

EUROPEAN UNION CITIZENSHIP: FREEDOM OF MOVEMENT AND FAMILY REUNIFICATION. RECONCILING COMPETENCES AND RESTRICTING ABUSE?*

Introduction

All Member States of the European Union experience international migration be it legal or illegal¹: this is symptomatic of the phenomenon of ‘globalisation in the contemporary world’.

This paper will treat the right of a citizen of the Union who has exercised his/her right freely to move within the current twenty seven European Union Member States, to be accompanied or joined by his /her third country national (TCN) spouse, in spite of the latter’s illegal residence. The provisions 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 (citizens’ rights Directive)² will be examined in context.

The competence of the supranational European Union as opposed to that of each Member State, to remove barriers to the immigration of third country family members of the migrant Union citizen is affirmed, as a result of the ruling given by the Court of Justice of the European Union in July 2008 in the *Metock* case;³ a ruling which accorded precedence to family life over lawful residence regardless of where and when the marriage took place, albeit subject to the proviso that there has been no abuse in the form of a marriage of convenience.⁴ Ultimately, Member States, acting proportionately and in accordance with the procedural safeguards⁵ of the citizens’ rights Directive, may adopt the necessary measures to refuse, terminate or withdraw any right conferred in the case of abuse of rights or fraud.⁶

This ruling has constitutional significance and elicited a robust response from, *inter alia*, the United Kingdom government, fearful of its implications for efforts to tackle false marriages and its potential to create greater opportunities for trafficking and smuggling. The Justice and Home Affairs Council of the European Union, nevertheless, formulated its conclusions on abuses and misuses of the right to free movement of persons, pursuant to

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¹ Cf http://www.ec.europa.eu/justice_home/fsj/immigration/fsj_immigration_intro_en.htm

² 2004] OJ L158/77.

³ Case C-127/08 *Metock v Minister for Justice, Equality and Law Reform*, Judgment of the Court (Grand Chamber) 25 July 2008, [2008] 3 CMLR 39.

⁴ Cf Samantha Currie, ‘Accelerated justice or a step too far? Residence rights of non-EU family members and the court’s ruling in *Metock*’, (2009) *E.L.Rev.*310.

⁵ Articles 30 and 31 of Directive 2004/38.

⁶ Article 35 of Directive 2004/38.

which Guidelines issued by the European Commission purport to facilitate better implementation of European Union law on the part of Member States investigating individual cases where there is a well-founded suspicion of abuse.⁷ The European Union citizenship framework remains, not without criticisms of reverse discrimination and questions of competence concerning human rights.⁸ It will be asserted that the legal status accorded to the Charter of Fundamental Rights of the European Union by the Treaty of Lisbon reinforces the supranational competence of the European Union in respect of citizenship of the Union and family life; and also in respect of restricting abuse – monitoring Member States in the implementation of the European Union legal principles of proportionality and procedural compliance.

European Union Citizenship and Free Movement

The concept of Citizenship of the European Union (EU) was introduced by the 1991 Maastricht Treaty on European Union and consequently amended by the 1997 Treaty of Amsterdam and in turn by the 2007 Treaty of Lisbon. This paper is concerned with the heart of the concept of EU citizenship: namely, freedom of movement and residence.

In accordance with Article 20 (1) of the Treaty on the Functioning of the European Union (TFEU): ‘Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.’ Thus EU citizenship is enjoyed by those possessing nationality of a Member State, inclusive of dual nationality, in accordance with national law.⁹ ‘Citizens of the Union shall enjoy the *rights* and be subject to the duties provided for in the Treaties.’¹⁰ They shall have, *inter alia*, (a) the right to move and reside freely within the territory of the Member States. ‘Every citizen of the Union shall have the *right* to move and reside freely within the territory of the Member States, *subject to* the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.’¹¹

⁷ For a comprehensive report see Sergio Carrera and Anaïs Faure Atger, ‘Implementation of Directive 2004/38 in the context of EU Enlargement. A proliferation of different forms of citizenship?’ *Centre for European Policy Studies (CEPS) Special Report*/April 2009, available on the Internet at <http://www.ceps.eu>

