directive are notified in writing of any decisions that may restrict their freedom of movement and residence and **Article 30(2)** requires that they be informed, precisely and in full, of the public policy, public security or public health grounds on which the decision taken in their case is based, unless this is contrary to the interests of State security. In accordance with **Article 30(3)**, the notification of decisions must specify the court or administrative authority with which the person concerned may lodge an appeal, the time limit for the appeal and, where applicable, the time allowed for the person to leave the territory of the Member State. Save in duly substantiated cases of urgency, the time allowed to leave the territory must be not less than one month from the date of notification.

Recital 26 states that '[i]n all events, judicial redress procedures should be available to Union citizens and their family members who have been refused leave to enter or reside in another Member State.'

In accordance with **Article 31(1) of the Directive**, the persons concerned must have access to judicial and, where appropriate, administrative redress procedures in the host Member State to appeal against or seek review of any decision taken against them on the grounds of public policy, public security or public health. In line with **Article 31(3**) the redress procedures must allow for an examination of the legality of the decision, as well as of the facts and circumstances on which the proposed measure is based. They must ensure that the decision is not disproportionate, particularly in view of the requirements laid down in Article 28 (protection against expulsion).

According to **Article 15(1) of the Directive**, the procedures provided for by Articles 30 and 31 are to apply by analogy to all decisions restricting free movement of Union citizens and their family members on grounds other than public policy, public security or public health as explained in Section 2.14 above.

Section 3.6 of the 2009 Guidelines on procedural safeguards already clarifies that:

- The person concerned must always be notified of any measures taken on grounds of public policy or public security, as required by Article 30.
- Decisions must be fully reasoned and list all the specific factual and legal grounds on which they are taken so that the persons concerned may take effective steps to ensure their defence and national courts may review the case in accordance with the right to an effective remedy in Article 47 of the Charter of Fundamental Rights of the European Union.
- 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'.

A number of main difficulties were identified in relation to the Directive's procedural safeguards resulting from the impossibility to access or delaying access to redress procedures to appeal or seek review of decisions (including decisions on visa refusals, entry refusals, refusals to issue residence cards, deportation and entry bans) and from the failure to issue a written decision when an application is refused by the national authorities. The latter difficulties sometimes involved oral refusals (no written decision) of visa applications of non-EU family members or tacit refusals (refusals based on the silence of the administration after a certain time has elapsed) of visa applications, residence certificates and permanent residence cards. A related difficulty concerns visa refusal without any clear reason being given as mentioned in Section 2.3 above. The latter is already addressed by **Section 4.10 of Part III of the Visa Handbook** stating that:

- Refusal to issue a visa to a family member of an EU citizen must always be fully reasoned and list all the specific factual and legal grounds on which the negative decision was taken, so that the person concerned may take effective steps to ensure their defence.
- The refusal must also specify the court or administrative authority with which the person concerned may lodge an appeal and the time limit for the appeal.
- Forms may be used to notify a negative decision but the motivation given must always allow for a full justification of the grounds on which the decision was taken.

CJEU case-law has underlined that the Directive must be interpreted in compliance with Article 47 of the **Charter of Fundamental Rights of the European Union** on the right to an effective remedy.[329] It has also specified that:

- Article 30 of the Directive requires the Member States to take appropriate measures to ensure that the person concerned understands the content and implications of a decision adopted under Article 27.[330]
- Other family members covered by Article 3(2) of the Directive must have access to a redress procedure before a national court consisting in the review by a court of whether the national legislation and its application have remained within the limits of the discretion set by the Directive.[331] Such a review must ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with.[332] Those safeguards include the obligation for the competent national authorities to undertake an extensive examination of the applicant's personal circumstances and justify any denial of entry or residence.[333]
- It is for the national legal order of each Member State to establish the procedures for redress in accordance with the principle of procedural autonomy on condition that those rules are not less favourable than those governing similar domestic situations and that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law.[334]
- The derogation in Article 30(2) of the Directive whereby Member States can limit the information sent to the person concerned in the interests of State security must be interpreted strictly.[335]

[329] C-89/17 *Banger*, para. 48 and C-94/18 *Chenchooliah*, para. 84.