⁸ See Anja Lansbergen, ‘Testing the Limits of European Citizenship’, European Policy Brief, The Federal Trust, May 2009, <http://www.fedtrust.co.uk>; Alina Tryfonidou, ‘Family Reunification Rights of (Migrant) Union Citizens: Towards a More Liberal Approach’, (2009) *European Law Journal*, 634 at pp. 645-652; Francis G Jacobs, ‘Citizenship of the European Union – A Legal Analysis’, (2007) *European Law Journal*, 591 at pp. 598 and 604; See P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’, (2002) 39 *Common Market Law Review* 945, at 972.

⁹ Case C-369/90 *Micheletti* [1992] ECR I-4239.

¹⁰ Article 20(2) TFEU.

¹¹ Article 21(1) TFEU.

Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the citizens' rights Directive) extends the right of entry and residence accorded to the EU citizen¹² to family members¹³ who are not nationals of a Member State, accompanying or joining the Union citizen in the host Member State.¹⁴ The full extent of this provision became apparent as a result of the controversial ruling of the Court of Justice of the European Union in the *Metock* case.

*Metock v Minister for Justice, Equality and Law Reform*¹⁵

The case of *Metock* concerned a reference for a preliminary ruling from the High Court in Ireland in the course of four applications for judicial review of the refusal to grant a residence card to a national of a non-member country married to a Union citizen who having crossed a border from another Member State resided lawfully in Ireland. In each of the four cases a national of a non-member country entered Ireland directly from outside the European Union and made an application for asylum which was refused. Each applicant then married a national of a Member State other than Ireland who was established and working in Ireland. Following the marriage each third country national (TCN) applied for a residence card as the spouse of a national of a Member State lawfully resident in Ireland. Each applicant was refused such a card by the Minister for Justice on the ground that he was unable to provide evidence that he had been lawfully resident in another Member State prior to arrival in Ireland,¹⁶ as required by the Irish regulations adopted to transpose the citizens' rights

¹² Residence for longer than 3 months - Article 7(1) (a) worker.; Article 7(1) (b) (independent means) and Article 7(1)(c) (students) – both categories having sufficient resources and comprehensive sickness insurance.

¹³ Defined in Article 2(2) (a) – (d) of Directive 2004/38.

¹⁴ *Ibid.* Article 7(2). Rights of Exit/Entry includes family members who are not nationals of EU Member State, required under Article 4 and 5(1) to have a valid passport and ID card. In accordance with Article 5(2), an entry visa may be required but must be free of charge and obtainable via an accelerated procedure; or a valid residence card - Article 10.

¹⁵ Case C-127/08, Judgment of the Court (Grand Chamber) 25 July 2008, [2008] 3 CMLR 39. Judgment was given by the Court, having regard to the decision of the President of the Court of 17 April 2008 to apply an accelerated procedure in accordance with Article 23a of the Statute of the Court of Justice and the first paragraph of Article 104a of the Rules of Procedure; having regard to the written procedure and further to the hearing on 3 June 2008; after considering the observations submitted on behalf of the parties; MS's and the Commission; and after hearing the Advocate General.

¹⁶ View of Advocate General Poiares Maduro of 11 June 2008, point 2.

Mr Metock, Chinedu, and Igboanusi were all refused residence cards on the grounds that they did not satisfy the condition laid down in Ireland's law – of prior lawful residence in another EU Member State. Mr Ikogho was refused a residence card on the basis of his illegal residence prior to his marriage – since a deportation order had been made against him. Mr Igboanusi was arrested and deported to Nigeria in December 2007.

Mr Metock, a national of Cameroon, arrived in Ireland on 23 June 2006 and applied for asylum. His application was refused on 28 February 2007. Ms Ikeng was from Cameroon, but having acquired United Kingdom nationality worked in Ireland. They did have a longstanding relationship and married in October 2006.

Mr Ikogho, a non EU citizen, arrived in Ireland in November 2004 and applied for asylum, which was refused and a deportation order was made against him on 15 September 2005. Mr and Mrs Ikogho, a UK national, met in Ireland in December 2004 and were married there in June 2006.

Mr Chinedu, a Nigerian national applied for asylum on his arrival in Ireland in December 2005. This was refused in August 2006. Ms Babucke is a German national, lawfully resident in Ireland. They were married in Ireland on 3 July 2006.

Directive.¹⁷ It was established at the outset by the national referring Court that none of the marriages were marriages of convenience.¹⁸

Advocate General Poires Maduro¹⁹ aptly described the issue as a sensitive one because it involved drawing a dividing line between that covered by the provisions on Union citizens' freedom of movement and residence and that which comes under immigration control, a matter over which the Member States retain competence in so far as and to the extent that the European Union has not brought about complete harmonisation. In his view the constitutional significance of the matter was evident in the fact that 10 Member States²⁰ intervened in support of Ireland.

The Court of Justice of the European Union ruled in *Metock* that the citizens' rights Directive must be interpreted as applying to all nationals of non-member countries who are family members of a Union citizen within the meaning of that Directive and accompany or join the Union citizen in a Member State other than that of which he is national, and as conferring on them rights of entry and residence in that Member State, without distinguishing according to whether or not the national of a non-member country has already resided lawfully in another Member State.²¹ It was the aim of the citizens' rights Directive,²² in particular to '*strengthen the right of free movement and residence of all Union citizens*'.²³ In the second place, the Court declared, that interpretation is consistent with the division of competences between the Member States and the European Union, since if Union citizens were not allowed to lead a normal *family life* in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed.²⁴ The refusal of the host Member State to grant rights of entry and residence to the family members of a Union citizen, continued the Court, is such as to discourage that citizen from moving to or

Mr Igboanusi, a Nigerian national, arrived in Ireland on 2 April 2004 and applied for asylum which was refused on 31 May 2005. The Minister made a deportation order against him on 15 September 2005. Ms Batkowska, a Polish national, resided and worked in Ireland since April 2006. They met in Ireland and were married there on 24 November 2006. Judgment of the Court, *supra*, at paras 18-37.

¹⁷ Following a judgment of the Court of Justice on 23 September 2003 [Case C-109/01 *Secretary of State for the Home Office v Akrich* [2003] ECR I-9607], Denmark, Ireland, Finland and the UK made the right of residence of third country family members conditional upon their prior lawful residence in another Member State. Seven Member States (AT, CZ, DE, EL, CY, MT and NL) adopted the same interpretation through administrative guidelines. The application of this additional requirement, not provided for in the Directive, resulted in a high number of complaints. Report from the Commission to the European Parliament on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840, 10 December 2008, para. 3.1, <http://www.europa.eu>

¹⁸ Para. 46 of the judgment in *Metock*.

¹⁹ Point 1 of his view in *Metock*.

²⁰ namely Czech Republic, Denmark, Germany, Greece, Cyprus, Malta, The Netherlands, Austria, Finland, United Kingdom.

²¹ Para. 54 of the judgment. The conclusion reached in Case C-109/01 *Akrich*, must, said the Court, be reconsidered. Para. 58 of the Court's judgment. The Court previously had held (in paras. 50 and 51 of that case), that in order to benefit from the rights provided for in Article 10 of Regulation No. 1612/68, the national of a non-member country who is the spouse of a Union citizen must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated.

²² which amended Article 10 of Regulation (EEC) No. 1612/68.

²³ (recital 3 in the preamble). Para 59 of the judgment. (*Emphasis added*).