[330] C-184/16 *Petrea*, paras. 66-72.

[331] C-89/17 *Banger*, paras. 50 and 51.

[332] C-89/17 *Banger*, paras. 51 and 52.

[333] C-89/17 *Banger*, para. 52.

[334] C-161/15 *Bensada Benallal,* para. 24.

[335] C-300/11 *Z.Z,* paras. 49-69.

- Following the judicial annulment of a decision refusing to issue a residence card of a family member of an EU citizen, the national authority must adopt a new decision within a reasonable period of time.[336]

Potential options

On the basis of the above, the **main difficulties** identified could be addressed by updating Section 3.6 of the 2009 Guidelines to further elaborate the key aspects of the requirements on the notification of decisions and the availability of judicial redress procedures to EU citizens and their family members who have been refused entry or residence in the host Member State.

The following options could be put forward, taking into account the extent to which the Article 30 and 31 procedural safeguards apply by analogy also to decisions restricting free movement on grounds other than public policy, public security or public health as explained in Section 2.14 above:

- With respect to visa refusals without a clear reason, add a cross-reference to Section 4.10 of Part III of the Visa Handbook that mirrors the guidance already set out in Section 3.6 of the 2009 Guidelines and that is not limited to visas and is therefore equally applicable to Member States not fully applying the Schengen *acquis*. This could be supplemented by a cross-reference to Section 2.2.1 of the 2009 Guidelines as revised on the basis of the options set forth in Section 2.3 of this Report.
- Add references to *Petrea*, *Gaydarov*, *Banger*, *Z.Z, Bensada Benallal*, *Chenchooliah* and *Diallo* to specify that:
  - The right to an effective remedy is a fundamental right. The Directive must be interpreted in a manner which complies with the requirements flowing from Article 47 of the Charter of Fundamental Rights of the European Union on the right to an effective remedy.[337]
  - The judicial remedy must permit a review of the legality of the decisions restricting free movement as regards matters of both fact and law in the light of the requirements of EU law and ensure that the decision in question is not disproportionate.[338]
  - While Article 30 of the Directive requires the 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 although the person did not bring an application to that effect.[339]
  - The derogation in Article 30(2) of the Directive whereby Member States can limit the information sent to the person concerned in the interests of State security must be interpreted strictly.[340] Articles 30(2) and 31 of the Directive, read in the light of Article 47 of the Charter, require the national court to ensure that any failure by the competent national authority to disclose to the person concerned the precise and full grounds on which a decision taken under Article 27 of the Directive is based and to disclose the related evidence to them, must be limited to that which is strictly necessary.[341] In addition, those provisions also require that the person in question is in any event informed of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence.[342]

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[336] C-246/17 *Diallo*, paras. 68-69.

[337] C-89/17 *Banger*, para. 48 and C-94/18 *Chenchooliah*, para. 84.

[338] C-94/18 *Chenchooliah*, para. 85, C-89/17 *Banger*, para. 48 and C-430/10 *Gaydarov*, para. 41.

[339] C-184/16 *Petrea*, paras. 66-72.

[340] C-300/11 *Z.Z,* paras. 49-69.

[341] C-300/11 *Z.Z,* paras. 49-69.

[342] C-300/11 *Z.Z,* paras. 49-69.

- While the time limits within which appeals from decisions of the authorities should be lodged or within which judicial proceedings should be conducted are not specified in the Directive, this grey area can be explained on the basis that it is for the national legal order of each Member State to establish the procedures for redress in accordance with the principle of procedural autonomy on condition that those rules are:
  - not less favourable than those governing similar domestic situations (principle of equivalence) and
  - that they do not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law (principle of effectiveness).[343]