²⁴ Paras 60 and 62 of the judgment. (*Emphasis added*).

residing in that Member State, *even if his family members are not already lawfully resident in the territory of another Member State*. It followed that the Community legislature had the competence to regulate, as it did by the citizens' rights Directive, the entry and residence of nationals of non-member countries who are family members of a Union citizen in the Member State in which that citizen has exercised his right of freedom of movement, including where the family members were not already lawfully resident in another Member State.²⁵

The Court was adamant, stating that to allow the Member States exclusive competence to grant or refuse entry into and residence in their territory to nationals of non-member countries who are family members of Union citizens and have not already resided lawfully in another Member State would have the effect that the freedom of movement of Union citizens in a Member State whose nationality they do not possess would vary from one Member State to another, according to the provisions of national law concerning immigration, with some Member States permitting entry and residence of family members of a Union citizen and other Member States refusing them. That, according to the Court, would not be compatible with the objective set out in the Treaty of an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of persons. Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States.²⁶

In order to assuage the concerns of those governments which submitted observations in *Metock* and which deemed it necessary to control migration at the external borders of the European Union, the Court emphasized that it is not all nationals of non-member countries who derive rights of entry into and residence in a Member State from the citizens' rights Directive, but only those who are *family* members, within the meaning of that Directive, of a *Union citizen who has exercised his right of freedom of movement*.²⁷

The Court then underlined the fact that the citizen's rights Directive does not deprive the Member States of all possibility of controlling the entry into their territory of family members of Union citizen; reiterating that Member States may, where this is justified, refuse entry and residence on grounds of public policy, public security or public health. Such a

²⁵ *Ibid.* paras. 64 and 65. (*Emphasis added*).

²⁶ *Ibid.* paras. 67 and 68.

²⁷ *Ibid.* para. 73 (*Emphasis added*).

refusal would be based on an individual examination of the particular case.²⁸ Moreover, and of significance in the context of this paper, the Court affirmed that in accordance with Article 35 of the citizens' rights Directive, Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, *such as marriages of convenience*. Any such measure shall be *proportionate and subject to the procedural safeguards* provided for in the Directive.²⁹

Pursuant to the second question referred, the Court determined that it makes no difference whether nationals of non-member countries who are family members of a Union citizen have entered the host Member State before or after becoming family members of that Union citizen, since the refusal of the host Member State to grant them a right of residence is equally liable to discourage that Union citizen from continuing to reside in that Member State.³⁰ Therefore, in the light of the necessity of not interpreting the provisions of the citizens' rights Directive restrictively and not depriving them of their effectiveness, the words 'family members [of Union citizens] who accompany ... them' in that Directive³¹ must be interpreted as referring both to the family members of a Union citizen who entered the host Member State with him and to those who reside with him in that Member State, without it being necessary, in the latter case, to distinguish according to whether the nationals of non-member countries entered that Member State before or after the Union citizen or before or after becoming family members.³² A national of a non-member country who is the spouse of a Union citizen residing in a Member State whose nationality he does not possess and who accompanies or joins that Union citizen benefits from the provisions of that Directive, irrespective of when and where their marriage took place and of how the national of a non-member country entered the host Member State.³³

An Assessment

Permanent residence and the right to work in the European Union

The *Metock* judgment potentially has far-reaching consequences for Member States in that the citizens' rights Directive provides for *permanent* residence status to be acquired by

²⁸ *Ibid.* para 74. Pursuant to Article 27 of Directive 2004/38.

²⁹ *Ibid.* para 75. (*Emphasis added*).

³⁰ *Ibid.* paras. 81 and 92.

³¹ In Article 3(1) of Directive 2004/38.

³² Para. 93 of the Court's judgment.

³³ *Ibid.*, para. 99. Confirmed in Case C-551/07 *Deniz Sahin v Bundesminister für Inneres*, Order of the Court (Seventh Chamber) 19 December 2008. In its order in *Sahin*, the Court ruled that Directive 2004/38 must be interpreted as applying also to family members who arrived in the host Member State independently of the Union citizen and acquired the status of family member or started to lead a family life with that Union citizen only after arriving in that State. Alina Tryfonidou, note 8 above, at 644.

the TCN spouse who has legally resided with a Union citizen in the host Member State for a continuous period of five years³⁴ and grants immediately the right to work in the host Member State to the TCN spouse of a migrant EU citizen.³⁵