  Here reference could also be made to the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union requiring a fair and public hearing 'within a reasonable time'.
- Other family members covered by Article 3(2) of the Directive whose residence authorisation has been refused on grounds other than public policy, public security or public health must have access to a redress procedure before a national court consisting in the review by a court of whether the national legislation and its application have remained within the limits of the discretion set by the Directive. Such a review must ascertain whether the refusal decision is based on a sufficiently solid factual basis and whether the procedural safeguards were complied with. Those safeguards include the obligation for the competent authorities to undertake an extensive examination of the applicant's personal circumstances and to justify any denial of entry or residence.[344]
- Following the judicial annulment of a decision refusing to issue a residence card of 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 the Directive (six months from the date on which the application is submitted). An automatic opening of a new period of six months, following the judicial annulment of a decision refusing to issue a residence card, is disproportionate in the light of the ultimate purpose of the administrative procedure referred to in Article 10(1) of the Directive and the Directive's objectives.[345]

Further consideration might also be given to citing case-law pre-dating the Directive which relates to the nature of the judicial redress procedures, which could be the subject of a separate research effort.

(ii) Exclusion orders and expulsion orders

Overview

Article 32(1) of the Directive states that persons excluded on grounds of public policy or public security may submit an application for lifting of the exclusion order after a reasonable period, depending on the circumstances, and in any event after three years from enforcement of the final exclusion order, by putting forward arguments to establish that there has been a material change in the circumstances which justified the decision ordering their exclusion. The Member State concerned must reach a decision on this application within six months of its submission. In accordance with **Article 32(2)**, the persons subject to an exclusion order have no right of entry to the territory of the Member State concerned while their application is being considered.

[343] C-161/15 *Bensada Benallal,* para. 24.

[344] C-89/17 *Banger*, paras. 42-52.

[345] C-246/17 *Diallo*, paras. 68-69.

Article 33(1) of the Directive provides that expulsion orders may not be issued by the host Member State as a penalty or legal consequence of a custodial penalty, unless they conform to the requirements of Articles 27, 28 and 29 and **Article 33(2)** states that if such an expulsion order is enforced more than two years after it was issued, the Member State must check that the individual concerned is currently and genuinely a threat to public policy or public security and must assess whether there has been any material change in the circumstances since the expulsion order was issued.

While **Sections 3.1 to 3.4 of the 2009 Guidelines** address the interpretation of the Directive's provisions on restrictions on free movement on the grounds of public policy or public security as explained in Section 2.13 above, the procedural safeguards with respect to exclusion orders and expulsion orders are not specifically addressed.

Although no main difficulties were identified with respect to these provisions of the Directive, there is relevant **CJEU case-law** that could be referred to when revising the 2009 Guidelines.

Potential options

As stated above, **no main difficulties** were identified in relation to Articles 32 and 33 of the Directive. Nevertheless, the 2009 Guidelines could add references to the relevant CJEU case-law since 2009, in particular:

- *Byankov*, where the CJEU clarified that Article 32 also applies to measures preventing a person from leaving his or her own Member State. For the review procedure to be available under Article 32, the measure at issue must have been validly adopted in accordance with EU law. However, a national law which makes no provision for regular review and maintains for an unlimited period a prohibition on leaving the territory is the antithesis of the freedom of movement.[346]
- *Petrea*, where the CJEU held that Member States may:
  - Withdraw a registration certificate wrongly issued to an EU citizen who had been expelled and re-entered while still being the subject of an exclusion order.
  - Lay down that individuals may not rely on the unlawfulness of an exclusion order made against them in order to contest a subsequent return order, in so far as the person concerned has effectively had the possibility to contest the exclusion order in good time in light of the provisions of Directive 2004/38/EC.[347]
  - Provide that an expulsion measure can be adopted against an EU citizen by the same authorities and according to the same procedure as a decision to return a third-country national staying illegally referred to in Article 6(1) of Directive 2008/115/EC, provided that the transposition measures of Directive 2004/38/EC which are more favourable to that EU citizen are applied.[348]
- *E*, where the CJEU considered that the fact that the individual concerned was imprisoned at the time the expulsion decision was adopted, without the prospect of being released in the near future, does not exclude that his conduct represents a present and genuine threat to the fundamental interests of the society of the host Member State.[349]
- *OBFG and Others*,[350] which is currently pending case before the CJEU relating to whether EU citizens and their family members can be obliged to comply with preventive measures, including detention, designed to prevent any risk of absconding during the period given to such persons in which to leave the territory of the host Member State following adoption of an expulsion decision.[351] In his recent Opinion in that case, the Advocate General has taken the

[346] C-249/11 *Byankov*, paras. 68 and 79, 80

[347] C-184/16 *Petrea*, paras. 45-49, 58-65.

[348] C-184/16 *Petrea*, para. 56.

[349] Case C-193/16 *E*, paras. 25 and 27.

[350] C-718/19 *Ordre des barreaux francophones and germanophone and Others.*

[351] C-718/19 *Ordre des barreaux francophones and germanophone and Others.*

> view that such measures are not contrary to EU law provided the measures are based on objective consideration and comply with the principle of proportionality and that any period of detention is kept as short as possible and does not exceed the time strictly necessary for enforcement of the removal order, which should normally be less than that which is necessary for removing irregularly-staying third-country nationals.[352]

2.16 FRAUD AND ABUSE (ARTICLE 35 OF THE DIRECTIVE; SECTION 4 OF THE 2009 GUIDELINES)

Overview

As stated in **Section 4 of the 2009 Guidelines**, EU law cannot be relied on in case of abuse. **Article 35 of the Directive** sets out the conditions for Member States to restrict the right of free movement in the case of abuse of rights, including **marriages of convenience**. More precisely, it provides that Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure must be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Section 4.2 of the 2009 Guidelines contains detailed guidance for national authorities on the assessment of marriages of convenience and specifies that the quality of the relationship is immaterial to the application of Article 35. It recalls that according to **Recital 28 of the Directive**, a marriage of convenience is defined as a marriage contracted for the **sole purpose** of enjoying free movement rights and residence that someone would otherwise not have. The 2009 Guidelines also note that measures taken by Member States to fight against marriages of convenience may not be such as to deter EU citizens and their family members from making use of their right to free movement or unduly encroach on their legitimate rights. The Guidelines further specify that Member States may investigate individual cases when there is a well-founded suspicion of abuse, but that Community law prohibits systematic checks. Finally, they present a set of indicative criteria to guide Member States in their assessments.

Further guidance on the assessment of alleged marriages of convenience by Member State authorities is also provided in the **2014 Commission Handbook on marriages of convenience**.[353] The Handbook on marriages of convenience provides indicative criteria and tools to assist in the identification of sham marriages between EU citizens and non-EU nationals in the context of EU law on free movement, while clarifying the legal framework applicable to the assessment of a possible abuse of rights by national authorities. These include, among others, compliance with the principle of proportionality, procedural safeguards, including on the burden of proof, and the fundamental rights enshrined in the ECHR and the Charter of Fundamental Rights, including the right to marry and family life, the right to an effective remedy and the right of defence.

Section 5 of **Part III of the Visa Handbook** cross-refers to the 2009 Guidelines and to the Handbook on marriages of convenience and provides detailed guidance in the context of entry visa applications by family members of EU citizens. Section 5.1 of Part III of the Visa Handbook specifies that for the purposes of Article 35 of the Directive 'the notion of abuse refers to an artificial arrangement entered into solely with the purpose of obtaining the right of free movement and residence under EU law which, albeit formally observing the conditions laid down by EU rules, does not comply with the

[352] Opinion of Advocate General Rantos in C-718/19, 10 February 2021.

[353] Communication from the Commission to the European Parliament and the Council, Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, COM(2014)604 final, 26 September 2014, and associated Commission Staff Working Document on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, SWD(2014)284 final.

purpose of those rules.' It also clarifies the distinction between fraud and abuse by stating that fraudsters 'seek 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'. Section 5.2 describes 'three predominant forms of abuse of EU law on free movement', namely, marriages of convenience, parenthood of convenience and abuse by returning nationals and Section 5.3 deals with the distinction between genuine marriages and marriages of convenience including guidance on the applicable safeguards and the burden of proof accompanied by cross-references to Sections 2.2 and 3 of the Handbook on marriages of convenience. Finally, Section 5.4 sets out operational guidance, particularly for consulates, through cross-references to Section 4 of the Handbook on marriages of convenience.