Reverse discrimination: The market citizen versus the static citizen

One leading commentator has described the reach of *Metock* as not stopping ‘at the *elimination* of barriers to free movement; on the contrary, it is intended explicitly to *encourage migration between Member States* and in so doing it *privileges the migrant citizen* above those who remain in the Member State of which they are nationals. This results in a situation of *reverse discrimination*, in which *migrant* citizens have *enhanced rights of residence* for their non-EU national family members under Community [now Union] law whilst static EU citizens must rest their hopes on fulfilment of national immigration criteria which are becoming increasingly restrictive.’³⁶ Brushing off the concerns expressed in the observations of the governments in *Metock* in relation to this unjustified dichotomy of treatment prejudicing the entry and residence of the TCN family members of the EU citizen who has never exercised his right of freedom of movement, the Court of Justice concluded that any such difference in treatment did not fall within the scope of European Union law.³⁷

Family rights for all EU citizens

Such contradictory treatment accorded to the family life, on the one hand, of the migrant EU citizen, and, on the other, of the EU citizen who remains in his Member State of allegiance, offends against ‘the deeply embedded view that human rights are rights that must be granted to *all* human beings, without any *unjustifiable* distinctions being made’.³⁸ Alina Tryfonidou acknowledged Eeckhout who wrote, ‘...if fundamental (human) rights are conferred on the moving European citizen, then this, undoubtedly, will lead to the further question of whether it remains permissible to differentiate between moving citizens and Union citizens who stay still’.³⁹

³⁴ Article 16(2) of Directive 2004/38. (*Emphasis added*).

³⁵ Article 23 of Directive 2004/38.

³⁶ Anja Lansbergen, note 8 above, at para. 5.

³⁷ Paras. 76-78 of the judgment in *Metock*.

³⁸ Alina Tryfonidou, note 8 above, at 648 and 649.

³⁹ P Eeckhout, note 8 above, at 972. Alina Tryfonidou, *Ibid.* at 649, note 76.

Illegal residence: association with criminality

Sergio Carrera and Anaïs Faure Atger further allude to ‘the political turmoil which followed’ and to ‘the resistance shown by certain Member States’ to European Union legislation and the rulings of the Court of Justice on the freedom to move.⁴⁰ Evidently, ‘by framing free movement rights under the insecurity discourse of ‘misuses and abuses’ and by associating it with illegality and even criminality, some Member States sought to resist the liberal judicial interpretation of the ECJ over derivative rights of TCNs who are family members of EU citizens independently of their irregular administrative migration status according to Member States’ national legal systems.’⁴¹

The *Metock* case was discussed by European Justice and Home Affairs ministers at the Council meeting on 25 September 2008, in the context of tackling illegal immigration.⁴² Of particular significance is the position portrayed in that Council meeting by the United Kingdom Minister of State for the Home Office. He underlined the concern of the United Kingdom government that the ruling in *Metock* could have implications for efforts to tackle false marriages⁴³ and create greater opportunities for trafficking and smuggling. He stipulated that the options for tackling false marriages, illegal immigration, preventing crime and pursuing deportation should be assessed as part of the review of the citizens’ rights Directive.⁴⁴ The Council formulated its conclusions on abuses and misuses of the right to free movement of persons.⁴⁵ It is worthy to note that the Council considered that, in compliance

⁴⁰ Sergio Carrera and Anaïs Faure Atger, ‘Implementation of Directive 2004/38 in the context of EU Enlargement. A proliferation of different forms of citizenship?’ *Centre for European Policy Studies (CEPS) Special Report/April 2009*, at 17, available on the Internet at <http://www.ceps.eu>

⁴¹ Sergio Carrera and Anaïs Faure Atger, *Ibid.* at 19. Cf pp. 17-21.

⁴² See Arabella Thorp, ‘Immigration: the *Metock* case and its implications for UK rules on family members of EEA citizens’, House of Commons Library, Home Affairs Section, SN/HA/4900, p. 4, point 2, 9 February 2009. Cf Council of the European Union press release, 2890th Council meeting: Justice and Home Affairs – Brussels, 25 September 2008, p. 9.