The most recurrent difficulty reported on in relation to Article 35 of the Directive relates to the unjustified or alleged systematic application of the rules on abuse for refusals of visas and residence cards to spouses, on the basis of suspicion of a marriage of convenience, including, for instance, an age gap being sufficient to conclude that there is a marriage of convenience or the systematic application of the rules on abuse for marriages concluded outside of the EU.

The **CJEU** has:

- Affirmed in *Sean McCarthy* that measures adopted by the national authorities on the basis of Article 35 of Directive 2004/38 must be based on an individual examination of the particular case and 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 the Directive unapplied.[354]
- Restated in *O. & B.* that the scope of EU law cannot be extended to cover abuses, specifying this also applies to returning nationals.[355] This case does not affect previous case-law cited in Section 4 of the 2009 Guidelines to support the statement that 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.[356] In *L.N.*, the Court confirmed that the motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration.[357]
- Interpreted the notion of abuse under its previous case-law in respect of a restriction on the right of entry in the Slovak territory concerning the President of Hungary.[358]

Potential options

The 2009 Guidelines contain detailed guidance for Member State authorities in their assessment of the situations under Article 35 of the Directive, including specifically on marriages of convenience. Further clarifications that would additionally address the **main difficulties** identified may therefore consist of:

- Introducing cross-references to the detailed guidance in the 2014 Commission Handbook on marriages of convenience and, in the context of visa applications, Section 5 of Part III of the Visa Handbook (the guidance set out therein can be extended to the EU Member States not fully applying the Schengen *acquis* as they derive directly from Article 35 of the Directive).
- Introducing specifications based on *Sean McCarthy*, *O. & B.* and *L.N.*, namely that:

[354] C-202/13 *Sean McCarthy and Others*, paras. 52-58.

[355] C-456/12 *O. & B.* para. 58.

[356] C-370/90 *Singh*; C-291/05 *Eind*; C-60/00 *Carpenter*; C-212/97 *Centros*, para 27; C-147/03 *Commission v Austria*, paras 67-70; C-109/01 *Akrich*, para. 55; C-1/05 *Jia*, para 31, already mentioned in the 2009 Guidelines.

[357] C-46/12 *L.N.*, paras 46-47.

[358] C-364/10 *Hungary v Slovak Republic*.

- Measures adopted by the national authorities on the basis of Article 35 of Directive 2004/38 must be based on an individual examination of the particular case and 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 the Directive unapplied.[359]
- The scope of Union law cannot be extended to cover abuses, specifying this also applies to returning nationals.[360]
- The motives which may have prompted a worker of a Member State to seek employment in another Member State are of no account and must not be taken into consideration.[361]

In addition, the use of other measures could be considered regarding this issue.

2.17 PUBLICITY/DISSEMINATION OF INFORMATION (ARTICLE 34 OF THE DIRECTIVE)

Overview

Article 34 of the Directive requires Member States to disseminate information concerning the rights and obligations of EU citizens and their family members on the subjects covered by the Directive.

The information requirement is not further specified in the 2009 Guidelines or in CJEU case-law and issues related to the lack of information or the provision of incorrect or confusing information by authorities or on their official websites in particular in relation to visa requirements for non-EU family members, registration certificates and Article 10 or Article 20 residence cards were identified as highly recurrent issues. However, when dealing with entry visas, **Section 2.2.1 of the 2009 Guidelines** does state that the authorities of the Member States should guide the family members as to the type of visa they should apply for.

In addition to dissemination of information by the Member States themselves, the Commission also provides information with respect to the rights and obligations of EU citizens and their family members under the Directive through the Your Europe Advice portal[362] and other tools such as the Single Digital Gateway established by Regulation (EU) 2018/1724.[363]

Potential options

Potential options for addressing the **main difficulties** mentioned above, could be to:

- Add a new Section on dissemination of information to the 2009 Guidelines emphasising that the availability of correct information on rights is an integral aspect of ensuring the ability of beneficiaries to effectively make use of those rights.
- Provide guidance in other parts of the 2009 Guidelines:
  - Further develop the statement in Section 2.2.1 of the 2009 Guidelines on entry visas stating that the national authorities should provide information as to the provisions applicable to family members of mobile EU citizens.
  - Add statements within the different Sections of the 2009 Guidelines on registration

[359] C-202/13 *Sean McCarthy and Others*, paras. 52-58.

[360] C-456/12 *O. & B.* para. 58.

[361] C-46/12 *L.N.*, paras 46-47.

[362] https://europa.eu/youreurope/index.htm#en

[363] 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: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2018.295.01.0001.01.ENG

certificates and Article 10 and Article 20 residence cards specifying the requirement for national authorities to provide clear and correct information.

- Consider, in the context of the updated Guidelines, links to Commission efforts relating to available information for instance through the Your Europe Advice portal and the Single Digital Gateway.

ANNEX I. LIST OF SOURCES

List of sources

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ANNEX II. RESEARCH METHOD FOR IDENTIFYING MAIN DIFFICULTIES INFORMING THE SUGGESTIONS FOR REVIEW

The suggestions for review of the 2009 Guidelines set out in the Overall Report (Deliverable E) are **developed on the basis of previous Deliverables**, in particular, the Thematic Report (Deliverable D) presenting and analysing the most important and urgent difficulties - **main difficulties** - that EU citizens have faced during the last five years (January 2015 to April 2020) with regard to the implementation of Directive 2004/38/EC in their contact with the national administrations.

The following paragraphs outline the methodology followed for the identification of main difficulties in the Thematic Report to contextualise and **explain the steps preceding the development of the potential options for review of the 2009 Guidelines** outlined in the Overall Report.

Scope and information base of Thematic Report

The Thematic Report was based on the Member State mapping carried out under Deliverable C that consisted of 28 Country Fiches identifying the problems faced by individuals with respect to the application of the Directive's requirements by administrative authorities.

The Thematic Report informs the suggestions for the review of the 2009 Guidelines set out in the Overall Report, together with the information gathered as part of Deliverables A and B (cataloguing and analysing all CJEU judgments delivered from 1 January 2009 until 18 January 2021 that relate to Articles 20(2)(a) and 21(1) TFEU, Directive 2004/38/EC and the 2009 Guidelines) and C.

Difficulties faced with private bodies such as banks and telecommunications service providers; tax and social security issues; issues related to vehicles and COVID related issues[370] fell outside the scope.

The Country Fiches were completed on the basis of a template containing:

(i) A **Summary Report** summarising and quantifying the main findings and listing the difficulties identified in order of recurrence.

(ii) A **Summary Table** structured around the Directive's provisions and mapping the following elements for each entry: source of information (column 1 - identifying all the sources in which the problem was reported); legal and administrative difficulties as reported (column 2); possible source of difficulty (column 3 - specifying whether the issue in question resulted from a possible misapplication of the Directive, a written administrative practice, a possible non-transposition or incorrect transposition or whether the difficulty could result from a grey area in EU law); difficulties as raised in national court judgments (column 4) and the relevant CJEU judgments (column 5). There is one row per problem identified. Where the same issue appeared in several sources, the relevant source references were added to column 1.

The completion of the Country Fiches was based on **desk research**. The main sources of information for completing the Country Fiches are the SOLVIT and Your Europe Advice (YEA) Quarterly Feedback Reports from the first quarter of 2015 to the first quarter of 2020. While the cases reported on in the YEA Quarterly Feedback Reports do not cover all the queries received from individuals, the information contained therein is representative of the difficulties faced by individuals. Similarly, stakeholders consulted explained that as regards SOLVIT, certain cases are not taken forward so that there may in fact be a greater number of cases relevant to specific difficulties. Several other sources including EU level studies, academic literature, country specific sources and national databases were systematically reviewed for each country thus ensuring that there is a broad evidence base for those

[370] Queries related to COVID-19 issues are only reported on in the first YEA Quarterly Feedback Report of 2020 as a result of various questions received by YEA as of March 2020. Since these queries only appear in a small portion of the January 2015 to April 2020 reference period sources, it would not be possible to provide a comprehensive and reliable picture of the range of COVID-19 related difficulties and it was agreed that they would not be included in the scope of this study.

difficulties that are most recurrent and significant.