⁴³ This is not a surprising reaction on the part of the United Kingdom government in the light of a recent House of Lords judgment in the case of *R (On the application of Baiai and others) v Secretary of State for the Home Department*, (House of Lords) [2008] UKHL 53, - in which case the control of the fundamental right to marry by the Secretary of State under and pursuant to section 19 of the Asylum and Immigration (Treatment of Claimants...) Act 2004 was deemed to be disproportionate. Lord Bingham of Cornhill explained: ‘The Immigration Directorates’ Instructions, promulgated (it is understood) without express parliamentary sanction, provide for the denial of permission to marry (save on compassionate grounds, relatively rarely allowed in practice) to all those who are in the country without leave, or whose grant of leave to enter or remain in the UK on the occasion in question did not total more than 6 months, or who did not have at least 3 months remaining at the time of making the application for permission. The vice of this scheme is that none of these conditions, although of course relevant to immigration status, has any relevance to the genuineness of a proposed marriage, which is the only relevant criterion for deciding whether permission should be given to an applicant who is qualified under national law to enter into a valid marriage. ... But the section 19 scheme does not provide for or envisage any investigation at all, because (as has been explained in the evidence) such investigation is too expensive and administratively burdensome. Thus, subject to the discretionary compassionate exception, the scheme imposes a blanket prohibition on exercise of the right to marry by all in the specified categories, irrespective of whether their proposed marriage marriages are marriages of convenience or whether they’re not. This is a disproportionate interference with exercise of the right to marry.’ Para 31 of the judgment.

⁴⁴ Letter to the Chairman from the Minister of State Home Office, (Liam Byrne MP), House of Commons Select Committee on European Scrutiny, Thirty Fourth Report, 2007/08, concerning the Justice and Home Affairs Council, 25 September 2008, <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmeuleg/16-xxx/01627> accessed 3 March 2010

Cf Note from the United Kingdom delegation to the Permanent Representatives Committee. Subject: Free movement of persons: abuses and substantive problems – Draft Council Conclusions, Council of the European Union, 15903/08, Brussels, 18 November 2008.

⁴⁵ Council Conclusions of 27 November 2008 on abuses and misuses of the right to free movement of persons, Council of the European Union, 16483/08, Brussels, 28 November 2008. Corrigendum to Outcome of Proceedings of the Council on 27 November 2008, Council of the European Union, 16483/08 COR 1, Brussels, 4 December 2008.

with and in the interests of the right of free movement, every effort must be made to prevent and combat any misuses, as well as actions of a criminal nature, with forceful and proportionate measure with due regard to the applicable law, against citizens who break the law in *a sufficiently serious manner by committing serious or repeated offences that cause serious harm*.⁴⁶ In this connection the Council noted the relevant provisions of the citizens' rights Directive, in particular Article 27 concerning restrictions on the right of entry and the right of residence of Community [Union] nationals and their family members on grounds of *inter alia* public policy and public security and Article 35 concerning abuse of rights and fraud, such as marriages of convenience.⁴⁷ The Council welcomed the Commission's intention to submit a report on the operation of the citizens' rights Directive and also the work being undertaken between the Commission and Member States meeting in an expert group to identify the problems in implementation of the Directive and good practice at national level. Concerned that emphasis should be placed on the full and correct implementation of the citizens' rights Directive, with adherence to the principle of proportionality, the Council requested the Commission to publish guidelines for the interpretation of the Directive and to consider all other appropriate and necessary proposals and measures.

Abuse and Fraud: Marriages of Convenience

Commission Report

In its duly published Report on the implementation in the Member States of the citizens' rights Directive, the Commission of the European Union reiterated that according to Article 35 of that Directive, Member States may adopt measures to prevent abuse, such as marriages of convenience, as confirmed by the Court of Justice in the *Metock* judgment. Where there are doubts that the marriage is not genuine, Member States can investigate to determine whether the rights granted by the Directive are being abused, for example to circumvent national rules on immigration, and can refuse or withdraw the rights of entry or residence if abuse is proven. The Directive requires the respect of the principle of

⁴⁶ Revised Corrigendum to Outcome of Proceedings of the Council on 27 November 2008, Council of the European Union, para. 4, p. 2, 16483/08 COR 2 REV 1, Brussels, 8 December 2008. (*Emphasis added*).