The results of the desk research carried out for the Country Fiches were supplemented by **stakeholder interviews** with representatives of various DGs of the European Commission, the European Union Agency for Fundamental Rights (FRA) and civil society organisations between October and November 2020. They were used to check completeness of/fill gaps in the research undertaken for the Deliverable C Country Fiches and to help inform the decision-making process as regards the shortlisting of main difficulties as described below.

The interviews with stakeholders were semi-structured and followed an interview guide with specific questions. Stakeholders were in particular asked to present the main difficulties they have encountered in the period from 2015 – first quarter of 2020 in their respective practice areas. Interviewers were instructed to guide the interviewee to cover the full range of topics addressed by the Directive, without pre-empting the identification of main difficulties. While most stakeholders were interviewed without having been presented the outcomes of the desk research, the Country Fiches had been previously circulated to and commented upon by the interviewees from DG EMPL and DG GROW.

Stakeholder interviews	
European Commission	**Civil society organisations**
■ DG Justice and Consumers (JUST) ■ DG Internal Market, Industry, Entrepreneurship and SMEs (GROW) ■ DG Employment, Social Affairs & Inclusion (EMPL) ■ European Union Agency for Fundamental Rights (FRA)	■ AIRE Centre (Advice on Individual Rights in Europe) (UK) ■ European Citizen Action Service (BE) ■ Specialistenvereniging Migratierechtadvocaten (NL) ■ Immigration Council of Ireland (IE) ■ Associazioni per gli Studi Giuridici sull' Immigrazione (IT) ■ Myria (BE)

In addition, a **meeting with the Consultative Body** - consisting of four prominent academic experts in the field of free movement law - took place on 23 November 2020 to discuss the selection criteria and the long list of difficulties as part of the shortlisting process described below.

Development of long list of difficulties

Under the Thematic Report, the difficulties faced by individuals with respect to the application of the Directive's requirements by administrative authorities as reported in the Country Fiches, were grouped together in summary form and compiled as a long list of difficulties.

The findings are based on facts and allegations raised by individuals and do not reflect the official position of the Commission. The difficulties listed did not necessarily entail the existence of a misapplication by the national authorities, but could also, for instance, be a consequence of a grey area in EU law or of a misunderstanding of the rights under the Directive by EU citizens or their family members. The purpose of the study is to reflect the main difficulties as reported and perceived rather than to analyse the individual cases to determine whether a misapplication of the Directive had actually occurred.

Wherever information reported in the sources of information was not specific enough this was not taken forward beyond the Country Fiches. In particular, this emerges from the fact that in addition to containing information on specific cases, the YEA Quarterly Feedback Reports also contain trends identified in the Member States that could not always be linked to specific cases and in the absence of a clear indication of the precise nature of a difficulty it would not be possible to apply the selection criteria used to prioritise the difficulties.

Similarly, certain issues mentioned in the YEA Quarterly Feedback Reports were not retained where they were not considered to constitute difficulties effectively faced with respect to the exercise of rights under the Directive but rather questions from citizens regarding e.g. what to do in a specific situation.

In addition, the difficulties identified in the UK, which ceased to be an EU Member State as of 1 February 2020, fell outside the scope of the Thematic Report and were thus not taken into account in the long list of difficulties.[371]

Issues identified in national case-law were included in the Country Fiches, but not in the long list of difficulties if the courts correctly applied the provisions of the Directive and redressed a potential misapplication by national authorities.

Having applied the above considerations, the long list of difficulties was presented in an overview table in the Thematic Report.

Development of selection criteria and shortlisting main difficulties

To determine the **main difficulties**, a set of **selection criteria** outlined in the box below was developed.

In order to shortlist the main difficulties on the basis of the selection criteria, as a general rule, a triangulated approach, involving the three steps in triangulation in qualitative research - documentation, perception and validation - was used. The objective of using this approach is to ensure that a wide range of factors is considered in the decision-making process by verifying that the problem in question is:

(i) Documented (on the basis of desk research and information in the Country Fiches).

(ii) Perceived (on the basis of stakeholder interviews).

(iii) Validated (on the basis of discussion of the long list of difficulties with the Consultative Body).