⁴⁷ Corrigendum to Outcome of Proceedings of the Council on 27 November 2008, Council of the European Union, para. 1, p. 3, 16483/08 COR 1, Brussels, 4 December 2008.

proportionality and of the procedural safeguards laid down in therein.⁴⁸ The Commission concluded that despite its importance, Article 35 was not transposed by all Member States!⁴⁹

Commission Guidelines

Guidelines issued by the Commission of the European Union purport to facilitate better implementation of European Union law on the part of Member States investigating individual cases on a case by case assessment where there is a well-founded suspicion of abuse.⁵⁰ The Commission did not concede to the calls to revise the citizens' rights Directive! Given the unsatisfactory state of implementation of the Directive, the Commission was of the opinion that it would be detrimental to propose amendments to the Directive at this stage, concluding that the main problems that have been identified could be solved through better implementation of the Directive.

With particular regard to abuse and fraud, the guidelines confirm that Member States may require third country family members moving with or joining an EU citizen to whom the Directive applies to have an entry visa. Nevertheless 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. This distinguishes them from other third country nationals, who have no such right.⁵¹ In the case that abuse is detected, Member States may deny or withdraw, at any time, the benefits granted under the Directive. Specifically concerning marriages of convenience, which are defined as marriages contracted for the sole purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise; the guidelines confirm that Member States can investigate individual cases where there is a well-founded suspicion of abuse. Pursuant to the guidelines, Member States may define *a set of indicative criteria* suggesting the possible intention to abuse the rights conferred by the Directive for the sole purpose of contravening national immigration laws. The guidance further explains that such *criteria are triggers for investigation, without any automatic inferences from results or subsequent investigations. Member States may not rely on one sole attribute; due attention must be given to all the circumstances of the individual case.* Furthermore, Member States

⁴⁸ Articles 30 and 31 of Directive 2004/38.

⁴⁹ Report from the Commission to the European Parliament on the application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2008) 840, 10 December 2008, para. 3.8.3 <http://www.europa.eu>

⁵⁰ Commission of the European Union, Guidelines on free movement and residence rights of EU citizens and their families, MEMO/09/311, Brussels, 2 July 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/311&format=H>

⁵¹ *Ibid.* p. 3.

can carry out ex-post sample reviews of family reunification. Where such reviews give rise to doubt of abuse in individual cases, the Directive allows Member States to investigate.⁵²

It would thus appear that although the control of abuse in the form of marriages of convenience is expressed to be the competence of the Member States, the requirement to conform to the European Union principles of proportionality and procedure in accordance with the rules of natural justice in accordance with the citizens' rights Directive,⁵³ brings the ways in which Member States exercise such control of abuse within European Union law and thus within the ambit of the European Commission in its endeavours to monitor the full and effective implementation of the citizen's rights Directive. This explains why the Commission's guidelines may not be seen only as a tool with which to raise the standards of compliance in the diverse Member States,⁵⁴ but actually as requiring compliance on the part of Member States in their implementation of European Union law on the fundamental freedom of movement, residence and family reunification rights of the EU citizen, - i.e. legally binding guidelines!⁵⁵

The Commission does allude to the fact that abuse could also occur when EU citizens, unable to be joined by their third country family members in their Member State of origin because of the application of national immigration rules preventing it, move to another Member State with the sole purpose to evade, upon returning to their home Member State, the national law that frustrated their family reunification efforts, invoking their rights under European Union law.⁵⁶ The potential does therefore exist for the otherwise stationary EU citizen to evade the national immigration laws of his/her Member State of nationality and residence, in the event of a genuine marriage to an unlawfully resident TCN, by moving to another Member State for a short while prior to that marriage and then, having engaged with European Union law on free movement, returning to their Member State of residence with the full protection of European Union family reunification law. Member States cannot do

⁵² *Ibid.* p. 4

⁵³ Articles 30, 31 and 35 of Directive 2004/38/EC.