In addition to the triangulation method described above, the shortlisting also covered a smaller number of difficulties that were documented and either perceived by stakeholders or validated by the Consultative Body.

Criteria for determining whether a difficulty qualifies as a 'main difficulty'

- **Recurrence**

This is a quantitative criterion based on:

(i) The number of Member States in which the issue is reported on in the Deliverable C Country Fiches
(ii) The number of sources reporting the problem

The recurrence criterion is satisfied whenever the difficulty appears in five or more Member States and/or five or more sources.[372]

- **Significance**

This is a qualitative criterion based on the following elements/sub-criteria:

(i) *Impedes exercise of a key right*

This is considered to be the case whenever the problem in question affects the ability of beneficiaries of the Directive to actually move to or reside in another Member State or to otherwise make use of key rights under the Directive. Conversely, difficulties that do not impede the exercise of free movement rights but make this more burdensome on citizens (e.g. requirement to renew registration certificate) would not satisfy this criterion.

(ii) *Catch-22 situation/deadlock*

[371] As the review of the Guidelines should ensure a more effective and uniform application of the Directive in the future, the difficulties identified in the UK in the previous five years do not appear to be relevant in this exercise.

[372] It should be noted that for YEA and SOLVIT, one case reporting the difficulty is counted as one source.

Criteria for determining whether a difficulty qualifies as a 'main difficulty'
This criterion will be satisfied wherever a deadlock situation is created. (iii) *Appears in Member States with a high number of mobile citizens* This criterion is completed on the basis of Eurostat data ([migr_pop1ctz] dataset: EU residents/total population) and provides an indicator of the relevance of the difficulty in question. The threshold for this criterion is determined at Member States with at least 3% of the total population of EU citizens that reside in a Member State other than the one of which they are nationals (excluding the UK). On the basis of the data available on 18 January 2021 (Annex I), on a total number of EU citizens residing in another Member State (excluding the UK) of 14,177,640, this threshold is exceeded in Member States with more than 425,330 EU residents, i.e. AT, BE, FR, DE, IE, IT, ES and NL. The data available refer to the year 2019. (iv) *Affects a group of particular attention* This criterion indicates whether the problem in question affects any of the following groups of particular attention: Roma, victims of gender-based violence, LGBTQ+, persons with disabilities or children.[373] The significance criterion is satisfied whenever the difficulty meets two or more of the above sub-criteria.
■ **Mentioned by stakeholders** This criterion is satisfied whenever existence of the problem in question was raised by stakeholders.
■ **Validation** This criterion is satisfied whenever the existence of the problem in question was confirmed by members of the Consultative Body.

In order to reach a shortlist, the steps outlined below were followed.

Application of the selection criteria		
Step 1 **(Recurrence + Significance + Confirmed by stakeholders and/or Consultative Body)**	**Step 2** **(High recurrence + Confirmed by stakeholders and/or Consultative Body)**	**Step 3** **(Shading of difficulties satisfying the checks in Step 1 or Step 2)**
■ It was checked whether the difficulties satisfied the benchmarks for both recurrence and significance as follows: (i) A difficulty was considered to satisfy the recurrence criterion if it appeared in five or more Member States and/or in five or more sources. (ii) A difficulty was considered to meet the significance criterion if it satisfied two or more of the significance sub-criteria outlined above. ■ It was checked whether the difficulties meeting the recurrence and significance criteria were also mentioned by stakeholders and/or validated by the Consultative Body.	■ It was checked whether difficulties not shortlisted on the basis of Step 1, were **highly recurrent**, that is, the recurrence criterion was viewed separately in order to ensure that difficulties appearing in 20 or more sources were shortlisted even when they did not meet two or more of the significance sub-criteria. ■ It was checked whether these highly recurrent difficulties were also mentioned by stakeholders and/or validated by the Consultative Body.	■ The difficulties satisfying the criteria in Steps 1 or in Step 2 were **shaded in green** in the overview table and taken forward for analysis.

[373] Identified on the basis of the strategic action initiatives set out by the European Commission in its 2020 and 2021 Work Programmes, https://ec.europa.eu/info/publications/2020-commission-work-programme-key-documents_en and https://eur-lex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC_2&format=PDF

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