⁵⁴ While the rights of free movement and residence are perhaps two of the most tangible rights available to Union citizens, the multitude of national authorities which are susceptible to limit the effective exercise of such rights (from border guards to immigration authorities to local councils) means that the implementation of EC law is often uneven across the EU. Commission Fifth Report on Citizenship of the Union (1 May 2004 – 30 June 2007), COM(2008) 85, 15 February 2008, Point 8 paragraph 1.

⁵⁵ The European Parliament, Committee on Civil Liberties, Justice and Home Affairs, in its Report 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, *inter alia*: Supports the approach proposed by the Commission based on continuous and comprehensive monitoring of the implementation of Directive 2004/38/EC, on assisting Member States in ensuring the full and correct application of the Directive through the drawing-up of guidelines in the first half of 2009 and on bringing proceedings against Member States where their national laws and/or practices conflict with the Directive; Calls on Member States to start procedures to implement the guidelines by the end of 2009 so to adapt their national legislation and practices, and calls on them to provide the guidelines to any competent authority and monitor their application; Asks the Commission to set a deadline for the implementation of the guidelines, after which proceeding would be brought. Points 16, 17 and 22, A6-0186/2009, 24 March 2009.

⁵⁶ Commission of the European Union Guidelines, note 50 above, at p. 4.

anything about this phenomenon, which no doubt has the potential to increase the immigration of TCNs in a Member State. The Commission in its guidelines takes steps to emphasise that the defining characteristics of the line between genuine and abusive use of European Union law should be based on the assessment of whether the exercise of Union rights in a Member State from which the EU citizens and their family members return was genuine and effective. The fact that the marriage is genuine is paramount, regardless of the motivated evasion of national immigration laws, in the case of the family reunification rights of an EU citizen who has exercised his right freely to move and reside.⁵⁷

The Charter of Fundamental Rights of the European Union and concluding comment

Respect for family life⁵⁸ and legal, economic and social protection of the family⁵⁹ are two pertinent provisions in the Charter of Fundamental Rights of the European Union, which has been accorded the same legal value as the Treaties, with effect from 1 December 2009, as a result of the entry into force of the 1997 Treaty of Lisbon.⁶⁰ ‘This latter provision is extremely important especially in family reunification cases, since it illustrates that the Charter recognises that ‘the family’ in the EU has to be protected in its own right, and not only in the process of achieving other goals whether economic (such as the establishment of the internal market) or not.’⁶¹ The fact that Member States are required to abide by the principles of proportionality and procedural compliance when investigating each case where there is evidence of abuse, namely a marriage of convenience entered into solely for the purpose of evading Member States’ immigration laws, brings Member States firmly within the remit of the Charter of Fundamental Rights of the European Union, which is of significance in light of the weight accorded therein to family life.⁶² It is a fact in the United Kingdom that marriages of convenience are on the increase⁶³ and thus the authorities will have to be vigilant. The potential for abuse is obvious, both in the form of sham marriages and also on the part of the national authorities in their endeavours to control illegal immigration: both forms of abuse are restricted under European Union law.

⁵⁷ Cf Case C-370/90 *R v Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for the Home Department* [1992] ECR I-4265 and Case C-200/02, *Catherine Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925.

⁵⁸ Article 7, [2007] OJ C303/1.

⁵⁹ Article 33(1), [2007] OJ C303/1.

⁶⁰ [2007] OJ C 115/1.

⁶¹ Alina Tryfonidou, note 8 above, at 652

⁶² ‘The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.’ Article 51(1) of the Charter of Fundamental Rights of the European Union.

⁶³ Home Office figures for 2009 are reported to show a 54% increase. <http://www.news.bbc.co.uk/1/hi/uk/8444360.stm>